

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:** 8 April 2019**CLASSIFICATION****Classification of the document
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**MEAS MUTH'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING
JUDGE'S INDICTMENT**

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TABLE OF CONTENTS

I. QUESTIONS AND ANSWERS PRESENTED 2

II. PRELIMINARY MATTERS 3

 A. Admissibility 3

 B. Standard of Review 4

 1. Standard of review applicable to the ECCC’s substantive and procedural law 4

 2. Standard of review applicable to personal jurisdiction determinations..... 5

 C. Non-Concession and Reservation 8

 D. Request for a Public Hearing 8

III. BACKGROUND 10

 A. The Judicial Investigations..... 10

 B. The Closing Orders 15

 1. The Dismissal Order 16

 2. The Indictment..... 20

IV. LAW AND ARGUMENT 22

 A. The ICIJ erred in law by interpreting Rule 77(13) in such a way as to suggest that unless the PTC upholds one of the Closing Orders by supermajority, either both Closing Orders or only his Indictment would stand..... 22

 1. The Parties to the Agreement did not intend for a case to proceed to trial on the basis of an indictment when a dismissal order is simultaneously issued..... 22

 2. Applying Rule 77(13) to appeals of opposing Closing Orders would lead to an absurd result, cause irreparable harm to Mr. MEAS Muth’s fair trial rights, and violate the Cambodian Constitution and ECCC framework 27

 3. Conclusion 30

B. The ICIJ erred in law by failing to conclude that, unless the PTC finds by
supermajority that the NCIJ committed errors or abuses fundamentally determinative
of his exercise of discretion, the Dismissal Order prevails over the Indictment under
the principle of *in dubio pro reo*32

1. Under the principle of *in dubio pro reo*, doubt, both to the facts and the
interpretation of legal provisions, must be resolved in Mr. MEAS Muth’s favor 32

2. Both CIJs investigated the facts of which they were seized and made findings on
them in reasoned Closing Orders34

3. Absent errors or abuses fundamentally determinative of the NCIJ’s exercise of
discretion that would impede the application of the principle of *in dubio pro reo*,
the Dismissal Order prevails over the Indictment.....40

4. Conclusion43

V. CONCLUSION AND RELIEF REQUESTED.....44



Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

United States Supreme Court Chief Justice John Marshall¹

That the Co-Investigating Judges (“CIJs”) filed separate and opposing Closings Orders was not unexpected. Not only was this envisaged by the Parties to the Agreement and the drafters of the Rules, but the CIJs knew long ago that they would reach diverging conclusions on their investigations. The overarching question confronting the Pre-Trial Chamber (“PTC”) is *which Closing Order must prevail*: the National Co-Investigating Judge’s (“NCIJ”) Dismissal Order finding Mr. MEAS Muth not most responsible for the crimes committed throughout Cambodia during the Democratic Kampuchea (“DK”) period of 17 April 1975 to 6 January 1979² or the International Co-Investigating Judge’s (“ICIJ”) Indictment finding to the contrary?³ This Appeal questions whether, absent a supermajority upholding the Indictment, the PTC can leave both Closing Orders hanging unresolved in perpetuity or, alternatively, send the case to trial when a dismissal order and an indictment are simultaneously issued. This Appeal also questions whether, absent a finding by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, the Indictment prevails over the Dismissal Order despite the principle of *in dubio pro reo*. The answers to these questions are clear. The Parties to the Agreement did not intend for a case to proceed to trial when a dismissal order and an indictment are simultaneously issued. With two equal and independent CIJs issuing Closing Orders of equal force, the Closing Order calling for the dismissal of the case trumps the Closing Order calling for indictment. The case against Mr. MEAS Muth must be dismissed.

¹ *Osborn v. U.S. Bank.*, 22 U.S. 738, 866 (1824).

² Order Dismissing the Case Against MEAS Muth, 28 November 2018, D266 (“Dismissal Order”).

³ Closing Order, 28 November 2018, D267 (“Indictment”).

I. QUESTIONS AND ANSWERS PRESENTED

Question One: *According to the CIJs, “Rule 77(13) only addresses the scenario of a joint dismissal order or indictment; not that of split closing orders.” In his Indictment, the ICIJ cited and adopted the CIJs’ view that “both [Closing Orders] would appear to stand” and considered it “unclear whether the indictment will stand” under Rule 77(13) should there be no supermajority in the PTC upholding one Closing Order or the other. Did the ICIJ err in law in interpreting Rule 77(13) in such a way as to suggest that unless the PTC upholds one of the Closing Orders, either both Closing Orders or only his Indictment would stand?*

Answer: *Yes, because the Parties to the Agreement did not intend for a case to proceed to trial when a dismissal order and an indictment are simultaneously issued. Applying Rule 77(13) to appeals of opposing Closing Orders would lead to an absurd result, cause irreparable harm to Mr. MEAS Muth’s fair trial rights, and violate the Cambodian Constitution and ECCC framework.*

Question Two: *According to the principle of in dubio pro reo – a fundamental principle of criminal law enshrined in the Cambodian Constitution, the ECCC framework, and international law – doubt must be resolved in the Charged Person’s favor. Two CIJs issued diametrically opposed Closing Orders: one calling for dismissal of the case and the other for indictment. Assuming the NCIJ did not commit errors or abuses fundamentally determinative of his exercise of discretion in determining personal jurisdiction, did the ICIJ err in law by failing to conclude that, unless the PTC finds otherwise by supermajority, the Dismissal Order prevails over the Indictment?*

Answer: *Yes, because one CIJ’s investigation, assessment of the facts, application of the law, or issuance of a Closing Order is neither superior nor subordinate to the other CIJ’s. Unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion that would impede the application of the principle of in dubio pro reo, the Dismissal Order prevails over the Indictment.*

II. PRELIMINARY MATTERS

A. Admissibility

1. Mr. MEAS Muth appeals the ICIJ's Indictment pursuant to Rules 74(3)(a) and 21 of the Internal Rules ("Rules"). This Appeal is timely filed in English only with the Khmer translation to follow.⁴
2. Rule 74(3)(a) permits Mr. MEAS Muth to appeal decisions of the CIJs "confirming the jurisdiction of the ECCC." The PTC has considered jurisdictional issues to cover the "personal, temporal and subject matter" aspects of the ECCC's jurisdiction.⁵ The Grounds of this Appeal concern the ICIJ's confirmation of the ECCC's jurisdiction by: **a.** interpreting Rule 77(13) in such a way as to suggest that unless the PTC upholds one of the Closing Orders by supermajority, either both Closing Orders or only his Indictment would stand;⁶ and **b.** failing to conclude that, unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, the Dismissal Order prevails over the Indictment under the principle of *in dubio pro reo*.⁷
3. Rule 21 requires the ECCC framework to be interpreted so as to always safeguard Mr. MEAS Muth's interests. While the PTC has held that Rule 21 does not provide a stand-alone avenue of appeal against Closing Orders,⁸ it has adopted a broader interpretation of the right to appeal under Rule 74(3)(a) in light of Rule 21: **a.** when the situation at issue is not contemplated by the Rules;⁹ **b.** when appeals filed against an indictment raise matters

⁴ Decision on MEAS Muth's Request for Extension of Time and Page Limits to Appeal the International Co-Investigating Judge's Closing Order & Request to File His Appeal in English with the Khmer Translation to Follow, 29 January 2019, D267/1/3, p. 3.

⁵ *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. 63; *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.

⁶ See *infra* paras. 32-48.

⁷ See *infra* paras. 49-66.

⁸ 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.

⁹ 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.

that cannot be rectified by the Trial Chamber (“TC”);¹⁰ and **c.** when the particular circumstances of the case require the PTC’s intervention to avoid irreparable harm to the Charged Person’s fair trial rights.¹¹

4. A broad interpretation of Mr. MEAS Muth’s right to appeal is warranted. The ICIJ’s suggested appeal resolution to the opposing Closing Orders scenario is not contemplated by the Rules.¹² This Appeal raises matters that cannot be rectified by the TC because if both Closing Orders stand, the proceedings would cease with the Indictment hanging over Mr. MEAS Muth in perpetuity – charges he would never be able to challenge since no other forum is available to him.¹³ Not allowing Mr. MEAS Muth to appeal the Indictment would irreparably harm and permanently deprive him of his constitutionally guaranteed rights to: **a.** be presumed innocent; **b.** defend himself; **c.** have proceedings against him brought to conclusion within a reasonable time; **d.** equal protection before the ECCC, and, in particular, **e.** have doubt resolved in his favor.¹⁴

B. Standard of Review

1. Standard of review applicable to the ECCC’s substantive and procedural law

5. The PTC will reverse an order confirming jurisdiction when the CIJs committed a specific error of law invalidating the decision.¹⁵ The PTC, as the arbiter of the ECCC’s applicable law at the pre-trial stage,¹⁶ “is bound in principle to determine whether an error

¹⁰ *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.

¹¹ 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.

¹² *See infra* paras. 32-48.

¹³ *See infra* paras. 42, 44.

¹⁴ 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. *See infra* paras. 43-45, 50-51.

¹⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 86 (internal citation omitted); *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. 112 (internal citation omitted).

¹⁶ *See Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261 (“Case 004/1 Closing Order”), para. 10: “[T]he only direct appellate panel for the decisions of the OCIJ is the PTC.”

of law was in fact committed on a substantive or procedural issue.”¹⁷ The PTC does not defer to the CIJs and reviews alleged errors of law *de novo* to determine whether legal holdings are correct.¹⁸ The PTC determines whether the CIJs “established the content of the applicable legal norms based in the appropriate sources of law and by employing rules of interpretation pertinent to those sources of law” and “assesses whether the result reached is precise and unambiguous.”¹⁹

2. Standard of review applicable to personal jurisdiction determinations

6. The determination of whether Mr. MEAS Muth is most responsible is a discretionary decision.²⁰ While the “flexibility” of the term most responsible requires that the CIJs exercise “some margin of appreciation,”²¹ this determination must be made according to “well-settled legal principles”²² – the factors the CIJs jointly devised to determine whether a Charged Person is most responsible.²³
7. The question before the PTC is not whether it agrees with one CIJ’s conclusion or the other’s, but whether the CIJs properly exercised their discretion in making their personal jurisdiction determinations.²⁴ For the PTC to overturn the CIJs’ personal jurisdiction

¹⁷ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 14 (internal citation omitted).

¹⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 86; *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. 113.

¹⁹ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 14 (internal citation omitted).

²⁰ *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.

²¹ *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.

²² The PTC did not define the “well-settled legal principles” applying to personal jurisdiction determinations. 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. 20, citing Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Vol. I, p. 256: “Article 9, it should be noted, uses the words ‘The Tribunal may declare’, so that the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.”

²³ These factors are: **a.** the intent of the Parties to the Agreement to limit the ECCC’s personal jurisdiction to those with the greatest responsibility in DK; **b.** the principles of *in dubio pro reo* and strict construction of criminal law; **c.** decision-making in DK structures (i.e. the degree to which the Charged Person was able to contribute to or determine CPK policies and/or their implementation); and **d.** the relative gravity of the Charged Person’s acts and their effects, subject to the intent of the Parties to the Agreement. See Case 004/1 Closing Order, paras. 3-41.

²⁴ See *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

determinations, they must have been: **a.** based on an error of law invalidating their decision; **b.** based on an error of fact occasioning a miscarriage of justice; and/or **c.** “so unfair or unreasonable” as to constitute an abuse of discretion.²⁵

8. While errors of law are reviewed *de novo*,²⁶ errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable CIJ would have reached the finding at issue.²⁷ The PTC has declined to substitute its own views when discretionary decisions involve questions of fact²⁸ because the CIJs make their assessments having “in-depth, intimate knowledge of the Case File.”²⁹ While the PTC considered that “it fulfils the role of the Cambodian Investigation Chamber” having the power to investigate the case by itself when seized of a dismissal order,³⁰ it previously acknowledged that it was neither “established” nor “equip[p]ed to conduct investigations” in the context of the unique

2009, D164/3/6, paras. 25-26, citing *Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, paras. 9-10. See also *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 (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.

²⁵ *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.

²⁶ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 86; *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. 113.

²⁷ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/2/15, para. 86.

²⁸ *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: “The [PTC] has repeatedly stated that, “[i]t is not for the [PTC] to replace its view for that of the [CIJs].””

²⁹ *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.

³⁰ *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. 22, citing *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal Against Closing Order indicting KAING Guek Eav Alias “DUCH”, 5 December 2008, D99/3/42, paras. 41-42.

nature of ECCC cases, “which involve large scale investigations and extrem[e]ly voluminous cases.”³¹

9. The PTC must also find that any errors were “fundamentally determinative” of the CIJs’ exercise of discretion;³² i.e. that their decisions hinged on the errors committed. An error of law, even if found, must have been so fundamental and dispositive as to “actually” render the CIJs’ personal jurisdiction determinations invalid.³³ An error of fact, even if found, must have been critical to the conclusion reached as to “actually” lead to a miscarriage of justice³⁴ (i.e. a “grossly unfair outcome in the judicial proceedings”).³⁵ An abuse of discretion must “force the conclusion that [the CIJs] failed to exercise their discretion judiciously.”³⁶

³¹ *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.

³² *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.

³³ 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.”

³⁴ *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.” See also *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 19.

³⁵ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 19 (internal citation omitted).

³⁶ *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.

10. When the PTC finds errors or abuses fundamentally determinative of the CIJs' exercise of discretion, it will "normally remit the decision" to the CIJs for reconsideration.³⁷ Only in exceptional circumstances – such as when the matter has already been remitted to the CIJs for reconsideration and the CIJs failed to comply with the PTC's directions³⁸ – will the PTC substitute its decision for that of the CIJs.³⁹

C. Non-Concession and Reservation

11. Mr. MEAS Muth does not concede to any findings of facts or conclusions of law made by the ICIJ not addressed in this Appeal and reserves the right to address these matters should the case proceed to trial.

