

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

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**INTERNATIONAL CO-PROSECUTOR'S REQUEST FOR CONCLUSION OF THE
PRE-TRIAL STAGE OF THE CASE 003 PROCEEDINGS**

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I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby requests the Pre-Trial Chamber (“PTC”) to conclude the pre-trial stage of the Case 003 proceedings by (i) issuing an agreed final determination confirming that Meas Muth is indicted and ordering that he be sent to trial on the Indictment,¹ consistent with the unanimous finding in its Considerations² that the Indictment is valid and Internal Rule 77(13),³ and (ii) taking all necessary administrative actions to direct the Court Management Section (“CMS”) to forward the Considerations, together with the Indictment, to the Trial Chamber (“TC”) and to allow the TC to access the remaining Case File electronically.
2. The ICP respectfully requests the PTC to take this action to resolve all the issues before it in the only manner consistent with the law of the ECCC, sending the Case forward to trial to effectuate its unanimous agreement that the Case 003 Indictment is valid.
3. Following the issuance of the PTC’s Considerations, Case 003 has reached a procedural stalemate of much the same type seen previously in Case 004/2. It is imperative that the pre-trial stage of Case 003 be concluded *through a judicial determination* in accordance with the plain letter of the law of this Court, which mandates that the Case be transferred to the TC as a matter of urgency. Only by doing so can the PTC avoid institutionalising an impotent criminal justice system and protect the rights and interests of *all* Parties by restoring legal certainty and ensuring the good, fair and expeditious administration of justice within this Court’s legal framework.

II. RELEVANT PROCEDURAL HISTORY

4. On 7 April 2021, the PTC issued its “Considerations on Appeals Against Closing Orders”,⁴ in which the validity of the Indictment committing Meas Muth to trial was confirmed by

¹ **D267** Closing Order, 28 November 2018 (“Indictment”).

² **D266/27 & D267/35** Considerations on Appeals Against Closing Orders, 7 April 2021 (“Considerations”).

³ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) (Rev. 9), as revised on 16 January 2015 (“Rules” or “IR(s)”), 77(13) (“A decision of the Chamber requires the affirmative vote of at least 4 (four) judges”).

⁴ **D266/27 & D267/35** Considerations. The International Co-Investigating Judge (“ICIJ”) issued a closing order indicting Meas Muth for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code, and committing him for trial, while the National Co-Investigating Judge (“NCIJ”) issued a closing order dismissing all charges against him on the basis that he does not fall within the ECCC’s personal jurisdiction.

all five PTC Judges.⁵ In addition, the International Judges found that the Dismissal Order⁶ was null and void for both substantive⁷ and procedural defect.⁸

5. Since they “ha[d] not attained the required majority of four affirmative votes to reach a decision based on common reasoning on the merits,”⁹ the PTC Judges issued separate opinions on the merits of the Parties’ appeals and the validity of the two Closing Orders, then stating their separate views on what the final determination of the pre-trial stage of Case 003 should be. The National Judges opined that since, after the appeals stage, the Indictment and Dismissal Order “maintain the same value”, the case against Meas Muth “should be held at the ECCC archives”.¹⁰ The International Judges opined that, in light of (i) their findings that the Dismissal Order is null and void and (ii) the *de facto* unanimous finding that the Indictment is valid, “the Trial Chamber must be seised of Case 003 on the basis of the Indictment pursuant to Internal Rule 77(13).”¹¹
6. On 19 April 2021—on the basis that the PTC Judges had unanimously upheld the Indictment, or in the alternative, pursuant to Rule 77(13)(b)—the ICP requested the Co-Investigating Judges (“CIJs”) to forward the Case File to the TC pursuant to Rule 77(14).¹²

⁵ **D266/27 & D267/35** Considerations, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy (“National Judges’ Opinion”), para. 115 (“In light of aforesaid Internal Rule 77(13), the two Closing Orders are of the same value and *stand valid*” (emphasis added)); Opinion of Judges Olivier Beauvallet and Kang Jin Baik (“International Judges’ Opinion”), paras 119, 262, 284 (“the Indictment stands as it is substantively valid and in conformity with the ECCC legal framework” (quote at para. 284)), 339-340 (upholding the ICIJ’s determination that Meas Muth is among those most responsible and thus falls within the ECCC’s personal jurisdiction), 342-343 (finding there was a *de facto* unanimous finding in this case: albeit for distinct reasons, the National and International Judges of the Chamber concurrently found the Indictment valid and upheld the Indictment unanimously), Disposition at EN 01667089, FR 01667264, KH 01667480.

⁶ **D266** Order Dismissing the Case Against Meas Muth, 28 November 2018 (“Dismissal Order”).

⁷ **D266/27 & D267/35** Considerations, International Judges’ Opinion, paras 119, 226-250, 284, Disposition at EN 01667089, FR 01667264, KH 01667480 (Upholding the ICP’s Appeal Grounds B and C, and finding that Case 003 contains an incomplete Dismissal Order that ignores seven years of evidence placed on the Case File since 29 April 2011 and a range of factual allegations of which the NCIJ was duly seised by the ICP. The International Judges found that the unfinished Dismissal Order is invalid within the meaning of IR 67, and null and void on this account alone). *See also* para. 339 (finding that the NCIJ “erred both in law and in fact in his assessment of the gravity of the crimes alleged or charged against Meas Muth, and in his review of Meas Muth’s level of responsibility during the Democratic Kampuchea.”).

⁸ **D266/27 & D267/35** Considerations, International Judges’ Opinion, paras 255-262, 284, Disposition at EN 01667089, FR 01667264, KH 01667480 (finding that the Dismissal Order is null and void since it was issued in contravention of the principle of continuation of the judicial investigation and prosecution contained in the ECCC legal framework.).

⁹ **D266/27 & D267/35** Considerations, para. 110 (unanimous), Disposition at EN 01666984, FR 01667141, KH 01667329 (unanimous) (quote in para. 110).

¹⁰ **D266/27 & D267/35** Considerations, National Judges’ Opinion, paras 117-118, Disposition at EN 01666986, FR 01667144, KH 01667332.

¹¹ **D266/27 & D267/35** Considerations, International Judges’ Opinion, paras 261, 342-343, Disposition at EN 01667089, FR 01667264, KH 01667480 (quote in the Disposition).

¹² **D270** International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 19 April 2021 (“ICP CIJs Request”).

Having received Meas Muth's Response in English only,¹³ and without awaiting the ICP's Reply,¹⁴ the CIJs rejected the ICP's Request.¹⁵

7. On 22 April 2021, the ICP sought from the TC an extension of time to file her Rule 80 list of witnesses and experts.¹⁶ In response, the TC Greffier, at the request of the TC President, advised the parties that "the [TC] has not been notified of the 'Considerations on Appeals against the Closing Orders' and is not in receipt of the case file. Therefore, the [TC] does not accept any communications from the parties, (see also IR 77/14)."¹⁷
8. On 10 June 2021, the PTC issued its Considerations on Appeal against the Order on the Admissibility of Civil Party Applicants.¹⁸ The PTC unanimously confirmed that, in the 7 April 2021 Considerations, it had found, *inter alia*, that (i) the Judges had not assembled the required majority to decide "based on common reasoning" on the merits of the appeals on Closing Orders;¹⁹ (ii) the National Judges had found that both Closing Orders were valid and that the Case File against Meas Muth should be sent to the ECCC archives;²⁰ and (iii) the International Judges had found that (a) the National Co-Investigating Judge's ("NCIJ") Dismissal Order was null and void and issued *ultra vires*; (b) the International Co-Investigating Judge's ("ICIJ") Indictment was valid; and (c) Meas Muth should be sent for trial before the TC in application of the principle of continuation of prosecution.²¹

III. APPLICABLE LAW

9. The applicable law is set out as relevant below.

¹³ **D270/4** Meas Muth's Response to the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 11 May 2021 (filed in English on 11 May 2021 and in Khmer on 24 May 2021).

¹⁴ **D270/6** Decision on International Co-Prosecutor's Request to File a Reply, 20 May 2021.

¹⁵ **D270/7** Decision on International Co-Prosecutor's Request to Forward Case 003 to the Trial Chamber, 20 May 2021 ("CIJs' Forwarding Decision").

¹⁶ Email from Brenda J. Hollis entitled "Request for extension of time to file Rule 80 list of witnesses and experts", 22 April 2021 at 2.02pm *attaching* International Co-Prosecutor's Request for Extension of the Rule 80(1) Deadline, 22 April 2021 ("ICP TC Extension Request").

¹⁷ Email from TC Greffier Suy-Hong Lim entitled "Re Request for extension of time to file Rule 80 list of witnesses and experts", 27 April 2021 at 7.27pm.

¹⁸ **D269/4** Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 10 June 2021 ("PTC Civil Party Considerations").

¹⁹ **D269/4** PTC Civil Party Considerations, para. 30 (unanimous).

²⁰ **D269/4** PTC Civil Party Considerations, para. 30 (unanimous). *See also* **D269/4** PTC Civil Party Considerations, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 44 ("The Pre-Trial Chamber National Judges are of the view that the two Closing Orders are of the same value *and stand valid* and that Case File 003 against the Charged Person Meas Muth should be held at the ECCC Archives" (emphasis added)).

²¹ **D269/4** PTC Civil Party Considerations, para. 30 (unanimous).

IV. SUBMISSIONS

10. The ICP submits this Request pursuant to article 12(2) of the ECCC Agreement,²² articles 33 and 35 new of the ECCC Law,²³ and Rules 21(1), 21(4)²⁴, 77(13), 77(14)²⁵ and 78²⁶ to comport with the mandate that the ECCC conduct its proceedings with respect for the rights and interests of *all* Case 003 Parties and the due process of law, and in accordance with the fundamental principles of legal certainty, expeditiousness, effectiveness, transparency, good and fair administration of justice, and the duty of judges to resolve the issues before them.
11. For the reasons articulated in detail below, the PTC's Considerations contain errors of law occasioning manifest injustice by failing to forward the Case to the TC for trial consistent with the ECCC legal framework and with the PTC's unanimous finding that the Indictment is valid. As a result of the PTC's failure to issue a final ruling that implements its own unanimous findings and concludes the pre-trial stage of Case 003, the Chamber has once again placed ECCC proceedings in judicial limbo.

The PTC is obliged to reach a decision concluding the pre-trial stage of Case 003 in accordance with the legal framework of the ECCC

12. Having reached, in their respective Opinions, decisions on the validity of the Indictment and Dismissal Order, the National and International PTC Judges issued two separate views

²² Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003 ("ECCC Agreement"), art. 12(2) ("The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights ["ICCPR"], to which Cambodia is a party"); ICCPR, New York, 16 December 1966, 999 UNTS 171, art. 14(3)(c) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] (c) To be tried without undue delay").

²³ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments as promulgated on 27 October 2004 ("ECCC Law"), arts 33 new ("The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims"), 35 new ("In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees [...] c. to be tried without delay").

²⁴ IR 21 ("Fundamental Principles. 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to *always safeguard the interests of Suspects, Charged Persons, Accused and Victims* and so as to *ensure legal certainty* and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect: a) ECCC proceedings shall be fair and adversarial and *preserve a balance between the rights of the parties*. [...] c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; [...] 4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time" (emphasis added)).

²⁵ IR 77(14) requires the PTC to give reasons for, and sign, its decisions.

²⁶ IR 78 requires, with limited exceptions, the PTC to publish all decisions and default decisions in full.

on what the final determination of the pre-trial stage of Case 003 should be: the National Judges declared that the case against Meas Muth should be archived, and the International Judges declared that Case 003 should be sent to trial on the basis of the Indictment.²⁷ Nowhere in the Considerations is there a *final determination* agreed upon by all five PTC Judges that decisively concludes the pre-trial stage of Case 003 by deciding upon the next steps in light of *all* the decisions made by the PTC Judges. By failing to take that last step and provide an agreed final determination, the PTC erred in law.