D. Request for a Public Hearing

12. "*Sunlight is said to be the best of disinfectants.*"⁴⁰ A public hearing⁴¹ is in the interests of justice, the interests of Mr. MEAS Muth, the interests of all Cambodians, the interests of the international community (particularly, the donor countries who finance the ECCC), and the interests of the ECCC, which is expected to be a model court for Cambodians to learn from and emulate.⁴² Considering the publicity (and controversies) generated by this case,⁴³ the near decade of investigation, the issuance of two Closing Orders, and the

³⁷ *Case of IM Chaem*, 004/1/07-09-2009/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 22. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC 67), Decision on Reconsideration of Co-Prosecutors' Appeals 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, paras. 66, 81.

³⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC67), Decision on Reconsideration of Co-Prosecutors' Appeals 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: "Given the failure of the [CIJs] to comply with the previous direction of this Chamber to provide reasoning for the rejection of each rejected document, the [PTC] has no choice but to acknowledge that remitting the matter to the [CIJs] and awaiting a third order may not produce the concrete factual analysis required for orders of this sort."

³⁹ *Case of IM Chaem*, 004/1/07-09-2009/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 22.

⁴⁰ Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, 20 December 1913, p. 10.

⁴¹ Under Rule 77(6), the PTC may "decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or applications concerning jurisdiction or bars to jurisdiction, if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court."

⁴² *See e.g., Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and Related Requests, 28 January 2011, E5/3, para. 14, explaining that, as a model court, the ECCC can serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity in Cambodian domestic courts.

⁴³ *See e.g., Seth Mydans, Judges Split on Whether Cambodia Tribunal Can Pursue Khmer Rouge Commander*, N.Y. TIMES, 28 November 2018, available at <https://www.nytimes.com/2018/11/28/world/asia/cambodia-tribunal-genocide.html>; Taing Vida, *ECCC to soon determine role of Meas Muth*, KHMER TIMES, 20 November

cross-appeals, responses, and replies that will ensue, not only is a public hearing beneficial to the PTC in ensuring that justice will be done, but is also critical in showing that justice is being done.⁴⁴ Allowing Mr. MEAS Muth to address substantive or procedural questions that may bring his case to an end would yield significant benefits at little cost to the ECCC, and would neither prejudice any party nor disturb public order.

2018, available at <https://www.khmertimeskh.com/552294/eccc-to-soon-determine-role-of-meas-muth/>; Alessandro Marazzi Sassoon, *Khmer Rouge prosecutors split on Muth case*, PHNOM PENH POST, 1 December 2017, available at <https://www.phnompenhpost.com/national-kr-tribunal/khmer-rouge-prosecutors-split-muth-case>.

⁴⁴ In the words of Lord Hewart C.J.: “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.” *R v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.

III. BACKGROUND

13. For nearly a decade, Mr. MEAS Muth has been under the scrutiny of the ECCC's one National and five successive International CIJs. On the cusp of CIJs YOU Bunleng and Siegfried Blunk issuing their Forwarding Order at the end of 2011, Judge Blunk – the second ICIJ – resigned after he and Judge YOU Bunleng jointly formed the view that the ECCC lacked jurisdiction to prosecute Mr. MEAS Muth, agreed not to charge him, and concluded their investigation. Seven years would pass between the conclusion of their investigation and the issuance of Judge YOU Bunleng's Dismissal Order. Countless investigators, analysts, experts, legal officers, and interpreters, scoured Cambodia, investigated, re-investigated, and analyzed the gathered evidence to reach a conclusion on the ECCC's jurisdiction over Mr. MEAS Muth. None of the additional evidence gathered would cause Judge YOU Bunleng to alter his conclusion that Mr. MEAS Muth could not conceptualize or affect Communist Party of Kampuchea ("CPK") policies and that Mr. MEAS Muth never exceeded his narrowly-defined authority. Judge Michael Bohlander – the fifth and current ICIJ – found otherwise. CIJs YOU Bunleng and Bohlander simultaneously issued their opposing Closing Orders on 28 November 2018 – one calling for the dismissal of the case, the other for Mr. MEAS Muth's indictment.

A. The Judicial Investigations

14. *The investigation begins* The investigation began on 7 September 2009.⁴⁵ At the time, the NCIJ and ICIJ Marcel Lemonde, the first ICIJ, had been investigating crimes committed by the Khmer Rouge for over two years at the ECCC, determining whether those investigated were senior leaders or most responsible for the crimes committed throughout Cambodia during the DK period of 17 April 1975 to 6 January 1979.⁴⁶ They had concluded their investigation in Case 001, finding KAING Guek Eav *alias* "Duch" most

⁴⁵ Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1; Co-Prosecutors' Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1 ("Introductory Submission"). The Co-Prosecutors disagreed as to whether to seize the CIJs with a judicial investigation into Case 003. Because the PTC could not attain the requisite supermajority on the disagreement, the International Co-Prosecutor ("ICP") was permitted to forward his Introductory Submission to the CIJs to open the judicial investigation. See Annex I: Public Redacted Version Consideration of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, para. 45.

⁴⁶ The CIJs were seized of the investigation into Cases 001 and 002 on 18 July 2007. See *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order indicting KAING Guek Eav alias Duch, 8 August 2008, D99, para. 4; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 3.

responsible,⁴⁷ and were close to concluding their investigation in Case 002. In determining the ECCC's personal jurisdiction over those investigated in Case 002, the CIJs reviewed, among other material, over 1,000 interviews, 36 site identification reports, and more than 223,000 pages of evidence relating to the facts.⁴⁸ Against this backdrop, the CIJs developed a detailed work plan to investigate Mr. MEAS Muth,⁴⁹ collecting more than 1,130 pieces of evidence⁵⁰ before ICIJ Lemonde resigned "to take up other long-standing plans."⁵¹

15. ICIJ Blunk took over from ICIJ Lemonde on 1 December 2010⁵² and continued investigating alongside the NCIJ, picking up where the investigation left off.⁵³ Collegially, the NCIJ and ICIJ Blunk primarily focused on determining whether Mr. MEAS Muth falls under the ECCC's personal jurisdiction.⁵⁴ They "established joint working groups,"⁵⁵ "agreed on the investigative methods,"⁵⁶ and investigated "in a smooth manner and in complete agreement."⁵⁷ Over the course of the following five months, the CIJs collected additional evidence⁵⁸ and reviewed over 3,000 inculpatory and exculpatory pieces of evidence from Cases 001, 002, and 003.⁵⁹ This included telegrams,

⁴⁷ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order indicting KAING Guek Eav alias Duch, 8 August 2008, D99, para. 129.

⁴⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 17.

⁴⁹ ECCC Court Report: Issue 26 (June 2010), p. 2, <https://www.eccc.gov.kh/sites/default/files/publications/The%20Court%20Report%20%5BJune%202010%5D%20FINAL.pdf>.

⁵⁰ A search on ZyLAB reveals that, between 7 September 2009 and 30 November 2010, the Office of the Co-Investigating Judges ("OCIJ") placed 1,134 documents in English, Khmer, and French on the Case File. See ZyLAB "Case File: CF003," "Filing Date: between 7 September 2009 and 30 November 2010," and "Filing Party: OCIJ." Some documents placed on the Case File during this period may be duplicates.

⁵¹ ECCC Court Report: Issue 29 (September 2010), p. 2, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_September2010.pdf. See also ECCC Website, *Judge Marcel Lemonde*, <https://www.eccc.gov.kh/en/person/judge-marcel-lemonde>.

⁵² ECCC Press Release, *Dr. Siegfried Blunk appointed as new international Co-Investigating Judge*, 1 December 2010, <https://www.eccc.gov.kh/en/articles/dr-siegfried-blunk-appointed-new-international-co-investigating-judge>.

⁵³ ECCC Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011, https://www.eccc.gov.kh/sites/default/files/documents/courtdec/2012-12-24%2016%3A37/E189_3_1_1.1.3_EN.pdf.

⁵⁴ Dismissal Order, para. 48.

⁵⁵ ECCC Court Report: Issue 33 (February 2011), p. 7, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_February_2011.pdf.

⁵⁶ Dismissal Order, para. 48.

⁵⁷ Dismissal Order, para. 41.

⁵⁸ A search on ZyLAB reveals that, between 1 December 2010 and 29 April 2011, the OCIJ placed 302 documents in English, Khmer, and French on Case File 003. See ZyLAB "Case File: CF003," "Filing Date: between 1 December 2010 and 29 April 2011," and "Filing Party: OCIJ." Some documents placed on the Case File during this period may be duplicates.

⁵⁹ Dismissal Order, paras. 42, 48. See also Dismissal Order, para. 359.

minutes of meetings, statements from insider witnesses such as DK cadres, other witness interviews, and materials from the Documentation Center of Cambodia.⁶⁰

16. *The investigation concludes* Marking the end to a 20-month investigation on 29 April 2011,⁶¹ the CIJs “unanimously agreed” that Mr. MEAS Muth should not be charged.⁶² When statements surfaced in the press calling into question ICIJ Blunk’s judicial independence and integrity, he resigned out of principle.⁶³ Shortly thereafter, H.E. Sok An emphasized “the need for decision makers from both sides to discharge their responsibilities without allowing themselves to be distracted by intense speculation, pressure and interference from the media and other outside sources.”⁶⁴

17. *The investigation reopens* Two months after ICIJ Blunk’s resignation, former Reserve ICIJ (“RICIJ”) Laurent Kasper-Ansermet – who was never sworn in as ICIJ⁶⁵ – unilaterally reopened the investigation against Mr. MEAS Muth.⁶⁶ The NCIJ cautioned him to review the evidence before taking any “hasty actions.”⁶⁷ RICIJ Kasper-Ansermet admitted he had not reviewed the Case File “but needed to take immediate action to reopen the investigation” because he feared that the NCIJ would issue the Forwarding Order drafted alongside ICIJ Blunk.⁶⁸ Five months later, he resigned.⁶⁹

⁶⁰ Dismissal Order, para. 2. *See also* Dismissal Order, paras. 42, 48.

⁶¹ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁶² Dismissal Order, para. 53.

⁶³ ECCC Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011, https://www.eccc.gov.kh/sites/default/files/documents/courtdec/2012-12-24%2016%3A37/E189_3_1_1.1.3_EN.pdf. ICIJ Blunk resigned effective 31 October 2011. *See* ECCC Website, *Dr. Siegfried Blunk*, <https://www.eccc.gov.kh/en/person/dr-siegfried-blunk>.

⁶⁴ ECCC Court Report: Issue 42 (November 2011), p. 5, http://www.eccc.gov.kh/sites/default/files/publications/November%202011%20Court%20Report%20-%20FINAL2_0.pdf.

⁶⁵ On 19 January 2012, the Royal Government of Cambodia (“RGC”) formally notified the United Nations (“UN”) Secretary-General of the Cambodian Supreme Council of the Magistracy’s decision not to appoint RICIJ Kasper-Ansermet as ICIJ. UN Press Release, *Statement Attributable to the Spokesperson for the Secretary-General on Cambodia*, 20 January 2012, <https://www.un.org/sg/en/content/sg/statement/2012-01-20/statement-attributable-spokesperson-secretary-general-cambodia>.

⁶⁶ Order on Resuming the Judicial Investigation, 2 December 2011, D28. RICIJ Kasper-Ansermet reopened the investigation after all appeals concerning the conclusion of the investigation by the NCIJ and ICIJ Blunk were dealt with. *See* Considerations of the Pre-trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, 2 November 2011, D20/4/4; 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.

⁶⁷ ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>.

⁶⁸ ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>.

18. Then came Mark Harmon, former Prosecutor at the International Criminal Tribunal for the former Yugoslavia. He was sworn in as the fourth ICIJ on 26 October 2012.⁷⁰ With ICIJ Harmon's arrival, the NCIJ withheld from issuing the Forwarding Order drafted alongside ICIJ Blunk, considering that issuing the Forwarding Order before discussing it with a duly-appointed ICIJ would have been a "rushed action that could lead to a violation of procedural principles."⁷¹ The NCIJ waited for his international counterpart to familiarize himself with the Case File. On 7 February 2013, the CIJs discussed the status of the investigation and registered a disagreement.⁷² On the same day, the NCIJ issued the Forwarding Order, considering the investigation complete since 29 April 2011.⁷³ Meanwhile, ICIJ Harmon continued investigating and gathering evidence,⁷⁴ since, to his understanding, the CIJs have "discretion to decide independently when they consider that an investigation has been concluded."⁷⁵ When the NCIJ later sent a memorandum to ICIJ Harmon "regarding the conclusion of the investigation and possibilities for [the ICIJ] to appeal to the [PTC], requesting [the] re-opening [of] the investigation,"⁷⁶ ICIJ Harmon did not respond. Rather, he continued investigating and gathering evidence,⁷⁷ eventually charging Mr. MEAS Muth⁷⁸ four months before resigning "for strictly personal reasons."⁷⁹

⁶⁹ RICIJ Kasper-Ansermet resigned effective 4 May 2012. See ECCC Press Release, *Press Release by the International Reserve Co-Investigating Judge*, 19 March 2012, <https://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge>.

⁷⁰ ECCC Press Release, *Mark Harmon sworn in as International Co-Investigating Judge*, 26 October 2012, <https://www.eccc.gov.kh/en/articles/mark-harmon-sworn-international-co-investigating-judge>.

⁷¹ ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>. The NCIJ also explained that he and ICIJ Blunk could not have signed the Forwarding Order they jointly drafted before ICIJ Blunk resigned because the PTC was seized with the ICP's appeals against the CIJs' decisions to deny his requests for investigative actions. *Id.*

⁷² See Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 10: "**Noting** that on 7 February 2013, Co-Investigating Judges You and Harmon signed a Written Record of Disagreement concerning the validity of certain documents placed on Case File No.003 since the resignation of International Co-Investigating Judge Siegfried Blunk and the current status of the judicial investigation in Case No.003." (bold in original).

⁷³ Forwarding Order dated 07 February 2013, 7 February 2013, D52; Dismissal Order, para. 32. See also ECCC Press Release, *Statement by the Co-Investigating Judges Regarding Case 003*, 28 February 2013, <https://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-003>.

⁷⁴ See Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 12; Rogatory Letter, 7 February 2013, D54; Rogatory Letter, 7 February 2013, D55.

⁷⁵ Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 5 (internal citations omitted).