13. Whilst the ICP retains her view that the TC has been seised of Case 003 by operation of law under Rule 77(13),²⁸ the CIJs have refused to forward the Considerations, Indictment and remaining Case File without a definitive decision from the PTC.²⁹ Without the Case File, the TC has refused to act in Case 003,³⁰ just as it did in Case 004/2.³¹ The PTC's failure or refusal to render an agreed final determination concluding the pre-trial stage of Case 003 has again created a judicial impasse rendering the ECCC judicial system impotent.
14. *All* Case 003 Parties have a right to a just and timely *judicial* resolution of the pre-trial appeals that brings legal certainty and clarity to the question of whether, and on what basis, Case 003 will proceed to trial. As the Supreme Court Chamber ("SCC") made clear in Case 004/2 almost eight months before the issuance of the Case 003 Considerations,³² and as the PTC has itself recognised,³³ when issuing its decision(s) on the appeals, it is the duty of the PTC Judges to ensure that the pre-trial stage of Case 003 is disposed of in a way that brings legal certainty and clarity, and which eliminates judicial limbo. Put another way, the PTC was obliged to deliver a final ruling,³⁴ including, pursuant to Rule 78, express articulation of all its decisions and default decisions.³⁵ This comports with the requirement in Rule

²⁷ See *supra*, paras 5, 8.

²⁸ **D270** ICP CIJs Request, paras 12-13; ICP TC Extension Request, paras 9-10.

²⁹ **D270/7** CIJs' Forwarding Decision, paras 25, 38-39, Disposition at EN 01671507, FR 01672328, KH 01671536.

³⁰ See *supra*, para. 7.

³¹ **D267/29.1.12** Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving Ao An, 3 April 2020.

³² Case 004/2-**E004/2/1/1/2** Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020 ("SCC Decision"), paras 59-61, 68, 71 (it is for the PTC to bring final resolution to the cases before it).

³³ **D266/24** & **D267/32** Decision on Meas Muth's Request for Clarification of the Pre-Trial Chamber Considerations on Appeals Against Closing Orders in Case 004/2, 3 November 2020, para. 31; Case 004/2-**D359/24** & **D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 ("Case 004/2 Considerations"), paras 46, 51, 54, 68.

³⁴ Case 004/2-**E004/2/1/1/2** SCC Decision, paras 61, 71.

³⁵ IR 78 ("Publication of Pre-Trial Chamber Decisions: All decisions and default decisions of the Chamber, including any dissenting opinions, *shall be published in full*, except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.") (Emphasis

77(14) that all PTC Decisions be reasoned.³⁶ Failure to issue an agreed final determination is thus an error of law that risks the fate of Case 003 either being left in perpetual limbo by judicial inaction, or shifts the obligation to either the TC or SCC to bring such finality to the pre-trial stage of the proceedings to prevent this judicially imposed institutional impotence.

15. The PTC has confirmed its own status as the appellate chamber with “sole and ultimate jurisdiction for pre-trial matters”,³⁷ and wide-ranging authority over the investigation stage.³⁸ It has unanimously recalled that one of the important purposes of the PTC is to assess the entirety of the investigation phase and to issue the final determinations in this regard,³⁹ and that it must ensure that the fundamental principles underlying the criminal procedure applicable before the ECCC are respected.⁴⁰ One such principle articulated by this Chamber is the “judicial duty to pronounce, based on the law, a decision on a matter in dispute [...] [which] lies at the heart of a judge’s highest responsibility and function.”⁴¹ For this reason, the PTC confirmed that “[judges] cannot refrain from adjudicating the matter before [them] and from arriving at a conclusion that effectively decides this matter.”⁴² Indeed, there is a universal judicial obligation to resolve *all* contested issues, no matter how complex, and to provide a legal remedy in a timely manner and in accordance with the applicable law, thereby avoiding a denial of justice.⁴³ As the SCC explained in Case 002:

added)).

- ³⁶ IR 77(14). *See further e.g.* Case 002-**D55/I/8** Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008, para. 21 (and jurisprudence therein) (“The Pre-Trial Chamber finds that all decisions of judicial bodies are required to be reasoned as this is an international standard.”); Case 001-**D99/3/42** Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias “Duch”, 5 December 2008, para. 38; Case 002-**E176/2/1/4** Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 September 2012 (“SCC Rule 35 Decision”), para. 25 (“all judicial decisions – whether oral or written – must comply with a court’s obligation to provide adequate reasons”); *Milutinović*, IT-99-37-AR65.3, Appeals Chamber, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, para. 22 (“A Chamber must, as part of the fair trial guarantee, render a reasoned opinion. This requirement obliges the Chamber, *inter alia*, to indicate its view about [...] all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.”).
- ³⁷ **D266/25** Decision on International Co-Prosecutor’s Request to File Additional Submissions on her Appeal of the Order Dismissing the Case Against Meas Muth, 3 November 2020, para. 31, *citing* IRs 73, 76(4), 77(13), 72(4)(d). *See also* Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 35, 41 (“the present Chamber [PTC] forms a final jurisdiction over the pre-trial stage at the ECCC.”), 49.
- ³⁸ Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 30-54 (unanimous), especially paras 30, 32-33, 40-49, 51-52, 54. *See also* Case 004/2-**E004/2/1/1/2** SCC Decision, paras 60-61.
- ³⁹ Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, para. 49 (unanimous).
- ⁴⁰ Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, para. 52 (unanimous).
- ⁴¹ Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, para. 122 (unanimous). *See also* **D266/27** & **D267/35** Considerations, para. 105 (unanimous); Case 004/2-**E004/2/1/1/2** SCC Decision, paras 59, 61.
- ⁴² Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, para. 122 (unanimous).
- ⁴³ Case 004/2-**E004/2/1/1/2** SCC Decision, paras 59, 64; UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of

it is necessary for a judicial decision to dispose of a legal matter before it in a definite manner. As such, a judicial decision should contain an operative part [...] which resolves the substantive and/or *procedural* issue by creating, altering, dissolving or confirming a law-based relation concerning the parties. [...] [A]ll judicial decisions [...] must comply with a court's obligation to provide adequate reasons.⁴⁴