⁷⁶ Dismissal Order, para. 44.

⁷⁷ Dismissal Order, para. 44.

⁷⁸ Notification of Charges Against MEAS Muth, 3 March 2015, D128.1.

⁷⁹ ECCC Press Release, *Judge Harmon announces his resignation*, 7 July 2015, <https://www.eccc.gov.kh/en/articles/judge-harmon-announces-his-resignation>. ICIJ Harmon resigned effective

19. *The investigation concludes, again* Next came Michael Bohlander, sworn in as the fifth ICIJ on 31 July 2015.⁸⁰ Like his predecessor, he familiarized himself with the Case File before investigating and gathering evidence,⁸¹ re-issuing decisions previously issued by ICIJ Harmon,⁸² rescinding some of ICIJ Harmon's charges,⁸³ and charging Mr. MEAS Muth with additional crimes.⁸⁴ The NCIJ patiently and unobtrusively waited for ICIJ Bohlander to conclude his investigation. Within 16 months of his arrival,⁸⁵ ICIJ Bohlander concluded his investigation – six years after the NCIJ and ICIJ Blunk had concluded theirs.⁸⁶

20. NCIJ YOU Bunleng and ICIJ Bohlander cooperated throughout their continuing tenure. For instance, deeply concerned over the ECCC's funding crisis – which could leave “an indictment hang[ing] over the Charged Person by simply ceasing the operations of the ECCC”⁸⁷ – the CIJs contemplated permanently staying the proceedings because it was uncertain whether any future proceedings could comply with the demands of the rule of law.⁸⁸ The CIJs also agreed to simultaneously issue separate Closing Orders based on the results of their investigations.⁸⁹

31 July 2015. See ECCC Website, *Judge Mark Brian Harmon*, <https://www.eccc.gov.kh/en/person/judge-mark-brian-harmon>.

⁸⁰ Indictment, para. 10; ECCC Press Release, *Michael Bohlander appointed as new Co-Investigating Judge*, 24 August 2015, <https://www.eccc.gov.kh/en/node/34050>; ECCC Website, *Judge Michael Bohlander*, <https://www.eccc.gov.kh/en/person/judge-michael-bohlander>.

⁸¹ See e.g., Extension of Rogatory Letter D59, 26 August 2015, D59.13; Extension of Rogatory Letter D89, 26 August 2015, D89.11.

⁸² Notice from the International Co-Investigating Judge to the Parties regarding Re-Issue of Decisions Taken by Judge Harmon On or After 31 July 2015, 8 September 2015, D149. See e.g. Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 11 September 2015, D120/3.

⁸³ Written Record of Initial Appearance, 14 December 2015, D174, p. 10.

⁸⁴ Written Record of Initial Appearance, 14 December 2015, D174.

⁸⁵ Notice of Conclusion of Judicial Investigation against MEAS Muth, 10 January 2017, D225.

⁸⁶ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁸⁷ 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.

⁸⁸ 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, 45.

⁸⁹ 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.

B. The Closing Orders

21. In their respective Closing Orders, the CIJs assessed and made findings on the facts in the Introductory and Supplementary Submissions relevant to Mr. MEAS Muth,⁹⁰ leading them to their opposing conclusions.⁹¹
22. Both CIJs agreed that Mr. MEAS Muth was *not* a senior leader.⁹² They also agreed that the determination of whether Mr. MEAS Muth is most responsible requires discretion.⁹³ Their assessment is based on the same evidentiary methodology⁹⁴ and factors they jointly devised: **a.** the intent of the Parties to the Agreement to limit the ECCC's personal jurisdiction to those with the greatest responsibility in DK; **b.** the principles of *in dubio pro reo* and strict construction of criminal law; **c.** decision-making in DK structures (i.e. the degree to which the Charged Person was able to contribute to or determine CPK policies and/or their implementation); and **d.** the relative gravity of the Charged Person's acts and their effects, subject to the intent of the Parties to the Agreement.⁹⁵ Both CIJs considered that anyone in lower ranks may be most responsible depending on their personal participation in brutal acts – requiring them to look beyond Mr. MEAS Muth's formal and effective hierarchical authority in the DK and to consider the level of his participation in CPK policy-making and/or implementation.⁹⁶
23. The NCIJ found that Mr. MEAS Muth was not most responsible because, despite holding several roles, he “did not exercise much power” and “[h]is participation was inactive, unimportant, and not proximate to the commission of the crimes.”⁹⁷ He called for the dismissal of the case.⁹⁸ The ICIJ found that Mr. MEAS Muth is most responsible because the combination of his rank and scope of authority in the DK hierarchy and the gravity of the crimes attributable to him⁹⁹ “mark him out as a major player in the DK structure and as a willing and driven participant in the brutal implementation of its criminal and

⁹⁰ Introductory Submission; International Co-Prosecutor's Supplementary Submission Regarding Crime Sites Related to Case 003, 31 October 2014, D120 (“Supplementary Submission”). See *infra* paras. 24, 28. See also *infra* para. 54.

⁹¹ Dismissal Order, paras. 408-29; Indictment, paras. 456-69.

⁹² See Dismissal Order, paras. 405-06, 429. See also Indictment, para. 459.

⁹³ Dismissal Order, paras. 364, 377; Indictment, para. 37, citing Case 004/1 Closing Order, paras. 9-10.

⁹⁴ Dismissal Order, paras. 354-59; Indictment, paras. 118-31. See also Case 004/1 Closing Order, paras. 103-39.

⁹⁵ Dismissal Order, paras. 360-407; Indictment, paras. 32-39. See also Case 004/1 Closing Order, paras. 3-41.

⁹⁶ Dismissal Order, paras. 368-69; Indictment, para. 39, citing Case 004/1 Closing Order, paras. 38-39.

⁹⁷ Dismissal Order, para. 428.

⁹⁸ Dismissal Order, para. 430.

⁹⁹ Indictment, para. 460.

inhuman policies.”¹⁰⁰ He called for Mr. MEAS Muth’s indictment for genocide, crimes against humanity, war crimes, and national crimes.¹⁰¹

1. The Dismissal Order

24. The NCIJ assessed the facts alleged in the Introductory and Supplementary Submissions relevant to Mr. MEAS Muth.¹⁰² He found that:

- a. *S-21 security center*¹⁰³ S-21 security center was “run directly by the Central Committee.”¹⁰⁴ Despite receiving information concerning arrests,¹⁰⁵ Mr. MEAS Muth was neither able to make decisions to arrest on his own¹⁰⁶ nor involved in the transfer of Division 164 personnel to S-21 security center.¹⁰⁷ No documents show direct communication between Mr. MEAS Muth and former S-21 security center Chairman, Duch.¹⁰⁸
- b. *Wat Enta Nhien security center*¹⁰⁹ While Wat Enta Nhien security center may have been under the control of a Division 164 battalion,¹¹⁰ no documents show Mr. MEAS Muth’s presence during arrests or regular inspections at the site.¹¹¹
- c. *Stung Hav rock quarry*¹¹² While Stung Hav rock quarry was under the control of a Division 164 battalion,¹¹³ Mr. MEAS Muth only reported to and received orders from Son Sen before passing on these orders to the battalion.¹¹⁴ No evidence shows Mr. MEAS Muth inspecting the site.¹¹⁵

¹⁰⁰ Indictment, para. 469.

¹⁰¹ Indictment, p. 256-64.

¹⁰² See Introductory Submission, seizing the OCIJ of facts concerning Mr. MEAS Muth’s position and role in the DK hierarchy (paras. 81-86), S-21 security center (para. 43), Wat Enta Nhien security center (paras. 55-57), Stung Hav rock quarry (para. 58), crimes committed by the DK navy (paras. 59-61), purges of RAK divisions (paras. 52-54), and armed conflict with Vietnam (para. 62). See Supplementary Submission, paras. 20-24, seizing the OCIJ of the additional fact concerning forced marriage.

¹⁰³ Dismissal Order, paras. 263-87.

¹⁰⁴ Dismissal Order, para. 267.

¹⁰⁵ Dismissal Order, paras. 285-86.

¹⁰⁶ Dismissal Order, para. 283.

¹⁰⁷ Dismissal Order, para. 280.

¹⁰⁸ Dismissal Order, para. 282.

¹⁰⁹ Dismissal Order, paras. 288-97.

¹¹⁰ Dismissal Order, para. 297.

¹¹¹ Dismissal Order, para. 297.

¹¹² Dismissal Order, paras. 298-305.

¹¹³ Dismissal Order, para. 305.

¹¹⁴ Dismissal Order, para. 305.

¹¹⁵ Dismissal Order, para. 305.

- d. *Crimes committed by the DK navy in Cambodian territorial waters and islands*¹¹⁶
The Standing Committee made decisions to arrest and execute fishermen, which were passed on to division commanders through Son Sen.¹¹⁷ While captures of Thai and Vietnamese fishermen in Cambodian waters were reported to Mr. MEAS Muth¹¹⁸ – who, in turn, reported to Son Sen¹¹⁹ – Mr. MEAS Muth had no authority to make independent decisions regarding the arrest and execution of fishermen.¹²⁰
- e. *Purges of Revolutionary Army of Kampuchea (“RAK”) divisions*¹²¹ While Mr. MEAS Muth attended meetings concerning the plans to purge RAK divisions¹²² and Son Sen ordered him to take measures such as re-educating, purging, and removing RAK units,¹²³ Mr. MEAS Muth did not execute soldiers, instead placing them in a production unit for farming and fishing.¹²⁴
- f. *Conflict with Vietnam*¹²⁵ A commander level meeting took place at Ta Mok’s house in 1977 to gather troops, where Son Sen and Ta Mok “explained manoeuvres [sic] to attack Vietnam.”¹²⁶ However, Chhouk Rin, who attended the meeting, testified that he did not meet Mr. MEAS Muth.¹²⁷
- g. *RAK security centers and other execution sites*¹²⁸ No evidence shows Mr. MEAS Muth’s role and participation in crimes at these sites.¹²⁹
- h. *Forced marriage*¹³⁰ The CPK implemented a forced marriage policy,¹³¹ which was reported in telegrams sent to the upper echelon.¹³²

¹¹⁶ Dismissal Order, paras. 306-22.

¹¹⁷ Dismissal Order, paras. 321-22.

¹¹⁸ Dismissal Order, paras. 308, 320, 322.

¹¹⁹ Dismissal Order, paras. 313-14, 316, 321-22.

¹²⁰ Dismissal Order, para. 321.

¹²¹ Dismissal Order, paras. 229-58.

¹²² Dismissal Order, para. 156.

¹²³ Dismissal Order, para. 258.

¹²⁴ Dismissal Order, para. 258.

¹²⁵ Dismissal Order, paras. 323-29.

¹²⁶ Dismissal Order, para. 327.

¹²⁷ Dismissal Order, para. 327.

¹²⁸ Dismissal Order, paras. 352-53.

¹²⁹ Dismissal Order, para. 352.

¹³⁰ Dismissal Order, paras. 82, 92-93.

¹³¹ Dismissal Order, para. 82, 92.

¹³² Dismissal Order, para. 93.

25. The NCIJ found that, despite holding several roles, Mr. MEAS Muth “did not exercise much power.”¹³³ He found that Mr. MEAS Muth was neither a member of the Standing Committee¹³⁴ – the body with the highest authority over decision-making that oversaw all CPK policies in DK¹³⁵ – nor a member of the Military Committee.¹³⁶ The NCIJ was not convinced that Mr. MEAS Muth was a member of the General Staff Committee¹³⁷ and reasoned that, had he become one in November 1978, his position would have lasted just over a month before the collapse of DK.¹³⁸ Instead, he found that Mr. MEAS Muth was a member of the Assisting Committee to the Central Committee¹³⁹ – the lowest level of the Central Committee¹⁴⁰ with no participatory or voting rights in decision-making.¹⁴¹ He found that Mr. MEAS Muth commanded Division 164 and was only responsible for naval operations along Kampong Som’s coast and islands.¹⁴² He also found that Mr. MEAS Muth “was under around 50 (fifty) cadres and held the same position as many other cadres, including zone and division secretaries,”¹⁴³ who all had to follow CPK policies.¹⁴⁴
26. The NCIJ found that, while crimes were committed in areas under Mr. MEAS Muth’s authority,¹⁴⁵ his “participation was inactive, unimportant, and not proximate to the commission of the crimes.”¹⁴⁶ He reasoned that the Central Committee – “i.e. POL Pot and NUON Chea, on Son Sen’s recommendations and in collaboration with institutional leaders”¹⁴⁷ – made decisions to arrest and transfer individuals to S-21 security center.¹⁴⁸ He found that, acting under the General Staff’s and Military Committee’s authority,¹⁴⁹

¹³³ Dismissal Order, para. 428.

¹³⁴ Dismissal Order, paras. 79, 418.

¹³⁵ Dismissal Order, paras. 79, 110, 410.

¹³⁶ Dismissal Order, para. 153.

¹³⁷ Dismissal Order, para. 163.

¹³⁸ Dismissal Order, para. 163.

¹³⁹ Dismissal Order, paras. 111, 117, 121.

¹⁴⁰ Dismissal Order, para. 110.

¹⁴¹ Dismissal Order, para. 418.

¹⁴² Dismissal Order, paras. 187-88, 416. The NCIJ considered that testimonies of “key witnesses show that Division 1 of the West Zone was tasked with watching the territorial waters in Koh Kong province.” *See id.*, paras. 219, 416.

¹⁴³ Dismissal Order, para. 419.

¹⁴⁴ Dismissal Order, para. 420.

¹⁴⁵ *See e.g.*, Dismissal Order, paras. 294-97 (Wat Ena Nhien security center), 303-05 (Stung Hav rock quarry), paras. 307-22 (crimes committed by the DK navy in Cambodian territorial waters and islands).

¹⁴⁶ Dismissal Order, para. 428.

¹⁴⁷ Dismissal Order, para. 424.

¹⁴⁸ Dismissal Order, para. 424. *See also id.*, para. 267, finding that S-21 security center was “run directly by the Central Committee.”

¹⁴⁹ Dismissal Order, para., 417. *See also id.*, paras. 153, 159 regarding the composition of the Military Committee and General Staff, respectively.

Mr. MEAS Muth participated in supporting¹⁵⁰ and disseminating CPK policies,¹⁵¹ following the upper echelon's orders to facilitate the arrest and transfer of prisoners.¹⁵² While the NCIJ found that 286 contemporaneous DK documents show Mr. MEAS Muth's correspondence with Son Sen,¹⁵³ he found that none show Mr. MEAS Muth's initiative to order arrests or executions.¹⁵⁴ He was not one of the 13 individuals who had such authority: Pol Pot, NUON Chea, Sao Phim, Ta Mok, Vorn Vet, Son Sen, KHIEU Samphan, Koy Thuon, Mean San, Ros Nhim, Ke Pauk, Chou Chet, and Kang Chap.¹⁵⁵

27. The NCIJ compared Mr. MEAS Muth to Duch, whom he found to be most responsible.¹⁵⁶ Contrary to his findings on Mr. MEAS Muth's positions and roles in the DK,¹⁵⁷ the NCIJ found that Duch was under the direct control of the Standing Committee and exercised "powerful and effective leadership" as the Chairman of S-21¹⁵⁸ – a security center carrying out nation-wide operations¹⁵⁹ – and had the "power to cause deaths and direct execution."¹⁶⁰ Contrary to his findings on Mr. MEAS Muth's participation in crimes and CPK policy-making and/or implementation,¹⁶¹ the NCIJ found that Duch "directly, effectively, and fully implemented" the upper echelon's orders at S-21 security center,¹⁶² facilitated arrests, organized, instructed, and monitored interrogations, and executed prisoners¹⁶³ sent from "almost everywhere in the country."¹⁶⁴ The NCIJ also found that the number of victims who suffered as a result of Mr. MEAS Muth's direct acts "differs greatly" from those who suffered as a result of Duch's.¹⁶⁵

¹⁵⁰ Dismissal Order, para. 422.

¹⁵¹ Dismissal Order, para. 416.

¹⁵² Dismissal Order, paras. 420, 422, 424.

¹⁵³ Dismissal Order, para. 423.

¹⁵⁴ Dismissal Order, paras. 220-25, 425-26.

¹⁵⁵ Dismissal Order, paras. 169, 418. *See also id.*, para. 122.

¹⁵⁶ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order indicting KAING Guek Eav alias Duch, 8 August 2008, D99, para. 129.

¹⁵⁷ *See supra* para. 25.

¹⁵⁸ Dismissal Order, para. 371.

¹⁵⁹ Dismissal Order, para. 372.

¹⁶⁰ Dismissal Order, para. 374.

¹⁶¹ *See supra* para. 26.

¹⁶² Dismissal Order, para. 374.

¹⁶³ Dismissal Order, paras. 371-74.

¹⁶⁴ Dismissal Order, para. 372.

¹⁶⁵ Dismissal Order, para. 428.

2. The Indictment

28. The ICIJ assessed the facts alleged in the Introductory and Supplementary Submissions relevant to Mr. MEAS Muth.¹⁶⁶ He found that Mr. MEAS Muth was in a joint criminal enterprise with Son Sen, Ta Mok, SOU Met, and other senior RAK staff, sharing the common purpose of implementing four CPK policies: **a.** establishing cooperatives and forced labor worksites; **b.** re-educating “bad elements” and killing “enemies” inside and outside the RAK; **c.** targeting specific groups (Vietnamese, Thais, military personnel, and civilians); and **d.** implementing the CPK’s forced marriage policy.¹⁶⁷

29. The ICIJ found that Mr. MEAS Muth held an elevated role “working at the highest level of the DK military command structure below the national political leadership.”¹⁶⁸ He considered that, while Mr. MEAS Muth was not a senior leader, he was close to the CPK senior leadership, reasoning that Mr. MEAS Muth commanded Division 164, was responsible for DK’s territorial waters, was a reserve member of the General Staff Committee and one of Son Sen’s deputies, and, from late 1978, was a reserve member of the Central Committee.¹⁶⁹ Aside from finding that Mr. MEAS Muth discharged the powers of a division commander¹⁷⁰ and controlled civilian activities in Kampong Som,¹⁷¹ the ICIJ made no findings on his effective authority in his other alleged positions.

30. The ICIJ found that the charges of genocide against the Vietnamese and extermination of Thais captured by the DK navy “alone put [Mr. MEAS Muth] solidly within the bracket of personal jurisdiction,”¹⁷² finding that he issued open-ended orders to kill those entering DK’s territorial waters.¹⁷³ He also considered Mr. MEAS Muth responsible for other

¹⁶⁶ See Introductory Submission, seizing the OCIJ of facts concerning Mr. MEAS Muth’s position and role in the DK hierarchy (paras. 81-86), S-21 security center (para. 43), Wat Enta Nhien security center (paras. 55-57), Stung Hav rock quarry (para. 58), crimes committed by the DK navy (paras. 59-61), purges of RAK divisions (paras. 52-54), and armed conflict with Vietnam (para. 62). See also Supplementary Submission, paras. 20-24, seizing the OCIJ of the additional fact concerning forced marriage. The ICIJ formally terminated the investigation into facts he excluded in his decision to reduce the scope of the judicial investigation concerning all allegations relating to: **a.** S-22 security center; **b.** Kampong Chhnang Airport construction site; **c.** Stung Tauch killing site; **d.** RAK involvement in purges of the Central Zone, the New North Zone and the East Zone, excluding alleged purges of members of RAK units located in those areas. Indictment, paras. 12-13; Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 10 January 2017, D226, paras. 4, 13.

¹⁶⁷ Indictment, para. 171.

¹⁶⁸ Indictment, para. 461.

¹⁶⁹ Indictment, para. 459.

¹⁷⁰ Indictment, para. 156.

¹⁷¹ Indictment, para. 159.

¹⁷² Indictment, para. 463.

¹⁷³ Indictment, para. 464.

crimes against humanity, war crimes, and national crimes.¹⁷⁴ While the ICIJ found that Mr. MEAS Muth implemented CPK policies in areas under his authority,¹⁷⁵ he made no findings that Mr. MEAS Muth had any role in devising these policies or had discretion in determining their implementation.

31. The ICIJ compared Mr. MEAS Muth to other Charged Persons. He found that Mr. MEAS Muth discharged duties at a significantly higher level than AO An, whom he also found most responsible,¹⁷⁶ and that Mr. MEAS Muth's position combined with the nature and impact of his actions exceeded AO An's, IM Chaem's, and Duch's¹⁷⁷ – “mark[ing] him out as a major player in the DK structure and as a willing and driven participant in the brutal implementation of its criminal and inhuman policies.”¹⁷⁸

¹⁷⁴ Indictment, para. 466.

¹⁷⁵ Indictment, para. 180 (establishment of worksites and cooperatives); para. 188 (purging the RAK of “bad elements”); paras. 192, 195, 198-99, 273, 279, 282, 284-86, 327 (targeting of specific groups); para. 205 (forced marriage). *See also id.*, paras. 303, 315 (finding that Mr. MEAS Muth had no direct involvement in the purges of Divisions 502 and 310).

¹⁷⁶ Indictment, para. 461.

¹⁷⁷ Indictment, para. 460.

¹⁷⁸ Indictment, para. 469.

IV. LAW AND ARGUMENT

A. The ICIJ erred in law by interpreting Rule 77(13) in such a way as to suggest that unless the PTC upholds one of the Closing Orders by supermajority, either both Closing Orders or only his Indictment would stand

32. Under Rule 77(13), PTC decisions on appeal require a supermajority vote of four of five Judges. If the PTC cannot reach a supermajority, Rule 77(13) provides two “default decisions”: under Rule 77(13)(a), “the order or investigative action other than an indictment ... shall stand”; under Rule 77(13)(b), the TC is seized “on the basis of the Closing Order of the [CIJs].” Opining on an appellate issue not within his jurisdiction, the ICIJ suggested that unless the PTC upholds one Closing Order by supermajority under Rule 77(13), either both Closing Orders or only his Indictment would stand. The ICIJ incorporated, in the procedural history of his Indictment, the CIJs’ view that both Closing Orders “would appear to stand” under Rule 77(13), citing a decision where they informed the parties of the likely consequences of issuing opposing Closing Orders.¹⁷⁹ Contradictorily, in the section of his Indictment relating to pre-trial detention, the ICIJ considered it “unclear” whether his Indictment would stand under Rule 77(13).¹⁸⁰ The ICIJ misinterprets Rule 77(13). Rule 77(13) does not apply to opposing Closing Orders because: **a.** the Parties to the Agreement did not intend for a case to proceed to trial on the basis of an indictment when a dismissal order is simultaneously issued; and **b.** applying Rule 77(13) to appeals of opposing Closing Orders would lead to an absurd result, cause irreparable harm to Mr. MEAS Muth’s fair trial rights, and violate the Cambodian Constitution and ECCC framework.

1. The Parties to the Agreement did not intend for a case to proceed to trial on the basis of an indictment when a dismissal order is simultaneously issued

33. During the protracted negotiations leading to the ECCC’s establishment,¹⁸¹ the Parties to the Agreement – the RGC and the UN – foresaw that the CIJs may reasonably disagree

¹⁷⁹ 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.

¹⁸⁰ Indictment, para. 579.

¹⁸¹ The negotiations leading to the ECCC’s establishment began in June 1996 when Special Representative of the UN Secretary-General for Human Rights in Cambodia, Thomas Hammarberg, went on his first mission to Cambodia. See Thomas Hammarberg, *Special Insert: Efforts to establish a tribunal against KR leaders*, PHNOM

over the course of their investigations, including the extent of the ECCC's personal jurisdiction.¹⁸² In reviewing a draft Cambodian law on the establishment of a "special tribunal" for the prosecution of crimes committed during the DK period submitted to the UN in January 2000, UN Secretary-General Kofi Annan expressed concerns that "[t]he present institution of ... co-investigating judges where none of them can proceed without the agreement of the other will be difficult to operate and is likely to lead to an impasse."¹⁸³ After meeting with Prime Minister H.E. Hun Sen in April 2000, the UN suggested that disagreements between the CIJs be resolved by a PTC of three Cambodian Judges and two International Judges.¹⁸⁴ A supermajority rule was proposed to ensure that the prosecution and investigation of suspects would not be halted by a stalemate between the CIJs.¹⁸⁵ The Establishment Law, passed by the Cambodian National Assembly, approved by the Senate and Constitutional Council, and ultimately promulgated on 10 August 2001 enshrines the supermajority rule: if there is no supermajority in the PTC "the investigation shall proceed."¹⁸⁶ The Agreement between the RGC and UN reached on 6 June 2003 mirrors the Establishment Law.¹⁸⁷ The Rules, finalized by the Plenary on 12 June 2007, reflect the Agreement and Establishment Law.¹⁸⁸

PENH POST, 14 September 2001, *available at* <http://www.phnompenhpost.com/national/special-insert-efforts-establish-tribunal-against-kr-leaders>.

¹⁸² See Letter from UN Secretary-General Kofi Annan to Prime Minister H.E. Hun Sen, 8 February 2000, p. 2; Letter from UN Secretary-General Kofi Annan to Prime Minister H.E. Hun Sen, 19 April 2000, p. 1, 3. The extent of the ECCC's personal jurisdiction was a major point of contention between the Parties to the Agreement. H.E. Prime Minister Hun Sen expressed concerns that "if improperly and heedlessly conducted, the trials of Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered...." Identical letters dated 15 March 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary-General and to the President of the Security Council, 53rd Sess., Agenda Item 110, UN Doc. No. A/53/851-S/1999/230 (3 March 1999), Annex, Letter dated 3 March 1999 from the Prime Minister of Cambodia addressed to the Secretary-General.

¹⁸³ Letter from UN Secretary-General Kofi Annan to Prime Minister H.E. Hun Sen, 8 February 2000, p. 2.

¹⁸⁴ Letter from UN Secretary-General Kofi Annan to Prime Minister H.E. Hun Sen, 19 April 2000, p. 1.

¹⁸⁵ Letter from UN Secretary-General Kofi Annan to Prime Minister H.E. Hun Sen, 19 April 2000, Annex, Art. 5 bis (4).

¹⁸⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, HJ/1/3/01 (edited by Helen Jarvis on 1 January 2001), Art. 23: "A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges.... If there is no majority as required for the decision, the investigation shall proceed." See also Stephen Heder, *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments*, 26 April 2012, p. 38; ECCC Website, *Establishment of ECCC – Chronology*, <https://www.eccc.gov.kh/en/about-eccc/chronologies?page=3>; Agreement, Art. 9 (noting that the Establishment Law was promulgated on 10 August 2001). This Establishment Law was later amended in 2004, but these amendments are unrelated to the PTC's supermajority rule or to the personal jurisdiction of the ECCC.

¹⁸⁷ Agreement, Art. 7(4). See also Establishment Law, Art. 23 new.

¹⁸⁸ See Internal Rules, 12 June 2007, Rules 72(4)(d), 77(13), <https://www.eccc.gov.kh/sites/default/files/legal-documents/IR-Eng.pdf>.

34. While the Parties to the Agreement and drafters of the Rules foresaw that the CIJs may disagree and established a mechanism to resolve disagreements during the investigation stage, they purposefully left unaddressed the opposing Closing Orders scenario at the Closing Order stage. They did not intend for a case to proceed to trial when a dismissal order and an indictment are simultaneously issued. Instead, the Parties to the Agreement and drafters of the Rules provided the CIJs equal status and independent authority over the investigations¹⁸⁹ and discretionary authority to decide how to settle their disagreements when they arise.¹⁹⁰
35. Rule 72, which governs the settlement of disagreements between the CIJs, provides the CIJs discretion when they disagree to register their disagreement internally or bring it to the PTC for resolution.¹⁹¹ The PTC's role in dispute resolution under Rule 72 is to "settle the specific issue upon which the [CIJs] ... disagree."¹⁹² The Supreme Court Chamber ("SCC") "explicitly acknowledged the scenario of the CIJs reasonably disagreeing over personal jurisdiction ... in the context of the disagreement procedure":¹⁹³

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

¹⁸⁹ The Agreement and Establishment Law provide for two CIJs, one Cambodian and one International, who "shall enjoy equal status. Agreement, Art. 5(1); Establishment law, Art. 27 new. The Rules provide that the CIJs may act independently from each other: Rule 14(2) provides each CIJ their own Greffier and Rule 14(7) provides the CIJs discretion, when they disagree, to resort to the dispute resolution procedure under Rule 72. The PTC held that the CIJs "are independent in the way they conduct their investigation." *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 16), Decision on IENG Thirith's Appeal Against Order on Extension of Provisional Detention, 11 May 2009, C20/5/18, para. 63 (internal citation omitted); *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, para. 22.