16. In its Case 003 Considerations, the PTC found a legal error in “the simultaneous issuance of two contrary decisions emanating from one single judicial office.”⁴⁵ It observed that split decisions creating a legal predicament in ECCC proceedings after (more than) ten years of investigation into crimes among the most atrocious and brutal committed during the twentieth century, are unacceptable:⁴⁶ they undermine the foundations of the hybrid system and proper functioning of the ECCC,⁴⁷ constituting a derogation from judges' highest duties,⁴⁸ and a denial of justice.⁴⁹ The PTC stressed that when disagreement in an ECCC judicial office prevents judges from arriving at a common final determination, they must still discharge their judicial duty by following the procedures available in the ECCC legal system to make sure that a conclusive determination of the matters within their jurisdiction is attained.⁵⁰

17. By issuing two separate opinions on what the final determination of the pre-trial stage of

Offenders, endorsed by General Assembly Res. 40/32, 29 November 1985 and 40/146, 13 December 1985, art. 2 (“The judiciary *shall* decide matters before them [...] in accordance with the law” (emphasis added)); ECCC Code of Judicial Ethics, as amended on 5 September 2008, art. 5(3) (“Judges shall perform all judicial duties properly”); *In re Desgranges v. ILO*, Judgment No. 11, 12 August 1953 (the impermissibility for a judicial tribunal to pronounce a *non liquet* because of the silence or obscurity of the law was regarded as a “fundamental tenet of all legal systems”); Permanent Court of International Justice (“PCIJ”), Advisory Committee of Jurists, *Procès-Verbaux* of the Proceedings of the Committee, 16 June-24 July 1920 (The Hague, 1920), p. 312 (“It is not possible to admit a declaration of a *non-liquet* by an international court; denial of justice must be excluded from the international court just as from National Courts”); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, Dissenting Opinion of Judge Higgins, paras 38-39. *See also e.g. France*: Civil Code, art. 4 (“Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice” Unofficial translation: “The judge who refuses to judge, under the pretext of the silence, obscurity or inadequacy of the law, may be prosecuted as guilty of denial of justice”); *Belgium*: Judicial Code, 10 October 1967, art. 5 (“Il y a déni de justice lorsque le juge refuse de juger sous quelque prétexte que ce soit, même du silence, de l'obscurité ou de l'insuffisance de la loi.” Unofficial translation: “There is a denial of justice where the judge refuses to decide on any pretext such as the silence, obscurity or inadequacy of the law”).

⁴⁴ Case 002-E176/2/1/4 SCC Rule 35 Decision, para. 25 (emphasis added) and citations therein.

⁴⁵ **D266/27 & D267/35** Considerations, paras 106-109 (unanimous) (quote at para. 109); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 124 (unanimous).

⁴⁶ **D266/27 & D267/35** Considerations, para. 109 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, paras 89, 124 (unanimous).

⁴⁷ **D266/27 & D267/35** Considerations, para. 106 (unanimous).

⁴⁸ Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 89 (unanimous). *See also D266/27 & D267/35 Considerations, para. 105 (unanimous).*

⁴⁹ **D266/27 & D267/35** Considerations, para. 108 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 123 (unanimous).

⁵⁰ **D266/27 & D267/35** Considerations, para. 105 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 122 (unanimous).

Case 003 should be, rather than issuing one agreed, conclusive final determination, the PTC failed to fulfil the judicial duties it unanimously articulated, erred in law, and occasioned manifest injustice.

The PTC is obliged to send Case 003 to trial following its unanimous decision that the Indictment is valid

18. In the Considerations, all five PTC Judges concluded that the Indictment is valid,⁵¹ constituting a supermajority decision within the meaning of Rule 77(13) that is not subject to appeal. Rule 77(13) is clear: “A decision of the Chamber requires the affirmative vote of at least 4 (four) judges.”⁵² That all five PTC judges arrived by different reasoning at the legal conclusion that the Indictment is valid, and thus memorialised the unanimous conclusion in different paragraphs of the Considerations,⁵³ in no way detracts from the unanimity of that decision. Indeed, in the Disposition, the PTC unanimously confirmed that it could not reach a decision *based on common reasoning*,⁵⁴ not that the Judges had not all reached a common understanding as to the ultimate decision. It would stand against law, logic and justice to ignore the express finding of all five Judges that the Indictment is valid.
19. Practice across all the modern international criminal tribunals demonstrates that common reasoning is not a prerequisite for a joint decision. Indeed, the ECCC legal framework expressly contemplates separate opinions in judicial decisions,⁵⁵ and appellate Chambers

⁵¹ *See supra*, paras 4-5, 8.

⁵² IR 77(13).

⁵³ **D266/27 & D267/35** Considerations, National Judges’ Opinion, para. 115; International Judges’ Opinion, paras 119, 262, 284, Disposition at EN 01667089, FR 01667264, KH 01667480.

⁵⁴ **D266/27 & D267/35** Considerations, Disposition at EN 01666984, FR 01667141, KH 01667329 (“The [PTC] unanimously hereby: [...] declares that it has not assembled an affirmative vote of at least 4 judges for a decision based on common reasoning on the merits.”). *See also* para. 110.

⁵⁵ IRs 101(2), 111(1) (With regard to trial and appeal judgments: “Where there is no unanimity [on the factual or legal reasons, or the disposition], a judge may write a separate or dissenting opinion, in which case, it shall be attached to the judgment.”). *See also* ECCC Agreement, art. 4(2) (“When there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority”); ECCC Law, art. 14(2).

in all the modern international criminal tribunals,⁵⁶ as well as post-World War II tribunals,⁵⁷ have issued decisions and judgments containing separate (concurring) opinions.