¹⁹⁰ While the CIJs must "cooperate with a view to arriving at a common approach to the investigation," they are not required to achieve consensus. Agreement, Art. 5(4); Establishment Law, Art. 23 new. *See also* Rule 14(7) (providing that "[i]n the event of disagreement between the [CIJs], the procedure in Rule 72 shall apply"); Rule 72(1) (providing that the CIJs *may* record the nature of their disagreement in a register kept by the CIJs' Greffiers); Rule 72(2) (providing that the CIJs *may* refer their disagreement to the PTC for resolution). *See also 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 (holding that the CIJs "are under no obligation" to seize the PTC when they do not agree on an issue before them).

¹⁹¹ Rule 72(1)-(2).

¹⁹² *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 65 (internal citation omitted).

¹⁹³ *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. 15, citing *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 65.

unable to achieve a supermajority on the consequence of such a scenario, “the investigation shall proceed.”¹⁹⁴

36. The CIJs did not seize the PTC with a request under Rule 72 to settle their opposing views prior to issuing their Closing Orders.¹⁹⁵ Nor were they compelled to.¹⁹⁶ The CIJs exercised their discretion to register their disagreement internally,¹⁹⁷ presenting their own views in their own Closing Orders.¹⁹⁸
37. Treating the opposing Closing Orders as an unresolved disagreement would deprive the CIJs of their discretionary authority to decide how to settle their disagreements when they arise. Even were the PTC to treat the opposing Closing Orders as an unresolved disagreement, Rule 72’s dispute resolution procedure would not resolve the opposing Closing Orders scenario. Under Rule 72(4)(d), if the PTC cannot reach a supermajority to resolve a disagreement, “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.”¹⁹⁹ Both CIJs issued Closing Orders and both CIJs enjoy equal status.²⁰⁰ Under Rule 72(4)(d), both Closing Orders would stand.
38. As tempting as it may be to overcome the impasse under Rule 72’s dispute resolution procedure by considering the issuance of opposing Closing Orders impermissible, remitting the case with instructions to produce a single Closing Order would not only be an injudicious use of the ECCC’s human and financial resources – prompting further appeals, responses, and replies – but would also violate Mr. MEAS Muth’s right to have proceedings brought to a conclusion within a reasonable time.²⁰¹ Had the PTC considered that the CIJs were required to issue a single Closing Order, it would have said so when prompted by the parties to clarify the law should the CIJs disagree on whether to dismiss

¹⁹⁴ *Case of KAING 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).

¹⁹⁵ Indictment, para. 27: “On 17 September 2018, the CIJs registered a disagreement regarding the issuance of separate and opposing Closing Orders.”

¹⁹⁶ Rules 14(7); 72(1)-(2).

¹⁹⁷ Indictment, para. 27.

¹⁹⁸ 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 single Closing Order. Rule 67(1) provides that the CIJs “conclude the judicial 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, TC, and SCC).

¹⁹⁹ Rule 72(4)(d).

²⁰⁰ Agreement, Art. 5(1); Establishment Law, Art. 27 new.

²⁰¹ Rule 21(4): “Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.”

or indict.²⁰² While this legal issue may not have been ripe when the PTC was called upon to review, it was certainly on the horizon, and not some alluring academic hypothetical. In any event, considering the length of the CIJs' investigations²⁰³ and comprehensive reasoning in their Closing Orders,²⁰⁴ remittance would cosmetically place form over substance, simply creating a single document incorporating the CIJs' irreconcilable views on the ECCC's personal jurisdiction over Mr. MEAS Muth, having no effect on the conclusions they independently reached. One CIJ would still call for a dismissal and the other for indictment. The impasse under Rule 72 would remain.

39. Now that the PTC is seized of cross-appeals against the Dismissal Order and the Indictment,²⁰⁵ the overarching question that the PTC must resolve is which of the two Closing Orders will stand. Rule 77 governs appeals against the CIJs' decisions or orders. Under Rule 77, the PTC's role is to determine whether the CIJs properly exercised their discretion in reaching their opposing conclusions,²⁰⁶ rather than settling the CIJs' differences. Absent errors or abuses fundamentally determinative of either CIJ's exercise of discretion, the PTC cannot replace its own views for those of the CIJs.²⁰⁷

40. Had the Parties to the Agreement and drafters of the Rules wished for a case to go forward when a dismissal order and an indictment are simultaneously issued and neither order is overturned on appeal by supermajority, they would have agreed on explicit

²⁰² The PTC was requested to provide its understanding of the law: **a.** should the CIJs disagree on whether to dismiss the case or indict and **b.** should the disagreement come before the PTC and the PTC fails to achieve a supermajority when deciding on the disagreement. The PTC declined to provide clarification, finding that it has "no jurisdiction to deal with hypothetical matters or provide advisory opinions." *Case of YIM Tith*, 004/07-09-2009-ECCC/OCIJ (PTC11), Decision on YIM Tith's Appeal Against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, paras. 4, 8.

²⁰³ See *supra* paras. 14-20.

²⁰⁴ See *supra* paras. 21-31. See also *infra* paras. 54-60.

²⁰⁵ See International Co-Prosecutor's Notice of Appeal against the Order Dismissing the Case Against MEAS Muth (D266), 7 February 2019, D266/1; MEAS Muth's Notice of Appeal against the International Co-Investigating Judge's Closing Order, 5 December 2018, D267/1; National Co-Prosecutor's Notice of Appeal against the ICIJ's Closing Order (Indictment), 14 February 2019, D267/2.

²⁰⁶ *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. See also *supra* paras. 7-9.

²⁰⁷ *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, 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: "The [PTC] has repeatedly stated that, '[i]t is not for the [PTC] to replace its view for that of the [CIJs].'"

provisions providing for such an outcome. None exist. Any amendments to the Rules would require amending the Establishment Law and Agreement based on consultations between the RGC and the UN.²⁰⁸ And assuming the RGC and the UN agreed, it would require 14 of 19 Judges eligible to vote to agree on any proposed amendments to the Rules governing the ECCC's procedure.²⁰⁹ No such amendments were ever proposed, let alone adopted.²¹⁰

2. Applying Rule 77(13) to appeals of opposing Closing Orders would lead to an absurd result, cause irreparable harm to Mr. MEAS Muth's fair trial rights, and violate the Cambodian Constitution and ECCC framework

41. Under Rule 77(13), PTC decisions on appeal require a supermajority vote of four of five Judges. If the PTC cannot reach a supermajority, Rule 77(13) provides two "default decisions": under Rule 77(13)(a), "the order or investigative action other than an indictment ... shall stand"; under Rule 77(13)(b), the TC is seized "on the basis of the Closing Order of the [CIJs]." If Rule 77(13)(a) applies to dismissal orders and Rule 77(13)(b) applies to indictments, their combined application to appeals of opposing Closing Orders would lead to an absurd result and cause irreparable harm to Mr. MEAS Muth's fair trial rights.²¹¹ If only Rule 77(13)(b) applies – either because Rule 77(13)(a) does not apply to dismissal orders, or because Rule 77(13)(b) trumps Rule 77(13)(a) at the Closing Order stage – the Indictment would automatically prevail over the Dismissal Order, violating the Cambodian Constitution and ECCC framework.²¹²

42. Applying both Rules 77(13)(a) and 77(13)(b) to appeals of opposing Closing Orders would lead to an absurd result²¹³ because contradictory Rules would apply. While under Rule 77(13)(a) the Dismissal Order would stand and the case would be terminated and archived,²¹⁴ under Rule 77(13)(b) the Indictment would stand and the case would proceed

²⁰⁸ Agreement, Arts. 2(3), 30.

²⁰⁹ Rules 3, 18(3)(b).

²¹⁰ The Rules were amended nine times since they were adopted in 2007. *See* Rules, p. 81. Rule 77 was amended twice (in 2008 and 2010), but Rule 77(13) was never amended. No proposal for amendment to Rule 77(13) was made.

²¹¹ *See infra* paras. 42-44.

²¹² *See infra* paras. 45-46.

²¹³ An absurd result is one that is **a.** "clearly untrue or unreasonable; ridiculously inconsistent with reason, or the plain dictates of common sense; logically contradictory"; **b.** "not in accordance with common sense, very unsuitable"; or **c.** "ridiculous, foolish." *See* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U.L. REV. 127, 141 (1994) (internal citations omitted).

²¹⁴ *Cf.* Rules 77(13)(a), 69(2)(b).

to trial.²¹⁵ Sending the case to trial once terminated (and archived) would be as oxymoronic as it would be unjust. Similarly, leaving the Indictment hanging over Mr. MEAS Muth in perpetuity after the proceedings against him cease²¹⁶ would irreparably harm and permanently deprive Mr. MEAS Muth of his constitutionally guaranteed fair trial rights.

43. Both CIJs acknowledged that leaving an unchallengeable indictment hanging in perpetuity is incompatible with the basic demands of the rule of law.²¹⁷ And just as the CIJs recognized the repugnant consequences of having such severe charges hanging over Mr. MEAS Muth, placing him in a perennial purgatory, the PTC must also recognize and uncompromisingly afford Mr. MEAS Muth all of his rights under the Cambodian Constitution and ECCC framework²¹⁸ – his rights to be presumed innocent,²¹⁹ to defend himself,²²⁰ to have proceedings against him brought to a conclusion within a reasonable time,²²¹ and to have equal protection before the ECCC.²²²

²¹⁵ Cf. Rules 77(13)(b), 69(2)(a), 79(1).

²¹⁶ 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."

²¹⁷ 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.

²¹⁸ See 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.

²¹⁹ The Cambodian Constitution and ECCC framework guarantee Mr. MEAS Muth's right to be presumed innocent unless and until found guilty through a final, binding decision according to law. See Cambodian Constitution, Art. 38; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 new; Rule 21(1)(d); International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49 ("ICCPR"), Art. 14(2). The presumption of innocence imposes on the Prosecution the burden of proving the charges. No guilt can be presumed until the charges have been proved beyond reasonable doubt. See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. No. CCPR/C/GC/32, 23 August 2007 ("General Comment No. 32"), para. 30.

²²⁰ Under international standards of human rights, incorporated in the Cambodian Constitution and ECCC framework, Mr. MEAS Muth is guaranteed the right to defend himself through judicial recourse. Mr. MEAS Muth's right to defend himself includes the rights to adequate time and facilities, to legal assistance, to communicate with counsel to prepare an effective defence, and to challenge witnesses and evidence used against him. See Cambodian Constitution, Arts. 31, 38; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 new (b), (d), (e); ICCPR, Art. 14(3)(b), (d), (e). See also General Comment No. 32, paras. 32-34, 37-39.

²²¹ The Cambodian Constitution and the ECCC framework guarantee Mr. MEAS Muth the right to be tried without undue delay and that proceedings be brought to an actual conclusion. Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1), Establishment Law, Arts. 33 new, 35 new (c); Rule 21(4); ICCPR, Art. 14(3)(c). The purpose of this right is to avoid keeping persons too long in a state of uncertainty about their fate and to serve the interests of justice. This guarantee relates not only to the time between the charging of the suspect and the time by which the trial should commence, but also the time until a final appeal judgement is rendered. See General Comment No. 32, para. 35.

²²² The Cambodian Constitution and ECCC framework guarantee Mr. MEAS Muth the right to equality before courts and tribunals. Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts.

44. There is no mechanism at the ECCC to transfer the case to any court or tribunal (Cambodian or international)²²³ that would enable Mr. MEAS Muth to challenge the evidence against him, confront his accusers, or maintain his innocence. Undeniably, he would be permanently branded a war criminal and *genocidaire*. Mr. MEAS Muth and his family would live with the permanent stigma of Mr. MEAS Muth having been indicted by one component of a UN-backed court for crimes of the most serious concern to the international community – charges he would never be able to challenge. Mr. MEAS Muth would also not know whether proceedings could be reopened against him, and if so, whether the charges would be based on the ECCC’s investigations or whether his case would be investigated anew. In Cases 001, 002, and 004/1, the PTC reached final, binding decisions on appeals of all Closing Orders.²²⁴ Mr. MEAS Muth must not be treated differently to Duch, NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan, IM Chaem, or any other Charged Person before Cambodian courts.
45. If only Rule 77(13)(b) applies to appeals of opposing Closing Orders, the Indictment would automatically prevail over the Dismissal Order, violating the Cambodian Constitution and ECCC framework. Under the Cambodian Constitution and ECCC framework, doubt, as to personal jurisdiction or otherwise, must be resolved in favor of

33 new, 35 new; Rule 21(1)(b); ICCPR, Arts. 14(1), 26. This right entails effective access to the administration of justice “to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice.” See General Comment No. 32, para. 9. Differential treatment in similar cases must be “based on reasonable and objective criteria.” See *Rita Hiro Balani v. Spain*, Communication No. 1021/2001, UN Doc. No. CCPR/C/77/D/1021/2001 (1998), para. 4.3, available at <http://www1.umn.edu/humanrts/undocs/1021-2001.html>. See also *Waldman v. Canada* (Views adopted on 3 November 1999), in UN, Report of the Human Rights Committee (vol. II), UN Doc. No. A/55/40, para. 10.6., available at [https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F55%2F40%5BVOL.II%5D\(SUPP\)&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F55%2F40%5BVOL.II%5D(SUPP)&Lang=en).

²²³ 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. 55. See also Case 004/1 Closing Order, para. 16 (finding that no attempts were ever made by the RGC or UN to “regulate the investigation and prosecution of those who would fall short of the personal jurisdiction threshold of the ECCC”); *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. 74.