20. The ICP respectfully disagrees with the PTC President's statement in Case 004/2 that "[o]nly the joint disposition part unanimously decided and signed by all 5 judges shall have the applicable effect."⁵⁸ Indeed, this Chamber has often made its mandatory decisions (including default decisions)⁵⁹ solely outside the confines of the unanimous Disposition.⁶⁰ For example, in its Considerations regarding the disagreement between the Co-Prosecutors

⁵⁶ See e.g. **ICTY**: *Krnjelac*, IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003, Separate Opinion of Judge Schomburg (agreeing with the conclusions reached by the Appeals Chamber, but not with certain reasons given in the Judgment); *Kupreškić et al.*, IT-95-16, Appeals Chamber, Separate Opinion of Judge David Hunt on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 2 ("I agree with the joint decision that the appeal should be allowed [...] but I regret that I am unable to agree with all of the reasons given in the joint decision for that result. I now give my own reasons upon the issues raised in the appeal."); *Tadić*, IT-94-1, Appeals Chamber, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 1 ("I have some difficulty in endorsing all the reasoning of the Decision concerning the third ground [...] I realise, however, that these divergencies concern the process of legal reasoning by which the result is reached more than the result itself, which I accept; whence the 'separate' character of this Opinion."); **ICTR**: *Kanyabashi*, ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia, 3 June 2009, para. 1; *Ngeze & Nahimana*, ICTR-99-52-A, Appeals Chamber, Decision on the Interlocutory Appeals, Separate Opinion of Judge Shahabuddeen, 5 September 2000, para. 1 ("I respectfully agree with the decision of the Appeals Chamber but propose to say something on a point on which there is some difference of opinion. The difference does not affect the outcome of the case"); **SCSL**: *Brima et al.*, SCSL-2004-16-AR73, Appeals Chamber, Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazy Kamara, 8 December 2005, para. 1. See further, e.g. Updated Statute of the International Criminal Tribunal for the former Yugoslavia, September 2009, art. 23(2); Statute of the International Criminal Tribunal for Rwanda, 31 January 2010, art. 22(2); Statute of the International Residual Mechanism for Criminal Tribunals, S/RES/1966 (2010), Annex 1, 22 December 2010, art. 21(2); Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, Freetown, 16 January 2002, 2178 UNTS 137, art. 18; Statute of the Special Tribunal for Lebanon, S/RES/1757 (2007), 30 May 2007, art. 23 (providing for separate opinions to be appended to chambers' judgments).

⁵⁷ See e.g. *United States et al. v. Araki et al.*, Judgment, 4 November 1948, Concurring Opinion by the Honorable Mr. Justice Delfin Jaranilla, Member from the Republic of the Philippines, pp. 1, 35.

⁵⁸ Case 004/2-**D359/34** & **D360/43** President's Memorandum concerning Notification of the Pre-Trial Chamber's Considerations in Case 004/2, 29 January 2020 ("PTC President's 29 January 2020 Memo"), EN 01640437. See also **D266/20.1.11** & **D267/25.1.11** Case 004/2-Memorandum from PTC President Prak Kimsan entitled "Re-Confirmation of the Decision on Case File 004/2", 16 March 2020 ("PTC President's 16 March 2020 Memo"), paras 2-3.

⁵⁹ IR 78.

⁶⁰ See e.g. **C2/4** Considerations of the Pre-Trial Chamber on Meas Muth's Urgent Request for a Stay of Execution of Arrest Warrant, 23 September 2015, paras 11-12, Disposition; **D20/4/4** 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 ("PTC Investigative Requests Considerations"), paras 13-14, Disposition; **D11/2/4/4** Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, 24 October 2011, paras 12-13, Disposition; Case 004-**D203/1/1/2** Considerations of the Pre-Trial Chamber on Yim Tith's Appeal Against the Decision Regarding his Request for Clarification that he Can Conduct his Own Investigation, 19 January 2015, paras 30-31, Disposition.

on whether to seise the CIJs with Cases 003 and 004, the PTC's finding that the Introductory Submissions should be forwarded to the CIJs does not appear in the disposition.⁶¹ The corollary assertion that the appended opinions of the Judges have no applicable effect⁶² is similarly erroneous. If they did not, this Chamber would have failed in its Rule 77(14) duty to give reasons for its decisions in this and many other considerations throughout the life of the ECCC, something the PTC has frequently expressly acknowledged,⁶³ including in these Case 003 Considerations.⁶⁴ In any event, all five Judges signed the portions of the Considerations in which they agreed the Indictment is valid.⁶⁵

21. Any interpretation of the Considerations which denies the express finding of the five PTC Judges that the Indictment is valid defies logic and elevates form over substance. The PTC Judges have a duty to implement this unanimous finding by issuing a final determination confirming that Meas Muth is indicted and sending him for trial.

In the alternative, the PTC is obliged to seise the Trial Chamber with the Indictment pursuant to Rule 77(13)(b)

22. ECCC law clearly requires that the Case and Case File be forwarded to the TC for trial based on the PTC's unanimous finding that the Indictment is valid. Should this Chamber ignore its unanimous finding, the PTC is nonetheless mandated to transfer the Case to the TC for trial.
23. Since the Indictment was not overturned by a supermajority of this Chamber, the PTC's own unanimous findings in Cases 003 and 004/2 demonstrate that it had an obligation to

⁶¹ **D1/1.3** Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009 ("PTC Considerations on Co-Prosecutors' Disagreement"), para. 45 (as corrected in **D1/1.2** Corrigendum to the Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule and Annex II, 31 August 2009 ("Corrigendum")) ("As the Pre-Trial Chamber has not reached a decision on the Disagreement brought before it, Internal Rule 71(4)(c) provides that the action of the International Co-Prosecutor shall be executed. In the current case, this means that the International Co-Prosecutor shall, pursuant to Internal Rule 53(1), forward the New Introductory Submissions to the Co-Investigating Judges to open judicial investigations."), Disposition at EN 00620551, FR 01616997, KH 00620604 ("Therefore, the Pre-Trial Chamber hereby: 1) Declares the Disagreement admissible; 2) Declares that it had not assembled an affirmative vote of at least four judges on a decision on the Disagreement.").

⁶² Case 004/2-**D359/34** & **D360/43** PTC President's 29 January 2020 Memo, EN 01640437; **D266/20.1.11** & **D267/25.1.11** PTC President's 16 March 2020 Memo, paras 3-4.

⁶³ See e.g. **D20/4/4** PTC Investigative Requests Considerations, para. 13; **D174/1/4** Considerations on Meas Muth's Appeal Against the International Co-Investigating Judge's Decision to Charge Meas Muth with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, para. 16; **D269/4** PTC Civil Party Considerations, para. 42.