²²⁴ *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal against Closing order indicting KAINING Guek Eav alias “DUCH”, 5 December 2008, D99/3/42; *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; *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; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-PTC/OCIJ (PTC 104), Decision on KHIEU Samphan’s Appeal against the Closing Order, 21 January 2011, D427/4/15; *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.

the Charged Person under the principle of *in dubio pro reo*.²²⁵ The ECCC framework provides for two independent CIJs of equal status.²²⁶ Absent errors or abuses fundamentally determinative of the NCIJ's exercise of discretion, the Dismissal Order may not be set aside.²²⁷ Applying 77(13)(b) so that the Indictment automatically prevails over the Dismissal Order would deprive the NCIJ of his equal status and discretionary authority to present his views in his own Closing Order.²²⁸ It would effectively render him subordinate to the ICIJ.

46. Applying Rule 77(13)(b) to appeals of opposing Closing Orders is perverse and contrary to the principle of *in dubio pro reo* enshrined in the Cambodian Constitution.²²⁹ The Parties to the Agreement could no more negotiate away the principle of *in dubio pro reo* in designing the ECCC framework than the Judges could diminish, dilute, or disregard its application in drafting the Rules implementing the Agreement and Establishment Law. Even if the Dismissal Order were to be set aside by supermajority, the PTC would still need to uphold the Indictment by supermajority and find that the case should proceed to trial based on the Indictment. A supermajority of four Judges in the TC is required to convict an Accused at the ECCC;²³⁰ a supermajority of at least five Judges in the SCC is required to overturn an acquittal.²³¹ It is preposterous that, under Rule 77(13), only one, two, or even three PTC Judges could send the case forward to trial, ignoring the supermajority rule.

3. Conclusion

47. In misinterpreting Rule 77(13), the ICIJ erred in law by suggesting that unless the PTC upholds one Closing Order by supermajority, either both Closing Orders would stand in perpetuity or only his Indictment would stand. While the Parties to the Agreement

²²⁵ Cambodian Constitution, Art. 38: "The doubt shall benefit the accused"; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 new; Rule 21(1). *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, 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." The principle of *in dubio pro reo*, guaranteed under Article 38 of Cambodian Constitution, could not have been negotiated away by the Parties to the Agreement. *See also infra* paras. 50-51.

²²⁶ Agreement, Art. 5(1); Establishment Law, Art. 27 new; Rules 14(2), 14(7), 72.

²²⁷ *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.

²²⁸ *See supra* paras. 34, 36.

²²⁹ Cambodian Constitution, Art. 38. *See also infra* paras. 50-51.

²³⁰ Agreement, Art. 4(1)(a); Establishment Law, Art. 14 new (1)(a); Rule 98(4).

²³¹ Agreement, Art. 4(1)(b); Establishment Law, Art. 14 new (1)(b); Rule 111(6).

foresaw that the CIJs may reasonably disagree during the course of their investigation and established a dispute resolution mechanism at the investigation stage of the proceedings, the Parties to the Agreement did not intend for a case to proceed to trial when a dismissal order and an indictment are simultaneously issued. Given the protracted negotiations leading to the ECCC's establishment, had the Parties to the Agreement wished for such an outcome, they would have agreed on explicit provisions. Applying Rule 77(13) – as the ICIJ suggests – would not only lead to an absurd result but would irreparably harm and permanently deprive Mr. MEAS Muth of his constitutionally guaranteed fair trial rights that the ECCC is bound to uphold.

48. The options presented to the PTC by the ICIJ are as unsound as they are unsustainable. His implication that both Closing Orders would stand would cause Mr. MEAS Muth, and his family, to live with the permanent stigma of being indicted for genocide, crimes against humanity, war crimes, and national crimes – charges that would “hang over [him],”²³² having no opportunity to demonstrate his innocence. Alternatively, the ICIJ's implication that only his Indictment – by virtue of its issuance – would stand in the absence of any legal reasoning for rejecting the NCIJ's Dismissal Order, suggests that his Indictment is inexplicably superior to the NCIJ's Dismissal Order. The PTC should find that the ICIJ erred in law in considering that Rule 77(13) applies to appeals of opposing Closing Orders and suggesting that either both Closing Orders or only his Indictment would stand. Rule 77(13) exclusively applies to joint Closing Orders.

²³² See 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.

B. The ICIJ erred in law by failing to conclude that, unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, the Dismissal Order prevails over the Indictment under the principle of *in dubio pro reo*

49. In misinterpreting Rule 77(13) and suggesting that either both Closing Orders or only his Indictment would stand absent a supermajority in the PTC,²³³ the ICIJ failed to conclude that, unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, the Dismissal Order prevails because: **a.** under the principle of *in dubio pro reo*, doubt, both to the facts and the interpretation of legal provisions, must be resolved in Mr. MEAS Muth's favor; **b.** both CIJs investigated the facts of which they were seized and made findings on them in reasoned Closing Orders; and **c.** absent errors or abuses fundamentally determinative of the NCIJ's exercise of discretion that would impede the application of the principle of *in dubio pro reo*, the Dismissal Order prevails over the Indictment.

1. Under the principle of *in dubio pro reo*, doubt, both to the facts and the interpretation of legal provisions, must be resolved in Mr. MEAS Muth's favor

50. The principle of *in dubio pro reo* is a fundamental principle of criminal law enshrined in the Cambodian Constitution,²³⁴ the ECCC framework,²³⁵ and international law.²³⁶ Under

²³³ See *supra* paras. 32-48. The ICIJ incorporated, in the procedural history of his Indictment, the CIJs' view that both Closing Orders "would appear to stand" under Rule 77(13), citing a decision where they informed parties of the likely consequences of issuing opposing Closing Orders for the appellate proceedings. See 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. Contradictorily, in the section of his Indictment relating to pre-trial detention, the ICIJ considered it "unclear" whether his Indictment would stand under Rule 77(13). See *id.*, para. 579.

²³⁴ Cambodian Constitution, Art. 38: "The doubt shall benefit the accused." See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, 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."

²³⁵ See Agreement Arts. 12(2), 13(1); Establishment Law, Art. 33 new, 35 new; Rule 21(1).

²³⁶ See *Trials of War Criminals Before the Nurnberg Military Tribunals under Control Council Law No. 10*, Ministries Case, Dissenting Opinion of Judge Powers, Vol. XIV (October 1946-April 1949), p. 878: "The legal question, therefore, for us to determine is not whether a particular act ought to be a crime, but whether it is a crime under the rules applicable here, always keeping in mind that we have no right to extend these rules by construction. It is the general rule that statutes and rules defining crime must be strictly construed in favor of the accused. This means that questions involving doubtful construction should be resolved in favor of the accused." The Rome Statute of the International Criminal Court enshrines the principle of *in dubio pro reo* by application of strict construction of criminal law. See Rome Statute, 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 also *Prosecutor v. Al Bashir*, ICC-02/05-

Article 38 of the Cambodian Constitution, “doubt shall benefit the accused.” Rule 21(1) requires that the ECCC framework – which incorporates the international standards of justice, fairness, and due process of law embodied in the ICCPR, to which Cambodia is a party²³⁷ – be interpreted so as to always safeguard the Charged Persons’ interests.

51. The principle of *in dubio pro reo* “results from the presumption of innocence”²³⁸ and applies at all stages of the proceedings, “including the pre-trial stage.”²³⁹ The principle of *in dubio pro reo* applies both to the facts and the interpretation of legal provisions.²⁴⁰ Both CIJs considered that Charged Persons are entitled to a “dispassionate evaluation of the evidence and interpretation of the law at all levels of the ECCC’s judicial hierarchy, beginning with the OCIJ.”²⁴¹ Both CIJs considered the principle of *in dubio pro reo* to have a “residual role in the interpretation of legal provisions” when doubts remain after the application of standard civil law rules of interpretation.²⁴² Considering the “flexibility” of the term most responsible, which “inherently requires a margin of appreciation on the part of the [CIJs],”²⁴³ all doubt as to the ECCC’s jurisdiction over Mr. MEAS Muth must be resolved in his favor.

01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 156 (internal citations omitted); *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.

²³⁷ Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992. See UN Treaty Collection, International Covenant on Civil and Political Rights, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (last visited 8 April 2019).

²³⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.

²³⁹ 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.”

²⁴⁰ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.

²⁴¹ See Case 004/1 Closing Order, para. 36.

²⁴² See Case 004/1 Closing Order, para. 26 (internal citation omitted). See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.

²⁴³ *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, considering the flexibility of the terms “senior leaders” and “most responsible... inherently requires some margin of appreciation on the part of the CIJs.”

2. Both CIJs investigated the facts of which they were seized and made findings on them in reasoned Closing Orders

52. The CIJs “are independent in the way they conduct their investigation.”²⁴⁴ They “formulate the *strategy* for the conduct of the judicial investigation – and *choose the means* of ascertaining the truth – and they possess the discretionary power to do so.”²⁴⁵ Both CIJs investigated the facts of which they were seized, reviewed inculpatory and exculpatory material, and collected additional evidence.²⁴⁶ The NCIJ was not compelled to continue investigating or re-evaluate his and ICIJ Blunk’s determination that Mr. MEAS Muth does not fall within the ECCC’s jurisdiction. The CIJs have “discretion to decide independently when they consider an investigation to be concluded.”²⁴⁷
53. There is nothing to suggest that any evidence collected after 29 April 2011 would have altered the NCIJ’s reasoning that Mr. MEAS Muth was not sufficiently high in the DK hierarchy to conceptualize or affect CPK policies and/or their implementation – reasoning that was fundamentally determinative of his conclusion that Mr. MEAS Muth is not most responsible.²⁴⁸ While the NCIJ stated that he did not use documents placed on the Case File after 29 April 2011 in his Dismissal Order, he cited documents filed after that date²⁴⁹ – indicating that he remained engaged throughout the investigation and considered the material on the Case File before drafting the Dismissal Order. Nothing in the Supplementary Submission alleges that Mr. MEAS Muth was higher in the DK hierarchy or had a higher degree of effective authority than the allegations in the Introductory Submission.²⁵⁰ To find someone most responsible for the crimes committed throughout Cambodia during the DK period of 17 April 1975 to 6 January 1979, there must be

²⁴⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 16), Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, 11 May 2009, C20/5/18, para. 63 (internal citation omitted); *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, para. 22.

²⁴⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Co-Investigating Judges’ Response to “Your ‘Request for Investigative action concerning, *inter alia*, the strategy of the Co-Investigating Judges in regard to the Judicial Investigation,” 11 December 2009, D171/5, para. 15 (italics in original).

²⁴⁶ See *supra* paras. 14-20.

²⁴⁷ Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 5 (internal citation omitted).

²⁴⁸ Dismissal Order, paras. 416-20, 429.

²⁴⁹ See e.g., Dismissal Order, fns. 7, 25, 27-40, 42, 46-48, 51, 54, 57. See also *id.*, fns. 1100-03, 1105, where the NCIJ also cited documents placed on other Case Files after 29 April 2011.

²⁵⁰ See Supplementary Submission, paras. 1-2, 6, 7, 10, 12, 15, in which the ICP submitted that he considered the OCIJ to already be seized of facts concerning the Durian Plantation and Bet Trang, Kang Keng, Tuek Sap, Purges in Kratie and Sector 505, and Ream by his Introductory Submission. The only new fact alleged in the Supplementary Submission concerned forced marriage. See *id.*, paras. 20-24.

evidence to demonstrate that Mr. MEAS Muth was involved in conceptualizing or affecting CPK policies and/or their implementation, as opposed to being merely a facilitator.²⁵¹

54. Both CIJs made findings in their Closing Orders on the facts of which they were seized relevant to Mr. MEAS Muth:²⁵² his roles and responsibilities within the DK hierarchy,²⁵³ S-21 security center,²⁵⁴ Wat Enta Nhien security center,²⁵⁵ Stung Hav rock quarry,²⁵⁶ crimes committed by the DK navy,²⁵⁷ purges of RAK divisions,²⁵⁸ armed conflict with Vietnam,²⁵⁹ and forced marriage.²⁶⁰ Other than seizing the CIJs with facts related to forced marriage, the primary intent in filing the Supplementary Submission, according to the ICP, was not to seize the CIJs with new facts, but to “clarify” facts he considered the CIJs to already be seized of.²⁶¹

55. Both CIJs used the same evidentiary methodology²⁶² and assessed whether Mr. MEAS Muth is most responsible according to “well-settled legal principles”²⁶³ based on the

²⁵¹ Dismissal Order, paras. 360-407. *See also* Indictment, paras. 38-39, citing Case 004/1 Closing Order, paras. 26-41.

²⁵² *See* Introductory Submission, seizing the OCIJ of facts concerning Mr. MEAS Muth’s position and role in the DK hierarchy (paras. 81-86), S-21 security center (para. 43), Wat Enta Nhien security center (paras. 55-57), Stung Hav rock quarry (para. 58), crimes committed by the DK navy (paras. 59-61), purges of RAK divisions (paras. 52-54), and armed conflict with Vietnam (para. 62). *See also* Supplementary Submission, paras. 20-24, seizing the OCIJ of the additional fact concerning forced marriage. The ICIJ formally terminated the investigation into facts he excluded in his decision to reduce the scope of the judicial investigation concerning all allegations relating to: **a.** S-22 security center; **b.** Kampong Chhnang Airport construction site; **c.** Stung Tauch killing site; **d.** RAK involvement in purges of the Central Zone, the New North Zone and the East Zone, excluding alleged purges of members of RAK units located in those areas. Indictment, paras. 12-13; Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 10 January 2017, D226, paras. 4, 13.

²⁵³ *See* Dismissal Order, para. 79 (finding that Mr. MEAS Muth was not a member of the Standing Committee); paras. 108-22 (assessing Mr. MEAS Muth’s role and authority in the Central Committee), para. 153 (finding that Mr. MEAS Muth was not in the Military Committee); paras. 156-71 (assessing Mr. MEAS Muth’s role and authority in the General Staff), paras. 187-89 (assessing Mr. MEAS Muth’s roles as Division 164 commander and Chairman of the Kampong Som City Committee). *See* Indictment, para. 150 (assessing Mr. MEAS Muth’s role and authority in the Central Committee), paras. 156-58 (assessing Mr. MEAS Muth’s role and authority as Division 164 commander), paras. 159-61 (assessing Mr. MEAS Muth’s role and authority as Kampong Som Autonomous Sector Secretary), para. 162 (assessing Mr. MEAS Muth’s role in the General Staff).

²⁵⁴ Dismissal Order, paras. 263-87; Indictment, paras. 168-69.

²⁵⁵ Dismissal Order, paras. 288-97; Indictment, paras. 426-43.

²⁵⁶ Dismissal Order, paras. 298-305; Indictment, paras. 355-402.

²⁵⁷ Dismissal Order, paras. 306-22; Indictment, paras. 217-57.

²⁵⁸ Dismissal Order, paras. 229-58; Indictment, paras. 270-329.

²⁵⁹ Dismissal Order, paras. 323-29; Indictment, paras. 206-10.

²⁶⁰ Dismissal Order, paras. 82, 92-93; Indictment, paras. 200-05; 444-55.

²⁶¹ *See* Supplementary Submission, paras. 1-2, 6, 7, 10, 12, 15.

²⁶² *See supra* para. 22.

²⁶³ *See Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Orders (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21.

factors they jointly devised;²⁶⁴ looking at his hierarchical authority in the DK, his personal participation in crimes, and the level of his participation in CPK policy-making and/or its implementation.²⁶⁵

56. Both CIJs assessed Mr. MEAS Muth's authority in the DK hierarchy.²⁶⁶ The NCIJ found that despite holding several roles, Mr. MEAS Muth did not exercise much power,²⁶⁷ reasoning that he was not a member of the Standing Committee,²⁶⁸ had no participatory rights in decision-making in the Central Committee,²⁶⁹ had no authority to order arrests and executions,²⁷⁰ and "was under around 50 (fifty) cadres and held the same position as many other cadres, including zone and division secretaries,"²⁷¹ who all had to follow CPK policies.²⁷² The ICIJ found that, while Mr. MEAS Muth was not a senior leader, he was close to the senior leadership level, reasoning that Mr. MEAS Muth commanded Division 164, was responsible for DK's territorial waters, was a reserve member of the General Staff Committee and one of Son Sen's deputies, and, from late 1978, was a reserve member of the Central Committee.²⁷³

57. Both CIJs assessed Mr. MEAS Muth's participation in crimes.²⁷⁴ While the NCIJ found that crimes occurred in areas under Mr. MEAS Muth's authority,²⁷⁵ he reasoned that Mr. MEAS Muth's participation was "inactive, unimportant, and not proximate to the commission of the crimes."²⁷⁶ The ICIJ found that the gravity of the crimes attributable to Mr. MEAS Muth justify the conclusion that he is most responsible, reasoning that Mr. MEAS Muth is responsible for genocide of the Vietnamese and extermination of Thais

²⁶⁴ These factors are: **a.** the intent of the Parties to the Agreement to limit the ECCC's personal jurisdiction to those with the greatest responsibility in DK; **b.** the principles of *in dubio pro reo* and strict construction of criminal law; **c.** decision-making in DK structures (i.e. the degree to which the Charged Person was able to contribute to or determine CPK policies and/or their implementation); and **d.** the relative gravity of the Charged Person's acts and their effects, subject to the intent of the Parties to the Agreement. Dismissal Order, paras. 360-407; Indictment, paras. 32-39. *See also* Case 004/1 Closing Order, paras. 3-41. *See supra* para. 22.

²⁶⁵ Dismissal Order, paras. 368-69; Indictment, para. 39, citing Case 004/1 Closing Order, paras. 38-39.

²⁶⁶ *See supra* paras. 25, 29.

²⁶⁷ Dismissal Order, para. 428.

²⁶⁸ Dismissal Order, paras. 79, 418.

²⁶⁹ Dismissal Order, para. 418.

²⁷⁰ Dismissal Order, paras. 169, 418. *See also id.*, para. 122.

²⁷¹ Dismissal Order, para. 419.

²⁷² Dismissal Order, para. 420.

²⁷³ Indictment, para. 459.

²⁷⁴ *See supra* paras. 26, 30.

²⁷⁵ *See e.g.*, Dismissal Order, paras. 294-97 (Wat Ena Nhien security center), 303-05 (Stung Hav rock quarry), paras. 307-22 (crimes committed by the DK navy in Cambodian territorial waters and islands).

²⁷⁶ Dismissal Order, para. 428.

captured by the DK navy and other crimes against humanity, war crimes, and national crimes.²⁷⁷

58. Both CIJs assessed Mr. MEAS Muth's participation in CPK policies.²⁷⁸ Both CIJs found that the conceptualization of CPK policies and means of their implementation rested with the top echelons;²⁷⁹ that decisions made by the top echelons were implemented by the lower levels on pain of personal consequences at any level;²⁸⁰ that despite the regular meetings held, decision-making in the DK did not allow for "egalitarian input from functionaries at any level and an ensuing discussion";²⁸¹ and that no one could be safe in assuming that conversations regarding the top echelons instructions would not be "reported in interested quarters with adverse effect upon themselves."²⁸² The NCIJ found that Mr. MEAS Muth participated in supporting²⁸³ and disseminating CPK policies.²⁸⁴ The ICIJ found that Mr. MEAS Muth was a "willing and driven participant" in the implementation of CPK policies.²⁸⁵ Only the NCIJ assessed Mr. MEAS Muth's ability to conceptualize or affect CPK policies or their implementation.²⁸⁶ Nowhere in the Indictment does the ICIJ demonstrate that Mr. MEAS Muth was involved in conceptualizing CPK policies as opposed to merely being a facilitator, having no authority to deviate from his narrowly-defined authority.²⁸⁷

59. Both CIJs compared Mr. MEAS Muth to other Charged Persons at the ECCC.²⁸⁸ The NCIJ found that, in contrast with Duch who directly participated in the commission of crimes,²⁸⁹ exercised "powerful and effective leadership" as Chairman of S-21 security center,²⁹⁰ and had the "power to cause deaths and direct execution,"²⁹¹ Mr. MEAS Muth's "participation was inactive, unimportant, and not proximate to the commission of the

²⁷⁷ Indictment, paras. 462-66.

²⁷⁸ See *supra* paras. 26, 30.

²⁷⁹ Dismissal Order, para. 386-87; Indictment, para. 39, citing Case 004/1 Closing Order, para. 40.

²⁸⁰ Dismissal Order, para. 386; Indictment, para. 39, citing Case 004/1 Closing Order, para. 40.

²⁸¹ Case 004/1 Closing Order, para. 40, cited in Indictment, para. 39. See also Dismissal Order, paras. 386, 388.

²⁸² Case 004/1 Closing Order, para. 41, cited in Indictment, para. 39. See also Dismissal Order, para. 388.

²⁸³ Dismissal Order, para. 422.

²⁸⁴ Dismissal Order, para. 416.

²⁸⁵ Indictment, para. 469.

²⁸⁶ Dismissal Order, paras. 409-20.

²⁸⁷ See *supra* paras. 29-30.

²⁸⁸ See *supra* paras. 27, 31.

²⁸⁹ Dismissal Order, paras. 371-74.

²⁹⁰ Dismissal Order, para. 371.

²⁹¹ Dismissal Order, para. 374.

crimes.”²⁹² The NCIJ also found that the number of victims who suffered as a result of Mr. MEAS Muth’s direct acts “differs greatly” from those who suffered as a result of Duch’s direct acts.²⁹³ The ICIJ found that Mr. MEAS Muth’s position and the nature and impact of his actions exceeded AO An’s, IM Chaem’s, and Duch’s.²⁹⁴

60. The CIJs both stated their reasoning in their Closing Orders setting out how they evaluated the evidence and reached their opposing conclusions.²⁹⁵ The CIJs were not bound by the parties’ submissions,²⁹⁶ compelled to mechanically work through each and every argument advanced,²⁹⁷ or required to discuss each item of evidence in the Case File.²⁹⁸ The CIJs have discretion “to decide the manner in which their reasoning is to be articulated.”²⁹⁹ Because of the CIJs’ independence and equal status,³⁰⁰ the NCIJ was not compelled to agree with the ICIJ’s investigative acts, factual findings, or legal analysis.³⁰¹

61. Only the ICIJ was required to describe the material facts and their legal characterizations with relevant criminal provisions and the nature of Mr. MEAS Muth’s criminal responsibility, as required for an indictment under Rule 67(2).³⁰² The Rules do not require

²⁹² Dismissal Order, para. 428.

²⁹³ Dismissal Order, para. 428.

²⁹⁴ Indictment, para. 460.

²⁹⁵ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, F36, para. 207: “[T]he reasoning required to ensure fairness of the proceedings will always depend on the specific circumstances of the case. This does not mean that a chamber has to mechanically work through each and every argument that a party has raised ... or that failure to do so automatically leads to a finding that the right to a reasoned decision has been violated. Of most importance is that it is comprehensible how the chamber evaluated the evidence and reached its factual and legal conclusions.” (internal citations omitted). See also *supra* paras. 21-31.

²⁹⁶ Rule 67(1): “The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors’ submissions.”

²⁹⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, F36, para. 207. See also *Van de Hurk v. The Netherlands*, ECtHR App. No. 16034/90, Judgement, 19 April 1994, para. 61 (the European Court of Human Rights held that the obligation to provide a reasoned decision “cannot be understood as requiring a detailed answer to every argument”).

²⁹⁸ See *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Orders (Reasons), D308/3/1/20, 28 June 2018, para. 306 (considerations of Judges Baik and Bauvallet), citing *Prosecutor v. Zigiranyirazo*, ICTR-01-73-A, Judgement, 16 November 2009, para. 45; *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013, para. 92. See also *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para. 19.

²⁹⁹ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 671.

³⁰⁰ The Agreement and Establishment Law provide for two CIJs, one Cambodian and one International, who “shall enjoy equal status.” Agreement, Art. 5(1); Establishment law, Art. 27.

³⁰¹ See Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 5: “[P]ursuant to Internal Rule 66(1), the Co-Investigating Judges have the discretion to decide independently when they consider that an investigation has been concluded.” (internal citation omitted).

³⁰² Rule 67(2) requires that an Indictment “shall be void for procedural defect unless it sets out ... a description of the material facts and their legal characterization ... including the relevant criminal provisions and the nature of the criminal responsibility.” See also Indictment, paras. 470-577, wherein the ICIJ legally characterized the

the same level of detail for a dismissal order.³⁰³ The purpose behind the more onerous requirements of an indictment is to protect the Accused's fair trial rights as the case proceeds to trial; i.e. to "inform the [the Accused] clearly of the charges against him so that he may prepare his defence,"³⁰⁴ and because the counts in the indictment are read at the opening of the trial.³⁰⁵ No such protections would be necessary in the event a case is dismissed. The PTC erroneously held in Case 004/1 that a dismissal order is required to contain findings regarding the existence of crimes and the likelihood of the Charged Person's criminal responsibility.³⁰⁶ Had the drafters of the Rules intended the Rules applicable to indictments and dismissal orders to be identical, they would have only used the encompassing term "Closing Order" throughout the Rules, rather than the terms "Dismissal Order" and "Indictment," which are defined separately in the Glossary of Terms.³⁰⁷

crimes and modes of liability. *See also* Cambodian Code of Criminal Procedure, Art. 247; French Code of Criminal Procedure, Art. 181. Under Article 247 of the Cambodian Code of Criminal Procedure, an indictment "shall describe the acts being charged and the type of offense according to the law." (official translation). Under Article 181 of the French Code of Criminal Procedure, an indictment is void for procedural defect if it does not contain a description of the material facts with which the charged person is indicted, their legal characterization, and the identity of the accused [*« L'ordonnance de mise en accusation contient, à peine de nullité, l'exposé et la qualification légale des fait[s], objet[s] de l'accusation, et précise l'identité de l'accusé. »*].

³⁰³ 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." Rule 67(3) does not require legal characterization of the material facts. *See also* Cambodian Code of Criminal Procedure, Art. 247; French Code of Criminal Procedure, Art. 177. Under Article 247 of the Cambodian Code of Criminal Procedure, the investigating judge shall issue a dismissal order if: "1. The act committed does not constitute a felony, misdemeanor, or petty offense; 2. The perpetrators who committed the acts are still not known; [or] 3. There is not enough evidence to charge the accused person" (official translation). Under Article 177 of the French Code of Criminal Procedure, the investigating judge shall issue a dismissal order if: **a.** the facts do not constitute a felony, misdemeanor, or petty offense; **b.** the perpetrator remains unidentified; or **c.** there is not sufficient evidence against the charged person [*« Si le juge d'instruction estime que les faits ne constituent ni crime, ni délit, ni contravention, ou si l'auteur est resté inconnu, ou s'il n'existe pas de charges suffisantes contre la personne mise en examen, il déclare, par une ordonnance, qu'il n'y a lieu à suivre. »*].

³⁰⁴ *Case of KAING Guek Eav* 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal Against Closing Order Indicting KAING Guek Eav alias "DUC", 5 December 2008, D99/3/42, para. 47.

³⁰⁵ Rule 89 *bis* (1): "The President shall declare the substantive hearing open. The President shall order the Greffiers to read the counts against the Accused and may order the Greffier to read the factual analysis in the Indictment." *See also* French Code of Criminal Procedure, Art. 327. Under Article 327 of the French Code of Criminal Procedure, the President of the Assize Court reads a summary of the charges against the Accused, as enumerated in the Indictment [*« Le président de la cour d'assises présente, de façon concise, les faits reprochés à l'accusé tels qu'ils résultent de la décision de renvoi. »*].

³⁰⁶ *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. 26.