⁶⁴ **D266/27** & **D267/35** Considerations, para. 110 ("*Pursuant to Internal Rule 77(14)*, the Opinions of the various members of the Pre-Trial Chamber are attached to these Considerations." (Emphasis added)).

⁶⁵ **D266/27** & **D267/35** Considerations, National Judges' Opinion, EN 01666986, FR 01667144, KH 01667332 adopting para. 115; International Judges' Opinion, EN 01667089, FR 01667264, KH 01667480 adopting paras 119, 262, 284, Disposition.

seise the TC with the Indictment under Rules 77(13)(b) and 79(1).⁶⁶ Its failure to do so was an error of law violating not only the express terms of the Internal Rules but also the overriding principles that proceedings must comply with the legality, fairness and effectiveness requirements of the ECCC legal framework and that existing procedures in force must be implemented to avoid procedural stalemate.⁶⁷ Only by sending Case 003 to trial does the PTC respect what it unanimously described as the “fundamental and determinative” default position⁶⁸—articulated in articles 5(4) and 7(4) of the ECCC Agreement,⁶⁹ accepted by both the Royal Government of Cambodia and the United Nations,⁷⁰ and reflected in article 23 new of the ECCC Law⁷¹—that the “investigation shall proceed”.⁷² This means that where the PTC fails to reach a supermajority overturning an Indictment, the case progresses to the TC.

24. This Chamber has expressly recognised that the case that came before it on appeal constituted an “unresolved disagreement” between the CIJs over at least the issue of whether or not Meas Muth falls within the ECCC’s personal jurisdiction.⁷³ The PTC found that the ECCC’s governing law openly contemplated that disagreements, including between CIJs, may arise in the ECCC hybrid context and enacted specific procedures to handle and settle such disagreements in order to avoid procedural stalemates.⁷⁴ The PTC placed an

⁶⁶ IR 77(13)(b), which establishes that the default position where an appeal against an indictment is not upheld by a supermajority shall be that the TC be seised on the basis of the Closing Order (Indictment); IR 79(1), providing that the TC shall be seised by an Indictment from the CIJs or the PTC, in conjunction with IR 1(2) defining CIJs as both acting jointly or one acting individually. Since IR 77(13)(b) is *lex specialis* relating to indictments, this result is mandated even where the PTC, as here, fails to reach a supermajority decision on the validity of the Dismissal Order.

⁶⁷ **D266/27 & D267/35** Considerations, paras 83, 96, 101 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, paras 95, 109, 119 (unanimous).

⁶⁸ **D266/27 & D267/35** Considerations, para. 98 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 112 (unanimous).

⁶⁹ ECCC Agreement, arts 5(4) (requiring that the investigation *shall* proceed unless article 7 is invoked. (emphasis added)), 7(4) (requiring that if the PTC is unable to resolve the disagreement by a supermajority, the investigation or prosecution *shall* proceed (emphasis added)).

⁷⁰ **D267/4.1.5** Letter from UN Secretary General to Prime Minister H.E. Hun Sen, 19 April 2000, Annexed Note from Hans Corell to Secretary General, Subject: Urgent call from Cambodia – Options to settle differences between investigating judges/prosecutors, 19 April 2000, EN 01614369; **D181/2.36** Statement by Under Secretary General Hans Corell Upon Leaving Phnom Penh on 17 March 2003, 17 March 2003, EN 01326112; **D267/10.1.50** David Scheffer in M. Cherif Bassiouni (ed), “The Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law*, Third Edition, Vol III, 2008, p. 246. For detailed descriptions of these documents, see **D267/10** International Co-Prosecutor’s Response to Meas Muth’s Appeal Against the International Co-Investigating Judge’s Indictment (D267), 28 June 2019 (“ICP Response to Meas Muth’s Appeal”), paras 31-32.

⁷¹ ECCC Law, art. 23 new, which requires that, in case of disagreement between CIJs, absent a PTC supermajority blocking its progress, the investigation *shall* proceed (emphasis added).

⁷² **D266/27 & D267/35** Considerations, paras 94, 97 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, paras 106-107, 111, 117 (unanimous).

⁷³ **D266/27 & D267/35** Considerations, para. 84 (unanimous).

⁷⁴ **D266/27 & D267/35** Considerations, para. 90 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2

emphasis on the *effective* resolution of disputes, confirming that the default position exists precisely to provide an effective way out of any possible procedural impasses caused by disagreements, and to prevent procedural stalemate that would hamper the effectiveness of proceedings and thwart effective criminal justice.⁷⁵

25. Moreover, only by applying the default position that “the investigation shall proceed” in the face of unresolved disagreements can the PTC ensure that the ECCC fulfils the object and purpose of the ECCC Agreement and ECCC Law, which is to “[bring] to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes.”⁷⁶ This is imperative to implement Cambodia’s international law obligations to investigate and prosecute the Khmer Rouge-era crimes,⁷⁷ by conducting genuine and effective investigations and prosecutions of crimes falling within the ECCC’s jurisdiction.⁷⁸
26. To that end, the PTC has repeatedly emphasised that disagreements should not become entrenched or be shielded from effective dispute settlement.⁷⁹ In this respect, this Chamber stressed unanimously that:

a principle as fundamental and determinative as the default position cannot be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions, taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless. Concluding otherwise would lead to a manifestly unreasonable legal result, violating both international law and Cambodian law.⁸⁰

27. The PTC’s unanimous findings show that, as the “ultimate authority” or “control body” at the investigation stage,⁸¹ this Chamber *has an obligation* to resolve those disagreements between the CIJs, irrespective of whether they came before it under the formal disagreement mechanism⁸² or by way of the Parties’ appeals. In the PTC’s own words, “[u]nder the

Considerations, para. 101 (unanimous).

⁷⁵ **D266/27 & D267/35** Considerations, paras 96-97, 100-101 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, paras 111, 114, 119 (unanimous).

⁷⁶ ECCC Agreement, art. 1; ECCC Law, art. 1.

⁷⁷ Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, paras 57, 110 (unanimous). *See also* Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018 (“Considerations on Case 004/1 Closing Order Appeal”), para. 75 (unanimous).

⁷⁸ Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 110 (unanimous).

⁷⁹ **D266/27 & D267/35** Considerations, para. 101 (unanimous); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, paras 119, 123 (unanimous).

⁸⁰ **D266/27 & D267/35** Considerations, para. 98 (unanimous; internal citations omitted); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 112 (unanimous).

⁸¹ Case 004/2-**D359/24 & D360/33** Considerations, paras 49, 54 (unanimous); Case 004/1-**D308/3/1/20** Considerations on Case 004/1 Closing Order Appeal, para. 28 (unanimous).

⁸² Case 004/2-**D359/24 & D360/33** Considerations, para. 117 (unanimous); **D266/27 & D267/35** Considerations, fn. 179 (unanimous). In just the same way, the PTC confirmed unanimously, in its Considerations regarding

ECCC Agreement, the primary function that is entrusted to the PTC is precisely to provide for an effective mechanism to conclusively resolve disagreements between [...] the [CIJs]”,⁸³ employing the default position if necessary. In that regard, the PTC has already emphasised that it may exercise inherent powers which are not explicitly stated in the ECCC legal framework, where – as in the current situation - they are compatible with (i) functions entrusted to it by the ECCC legal texts in the interests of justice;⁸⁴ (ii) its Rule 21 obligation to “safeguard the interests of a Charged Person and ensure legal certainty and ‘fair and adversarial’ proceedings”;⁸⁵ and (iii) the imperative need to ensure good and fair administration of justice.⁸⁶

28. At the Special Criminal Court in the Central African Republic, another hybrid tribunal based in the civil law system, the *Chambre d'accusation spéciale*—the pre-trial appellate chamber like the PTC—performs a similar role in resolving disputes between equal co-investigating judges. In that case, as at the ECCC, definitive, effective and expeditious resolution by the *Chambre d'accusation spéciale* is expected.⁸⁷

29. Finally, recognising the obligation for chambers to provide legal certainty and a final determination of the matters before it, the practice of other international courts and tribunals demonstrates that there exists a *requirement* to implement a default position where the required majority cannot be achieved, and that it is impermissible to leave cases in judicial limbo. The ECCC’s supermajority requirement presents the same predicament as an even-numbered chamber in the sense that it is mathematically possible that the requisite majority

the disagreement between the Co-Prosecutors on whether to seize the CIJs with Cases 003 and 004, that a failure to reach a supermajority decision to block the transfer of the Introductory Submissions triggered the default mechanism in article 7(4) of the ECCC Agreement and article 20 of the ECCC Law that “the prosecution shall proceed” meaning that the Introductory Submissions should be forwarded to the CIJs. *See* **D1/1.3** PTC Considerations on Co-Prosecutors’ Disagreement, paras 17, 45 (as corrected in **D1/1.2** Corrigendum). This Chamber has highlighted the parallels between this decision and the default position applicable to disagreements between the CIJs. *See* Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, para. 117, fn. 188 (unanimous).

⁸³ **D266/27** & **D267/35** Considerations, para. 90, fn. 179 (unanimous); Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 101, 117 (unanimous).

⁸⁴ Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 45-46, 51 (unanimous).

⁸⁵ Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 46, 51 (unanimous).

⁸⁶ Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, para. 51 (unanimous).

⁸⁷ Central African Republic, Loi Organique No. 15.003 Portant Création, Organisation et Fonctionnement de la Cour Pénale Spéciale, 3 June 2015, arts 11 (The Investigation Chamber is composed of three cabinets. Each cabinet includes one national judge and one international judge), 12 (The Special Indictment Chamber, composed of three judges: two international judges and one national judge, rules on appeals against the orders issued by the investigating cabinets), 42 (In the event of disagreement between the investigation judges of the same cabinet, the points of divergence are recorded in a report and transmitted, through the Special Prosecutor, to the Special Indictment Chamber, which has five days to decide. The decision of the Special Indictment Chamber is binding on the co-investigating judges).

of votes may not be achieved. When viewed through that lens, it is clear that, unanimous finding of a valid indictment aside for the moment, the situation faced by the PTC in this case is not unique.⁸⁸ Whilst, for obvious reasons, most international jurisdictions sit with odd-numbered panels, not an insignificant number have chambers consisting of, or capable of consisting of, an even number of judges.⁸⁹ In every one of these cases, the legal framework of the relevant tribunal contains a default mechanism triggered when the requisite majority cannot be achieved⁹⁰ and which must be implemented by the judges. *In no instance* does a split result in the automatic dismissal of a case.

30. Rule 77(13)(b) and the default position are no different, and it was not open to the National Judges to simply ignore them. Indeed, as the ICP has explained at length in previous submissions, the dismissal of Case 003 is *not* mandated by either the presumption of innocence⁹¹ or the principle of *in dubio pro reo*,⁹² especially where, as here, the Indictment

⁸⁸ As such, the ICP respectfully disagrees with the International PTC Judges when they opined that “the supermajority rule and the default position envisaged by the Internal Rules are unique features of the ECCC which may result in the Chamber not being able to reach a decision on a specific issue.” See **D266/20.1.10 & D267/25.1.10** Case 004/2-Interoffice Memorandum from PTC Judges Olivier Beauvallet and Kang Jin Baik entitled “Transfer of Case File 004/2”, 12 March 2020, para. 3. Indeed, there are a number of other default positions written into the ECCC Internal Rules pertaining to decisions by the **PTC** (IRs 11(5) (Listing of lawyers for indigent defendants by the Defence Support Section), 22(1)(f) (Registration of foreign lawyers with the Cambodian Bar Association (BAKC)), 23*quater*(1)(e) (Admission of Victims’ Associations by the Victims Support Section), **TC** (IR 98(4)), **SCC** (IR 108(4*bis*)), and **Special Panels** (IR 34(11)).