³⁰⁷ *See* Rules, Glossary of Terms. "'Dismissal Order' ... refers to a Closing Order by the Co-Investigating Judges or the Pre-Trial Chamber, dismissing the charges against a person." "'Indictment' ... refers to a Closing Order by the Co-Investigating Judges, or the Pre-Trial Chamber, committing a Charged Person for trial." *See also* Rules 67(3), 67(5), 69(2)(b), 70, 76(4)(f), 76(15), relating to "Dismissal Orders" and Rules 29(3), 67(2), 68(2), 69(2)(a), 77(13)(a)-(b), 79(1)-(2), 80(1), 80(3)(a)(ii), 87(6), 89(1)(c), 89 *bis* (1), 89 *ter* (1), 89 *quarter* (1), 98(2), 98(6), relating to "Indictments."

3. Absent errors or abuses fundamentally determinative of the NCIJ's exercise of discretion that would impede the application of the principle of *in dubio pro reo*, the Dismissal Order prevails over the Indictment

62. Prior to issuing his Indictment, the ICIJ knew his judicial peer, the NCIJ, would issue a Dismissal Order.³⁰⁸ Sensibly, the CIJs, collegially and in good faith, would have discussed their opposing views on personal jurisdiction³⁰⁹ before recording “the exact nature” of their disagreement.³¹⁰ The CIJs would have continued to discuss and “seek consensus” after registering their disagreement, as required by Rule 72(3). Given: **a.** that the CIJs registered their disagreement and would have continued discussing it; **b.** that the NCIJ maintained that the investigation was concluded in 2011 when he and ICIJ Blunk drafted their Forwarding Order;³¹¹ **c.** that both CIJs had access to the same Case File; **d.** that both CIJs cooperated on critical matters;³¹² and **e.** that the CIJs agreed on the factors for determining personal jurisdiction (including the principle of *in dubio pro reo*),³¹³ evidentiary methodology,³¹⁴ and definition of crimes and modes of liability,³¹⁵ the ICIJ, reasonably, would have been in a position to assess how the NCIJ's interpretation of the term most responsible would yield an opposing conclusion on the ECCC's jurisdiction over Mr. MEAS Muth.

63. While it was not within the ICIJ's remit to review and assess the NCIJ's findings of facts and conclusions of law that led to the Dismissal Order, by suggesting that absent a

³⁰⁸ Before issuing their Closing Orders, the CIJs registered a disagreement regarding the issuance of opposing Closing Orders which required them to state the disagreement's “exact nature.” Indictment, para. 27; Rule 72(1): “In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.”

³⁰⁹ See Rule 72(3). The NCIJ has consulted with his international counterparts throughout the judicial investigation in Case 003. Even when RICIJ Kasper-Ansermet had yet to be duly appointed as ICIJ, the NCIJ consulted with him, informing him that he must first wait for an official judicial appointment before the NCIJ could “discuss any case file-related issues or undertake any procedural measures” with him. Upon ICIJ Harmon's taking of office, the NCIJ recognized him as having “full rights and capacity,” and together, registered an internal disagreement. See ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>; ECCC Press Release, *Statement by the Co-Investigating Judges Regarding Case 003*, 28 February 2013, <https://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-003>; Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 10. See also Dismissal Order, paras. 32, 44.

³¹⁰ See Agreement, Arts. 5(4), 7(1); Rule 72(1).

³¹¹ See Dismissal Order, para. 359; ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>.

³¹² See e.g., Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249.

³¹³ See *supra* para. 21.

³¹⁴ See *supra* para. 21.

³¹⁵ See Case 004/1 Closing Order, paras. 42-102.

supermajority in the PTC either both Closing Orders or only his Indictment would stand,³¹⁶ the ICIJ unwarrantedly implies that the principle of *in dubio pro reo* is of no consequence in this instance – suggesting that his Indictment is superior to the Dismissal Order or that the Dismissal Order is somehow flawed. Aside from the fact that the ICIJ did not indicate that he analyzed the validity of the NCIJ's investigation, assessment of the facts, application of the law, or Dismissal Order, he did not have such authority. Only the PTC may review the CIJs' exercise of discretion in reaching their conclusions on personal jurisdiction.³¹⁷

64. The ICIJ considered that the CIJs “have a broad margin of appreciation in determining personal jurisdiction, and this can only be reviewed when abused.”³¹⁸ Absent errors or abuses of discretion fundamentally determinative of either CIJ's exercise of discretion, one CIJ's investigation, assessment of the facts, application of the law, or issuance of a Closing Order is neither superior nor subordinate to the other CIJ's.³¹⁹ Simply because the PTC disagrees with either CIJ's findings of facts or conclusions on personal jurisdiction does not mean it may set aside their discretionary decisions.³²⁰ For the PTC to set aside the Dismissal Order, it must find that the NCIJ exercised his discretion based on legal errors “invalidating the decision”; factual errors “occasioning a miscarriage of justice”; or that his Dismissal Order was “so unfair or unreasonable” as to constitute an abuse of discretion.³²¹ In other words, the PTC must find by supermajority that the NCIJ committed errors or abuses that were fundamentally determinative of his exercise of

³¹⁶ The ICIJ incorporated, in the procedural history of his Indictment, the CIJs' view that both Closing Orders “would appear to stand” under Rule 77(13), citing a decision where they informed parties of the likely consequences of issuing opposing Closing Orders for the appellate proceedings. *See* 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. Contradictorily, in the section of his Indictment relating to pre-trial detention, the ICIJ considered it “unclear” whether his Indictment would stand under Rule 77(13). *See id.*, para. 579.

³¹⁷ *See supra* paras. 6-10.

³¹⁸ Consolidated Decision on MEAS Muth's Requests on Personal Jurisdiction, 1 February 2016, D181, para. 29.

³¹⁹ *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 (holding that the CIJs' discretionary decisions may be reversed when they are based on an error of law invalidating the decision, based on an error of fact occasioning a miscarriage of justice, and/or their decision was “so unfair or unreasonable” as to constitute an abuse of discretion).

³²⁰ *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.

³²¹ *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.

discretion in concluding that Mr. MEAS Muth is not most responsible.³²² Absent such a finding, the principle of *in dubio pro reo* applies. Even if the Dismissal Order were to be set aside by supermajority, the PTC would still need to uphold the Indictment by supermajority and find that the case should proceed to trial based on the Indictment.³²³

65. The NCIJ did not commit errors or abuses fundamentally determinative of his exercise of discretion in investigating Mr. MEAS Muth, making his personal jurisdiction determination, and drafting his Dismissal Order. He investigated, assessed, and made findings on the facts in the Introductory and Supplementary Submissions and articulated his reasoning as to why he found Mr. MEAS Muth to fall outside the ECCC's personal jurisdiction,³²⁴ using the same factors for assessing personal jurisdiction and evidentiary methodology as the ICIJ.³²⁵ Under the principle of *in dubio pro reo*, doubt, both to the facts and interpretation of the law – including the limits of the ECCC's personal jurisdiction – must be resolved in Mr. MEAS Muth's favor.³²⁶ Considering the “flexibility” of the term most responsible,³²⁷ the consequences of the ICIJ's erroneous implication that both Closing Orders stand (a situation that both CIJs considered to be incompatible with the basic demands of the rule of law),³²⁸ and the consequences of the ICIJ's erroneous implication that only his Indictment would stand (a violation of the Cambodian Constitution and ECCC framework),³²⁹ the principle of *in dubio pro reo* must resolve this Appeal.

³²² As the PTC held, “not all errors will cause the Pre-trial Chamber to set aside a decision of the Co-Investigating Judges.” See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC62), 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; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on IENG Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 22; *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.

³²³ See *supra* para. 46.

³²⁴ See *supra* paras. 22-, 24-27, 54-60.

³²⁵ See *supra* para. 22.

³²⁶ Cambodian Constitution, Art. 38; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31. See also *supra* paras. 50-51.

³²⁷ *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, para. 21.

³²⁸ 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.

³²⁹ See *supra* paras. 45-46.

4. Conclusion

66. In gratuitously suggesting that either both Closing Orders or only his Indictment would stand absent a supermajority in the PTC, the ICIJ erred in law by failing to conclude that unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, the Dismissal Order prevails over the Indictment under the principle of *in dubio pro reo*. The ICIJ's implication inexplicably subordinates the Dismissal Order to his Indictment, disregarding the fundamental principle of criminal law enshrined in the Cambodian Constitution and ECCC framework that all doubt be resolved in Mr. MEAS Muth's favor. Both CIJs did what was required of them in investigating and drafting their Closing Orders. Two reasonable minds can reasonably reach divergent conclusions based on their independent assessment of the facts. The question before the PTC is not whether it agrees with one CIJ's conclusion or the other's, but whether the CIJs exercised their discretion judiciously. Simply because the PTC disagrees with either CIJ's findings or conclusions does not mean that it can substitute its own views. Absent a finding by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion that would impede the application of the principle of *in dubio pro reo* – none of which exists – the Dismissal Order cannot be set aside. The PTC should find that the ICIJ erred in law in suggesting, without reasoning for rejecting the Dismissal Order, that his Indictment is superior. With two equal and independent CIJs issuing Closing Orders of equal force, the Closing Order calling for the dismissal of the case trumps the Closing Order calling for indictment.

V. CONCLUSION AND RELIEF REQUESTED

67. Contrary to Benedict Carpzov's odious statement that "in the cases of the most serious offences the boundaries of the law may be disregarded because of the enormity of the crime,"³³⁰ now is not the time for the PTC to disregard the letter and spirit of the Agreement. The ECCC framework is the result of protracted negotiations, calculated and deliberate decisions, and consciously worded provisions. For nearly four years, the Parties to the Agreement debated, disagreed, and doubled-down on their positions before finally achieving a consensus: "only a certain small group of people will be prosecuted in the Courts of Cambodia for the atrocities which occurred during the DK"³³¹ – senior leaders and those who were most responsible for crimes committed throughout Cambodia between 17 April 1975 and 6 January 1979.³³² While it may seem unpalatable to some that not all those who participated in DK era crimes would be tried, the Agreement reflects a conscious political choice balancing *peace versus justice*: "the integration of the remaining Khmer Rouge into Cambodian society and the desire for judicial closure for the horrendous suffering of the victims."³³³
68. With the uniquely negotiated "Co-" structure, providing for CIJs of equal status and independent authority over the investigations, it was expected that disagreements could occur over the limits of the ECCC's jurisdiction. As a result, a dispute resolution mechanism was established to ensure that the investigation of suspects would not be halted by a stalemate between the CIJs: in case of disagreements, the investigation would proceed. Yet when it came to the conclusion of their investigations, the CIJs were provided wide discretionary authority to present their own views in their own Closing Orders. That one CIJ would send a case to trial when the other would dismiss it was foreseen. The Parties to the Agreement never provided, nor could the Judges who drafted the Rules provide, that a case would proceed to trial on the basis of an indictment when a dismissal order is simultaneously issued. Given the decade it took to negotiate the Establishment Law, the Agreement, and ultimately, the Rules governing the ECCC's procedure, had the Parties to the Agreement and drafters of the Rules wished for such an outcome, they would have agreed on explicit provisions. But the Parties to the Agreement

³³⁰ *Notissimum est, quod in delictis atrocissimis propter criminis enormitatem jura transgredi liceat*. Benedict Carpzov, *Practica nova imperialis Saxonica rerum criminalium*, 1652, Pars III, Quaestio C II, cited in Case 004/1 Closing Order, para. 30.

³³¹ Case 004/1 Closing Order, para. 31.

³³² Agreement, Arts. 1, 2(1); Establishment Law, Arts. 1, 2 new.

³³³ Case 004/1 Closing Order, para. 32.



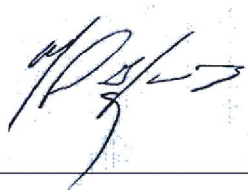
and the drafters of the Rules did not agree to this sort of dispute resolution mechanism. They could not even if they had wanted to. Neither of them could, any more than the PTC, strip the ECCC proceedings of the principle of *in dubio pro reo*; a fundamental principle of criminal law enshrined in the Cambodian Constitution which must be afforded to all Cambodians in all of Cambodia's courts, including the ECCC.

69. The ICIJ erroneously implied, without reasoning, that his Indictment would inexplicably stand regardless of the validity of the NCIJ's Dismissal Order. As two reasonable CIJs can reasonably reach divergent conclusions on personal jurisdiction based on their independent investigations, the PTC's role in resolving the appeals of the opposing Closing Orders is not to determine whether it agrees with one CIJ's conclusion or the other's, but whether the CIJs properly exercised their discretion in making their personal jurisdiction determinations. Absent errors or abuses fundamentally determinative of either CIJ's exercise of discretion, one CIJ's investigation, assessment of the facts, application of the law, or issuance of a Closing Order is neither superior nor subordinate to the other CIJ's.
70. Even if the PTC disagrees with the NCIJ's factual findings, it would not only have to find that no other reasonable CIJ would have reached the findings at issue, but also that they were critical to the conclusion reached, causing a miscarriage of justice. And even if the PTC sets the Dismissal Order aside by supermajority on the basis that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, for the case to proceed to trial, the PTC would still need to uphold the Indictment by supermajority.
71. The Closing Order calling for the dismissal of the case trumps the Closing Order calling for indictment. The principle of *in dubio pro reo* cannot countenance a system where an impasse goes to the prosecution of a Charged Person. Where two simultaneous, opposing Closing Orders by the NCIJ and the ICIJ place the question of jurisdiction over a Charged Person in equipoise, an indictment cannot stand and trial cannot proceed.
72. The case against Mr. MEAS Muth must be dismissed.

WHEREFORE, for all the reasons stated herein, Mr. MEAS Muth respectfully requests the PTC to:

- A. FIND that this Appeal is admissible under Rules 74(3)(a) and 21;
- B. DECLARE that the ICIJ erred in law in interpreting Rule 77(13) in such a way as to suggest that unless the PTC upholds one of the Closing Orders, either both Closing Orders or only his Indictment would stand;
- C. DECLARE that the ICIJ erred in law by failing to conclude that, unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, the Dismissal Order prevails over the Indictment;
- D. DECLARE that the principle of *in dubio pro reo* applies; and
- E. DECLARE that the case be dismissed.

Respectfully submitted,

 _____ ANG Udom	 _____ Michael G. KARNAVAS	 _____ Michael G. KARNAVAS
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Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 8th day of April, 2019