⁸⁹ See e.g. **International Military Tribunal at Nuremberg (“IMT”)**: Charter of the International Military Tribunal, London, 8 August 1945 (“London Charter”), arts 2, 4(a); **International Military Tribunal for the Far East (“IMTFE”)**: Charter of the IMTFE, Tokyo, 19 January 1946, arts 2, 4(a); **US Military Tribunal at Nuremberg (“USMT”)**: Military Government – Germany, United States Zone, Ordinance No. 7: Organization and Powers of Certain Military Tribunals, 18 October 1946 (“Ordinance No. 7”), arts II(b), II(g); **International Court of Justice (“ICJ”) and PCIJ**: Statute of the International Court of Justice, 18 April 1946 (“ICJ Statute”), arts 3(1), 23-26, 29, 31, League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920 (“PCIJ Statute”), as amended on 31 July 1926, arts 24-27, 29; **Inter-American Court of Human Rights (“IACtHR”)**: Statute of the Inter-American Court of Human Rights (“IACtHR Statute”), 1 October 1979, arts 4, 10, 23; **African Court of Justice and Human Rights (“ACJHR”)**: Statute of the African Court of Justice and Human Rights, 1 July 2008 (“ACJHR Statute”), arts 3, 16-19, 21; **International Tribunal for the Law of the Sea (“ITLOS”)**: Statute of the ITLOS, Annex VI to the UN Convention on the Law of the Sea, 10 December 1982 (“ITLOS Statute”), arts 2, 13-15, 17, 35-36.

⁹⁰ In the event that votes are evenly divided, the following default positions are implemented: **IMT**: London Charter, art. 4(c) (the vote of the President is decisive provided always that convictions and sentences are only imposed by affirmative votes of at least three members of the Tribunal); **IMTFE**: Charter of the IMTFE, art. 4(b) (the vote of the President is decisive); **USMT**: Ordinance No. 7, art. II(h) (the presiding member declares a mistrial); **ICJ and PCIJ**: ICJ Statute, art. 55(1)-(2) (the President (or alternate) has a casting vote), PCIJ Statute, art. 55(1)-(2) (the President or his deputy has a casting vote); **IACtHR**: IACtHR Statute, art. 23(2)-(3) (The President casts the deciding vote); **ACJHR**: ACHR Statute, art. 42(1)-(2) (the President has a casting vote); **ITLOS**: ITLOS Statute, art. 29(1)-(2) (the President (or alternate) has a casting vote).

⁹¹ *Contra* **D266/27 & D267/35** Considerations, National Judges’ Opinion, para. 116. The presumption of innocence ensures that before criminal sanctions can be imposed, the burden is on the prosecution to prove the accused’s guilt beyond reasonable doubt *at trial*. It remains undisturbed unless and until Meas Muth is convicted by a supermajority of the TC Judges. See IRs 87(1), 98(4); Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, para. 163 (unanimous).

⁹² **D267/10** ICP Response to Meas Muth’s Appeal, paras 39-50; **D266/6 & D267/11** International Co-Prosecutor’s Reply to Meas Muth’s Response to the Appeal of the Order Dismissing the Case Against Meas

has been upheld by a supermajority. Article 7 of the Cambodian Code of Criminal Procedure (“CCCP”)⁹³ limits the causes of extinction of a criminal action within a court’s jurisdiction—beyond a dismissal or acquittal on the merits⁹⁴—to the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law and *res judicata*.⁹⁵ None of these apply to Case 003, which has a valid indictment for crimes within the jurisdiction of the ECCC, and the SCC and TC have both held that the ECCC has no authority to order termination for any other reason.⁹⁶

31. Applying all these principles to Case 003, therefore, demonstrates that, even if the PTC ignores its unanimous finding that the Indictment is valid (which it cannot), when after all the appellate procedures have been completed and the PTC has not overturned the Indictment by a supermajority, the PTC has a duty to apply the default position and send Case 003 to trial.

V. CONCLUSION

32. If the PTC fails to carry out its judicial duties in accordance with law, logic and justice, it renders the ECCC judicial mechanism impotent and risks giving Meas Muth an unjustified benefit of impunity for the most egregious crimes, both in number and type, alleged against him. Meas Muth acknowledges that the crimes for which he is indicted are “of the most serious concern to the international community”.⁹⁷ He has not challenged any factual or legal findings in the Indictment regarding those crimes nor the ICIJ’s finding that the ECCC has personal jurisdiction over him. That same Indictment was upheld by every one of the five PTC judges and there was no supermajority upholding the validity of the Dismissal Order. Indeed, the only PTC Judges who examined the substance of the Dismissal Order found it to be manifestly “incomplete”, ignoring seven years of evidence placed on the Case File since 29 April 2011 and a range of factual allegations of which the NCIJ was duly

Muth (D266), 9 August 2019, paras 67-71.

⁹³ Code of Criminal Procedure of the Kingdom of Cambodia, 7 June 2007 (“CCCP”), art. 7; echoed in the French Code of Criminal Procedure, art. 6.

⁹⁴ At the pre-trial stage, the CIJ(s) may issue a dismissal order for one of the reasons listed in CCCP, art. 247 (*see also* IR 67(3)). An accused may also be acquitted at trial or on appeal under CCCP, arts 350, 405, 439-441 (*see also* IRs 87(1), 98(3)-(4), 111(4)).

⁹⁵ *See further* **D267/10** ICP Response to Meas Muth’s Appeal, para. 50.

⁹⁶ Case 002-E138/1/10/1/5/7 Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith 14 December 2012, para. 38; Case 002-E116 Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011, paras 16-17 (Finding that ECCC proceedings may only be terminated under IR 89(1)(b) on one of the limited grounds set out in art. 7 of the CCCP).

⁹⁷ **D267/4** Meas Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019, para. 44.

seised by the ICP.

33. Justice is not defined as whatever most benefits the Accused. Justice extends to all Parties, and to the right of primary and secondary victims to have accountability judicially determined by independent, impartial judges who act only on good faith and the logical application of law and fact.

VI. RELIEF REQUESTED

34. For the reasons outlined above, the International Co-Prosecutor respectfully requests the Pre-Trial Chamber to:
- a. conclude the pre-trial stage of Case 003 by providing an agreed final determination confirming that Meas Muth is indicted and ordering him to be sent for trial; and
 - b. take all necessary administrative actions to immediately forward the Considerations, Case 003 Indictment and remaining Case File to the Trial Chamber.

Respectfully submitted,

Date	Name	Place	Signature
21 June 2021	Brenda J. HOLLIS International Co-Prosecutor		