BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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MEAS MUTH'S RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S APPEAL OF THE DISMISSAL ORDER

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I. OVERVIEW

1. Beneath the surface of the International Co-Prosecutor's ("ICP") 100-page Appeal[1] lie maligning and unsustainable allegations against National Co-Investigating Judge ("NCIJ") YOU Bunleng and a daft claim that Mr. MEAS Muth's case must proceed to trial based on a phantom "policy." The ICP's Appeal should be dismissed in its entirety, as should Mr. MEAS Muth's case.

2. Alleging that the NCIJ conducted a sham investigation, prematurely concluded it on 29 April 2011, unreasonably refused to consider evidence gathered after its reopening, failed to make requisite findings, consequently performed a bogus analysis of whether Mr. MEAS Muth falls within the ECCC's personal jurisdiction, the ICP calls upon the Pre-Trial Chamber ("PTC") to reverse the NCIJ's Dismissal Order[2] and send the case to trial based on International Co-Investigating Judge ("ICIJ") Michael Bohlander's Indictment[3] even if both Closing Orders stand. The ICP misinforms by misconstruing the investigation, misinterpreting the applicable law, and misrepresenting the NCIJ's findings. He misapprehends the purpose of an Appeal, devoting large swaths to regurgitating his Final Submission.[4] Preposterously, he calls upon the PTC to engage in a perversion of justice – to disregard the constitutionally guaranteed and universally accepted principle of *in dubio pro reo* in favor of a new maxim – *when in doubt, prosecute.*

3. The NCIJ diligently, ethically, and forthrightly performed his judicial duties, faithfully adhering to the letter and spirit of the law and prudently exercising his discretion. He conducted a genuine and effective investigation alongside ICIJ Marcel Lemonde and ICIJ Siegfried Blunk before concluding it on 29 April 2011. As an independent CIJ equal to his international counterparts, the NCIJ was not required to consider the evidence they gathered to reach his determination on the ECCC's lack of personal jurisdiction over Mr. MEAS Muth which, ultimately, was based on factors he and ICIJ Bohlander jointly articulated and applied. He did not, as the ICP spuriously claims, premise his Dismissal Order on any holding that *only* S-21 Chairman KAING Guek Eav *alias* Duch is most responsible.

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[1] International Co-Prosecutor's Appeal of the Order Dismissing the Case Against MEAS Muth (D266), 8 April 2019, D266/2 ("ICP's Appeal").
[2] Order Dismissal the Case Against MEAS Muth, 28 November 2018, D266 ("Dismissal Order").
[3] Closing Order, 28 November 2018, D267 ("Indictment").
[4] International Co-Prosecutor's Rule 66 Final Submission, 14 November 2017, D256/7 ("ICP's Final Submission").

4. The ICP fails to demonstrate, as he must, how, individually or collectively, the NCIJ committed any errors or abuses fundamentally determinative of his exercise of discretion that would require the PTC to reverse the Dismissal Order. Even were the Dismissal Order to be set aside by supermajority, the PTC would still need to uphold the Indictment by supermajority for the case to proceed to trial.

5. Considering the befuddling structure of the ICP's Appeal, to avoid unnecessary repetition and meandering, the Response begins by addressing preliminary matters – listing arguments warranting summary dismissal and addressing the ICP's reliance on inapposite factors to identify those most responsible set out in his Applicable Law Part and argued throughout his Appeal. It then addresses Part V of the Appeal, wherein the ICP absurdly turns the principle of *in dubio pro reo* on its head. Having dealt with the determinative issue of the opposing Closing Orders scenario (as also argued in Mr. MEAS Muth's Appeal),[5] the Response then addresses the ICP's Grounds of Appeal, starting with his claim that the NCIJ erred in failing to consider evidence gathered after 29 April 2011 (Ground B). Only after fully appreciating the investigation conducted before 29 April 2011 can the ICP's claims that the NCIJ failed to issue a decision on all the facts and to legally characterize them in his Dismissal Order be addressed (Grounds C and A). The remainder of the ICP's Grounds are addressed in the order presented in the Appeal.

II. PRELIMINARY MATTERS

A. Several of the ICP's arguments warrant summary dismissal

6. The ICP rashly invites the PTC to summarily dismiss several arguments having no potential of reversing the Dismissal Order[6] – arguments that: are "evidently unfounded," undeveloped, or fail to articulate an error;[7] are "based on unsubstantiated alternative interpretations of the same evidence" without explaining why the findings cannot stand on

[5] MEAS Muth's Appeal Against the International Co-Investigating Judge's Indictment, 8 April 2019, D267/4 ("MEAS Muth's Appeal").
[6] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC47 & 48), Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, para. 22: "The [PTC] is of the view that arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be dismissed immediately by the [PTC] and do need not be considered on the merits." *See also Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28 ("Case 001 Appeal Judgement"), para. 20.
[7] Case 001 Appeal Judgement, para. 20. *See also Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22: "[T]he Appeals Chamber will dismiss without detailed analysis: … (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error."

the basis of the remaining evidence;[8] merely repeat unsuccessful arguments from his Final Submission without demonstrating that their rejection by either CIJ constituted an error warranting the PTC's intervention;[9] and challenge findings on which the NCIJ's personal jurisdiction determination did not rely.[10] Specifically, the PTC should summarily dismiss the ICP's arguments that:

a. Claim that the investigation prior to 29 April 2011 was not impartial.[11] The ICP fails to advance any argument showing that any of the CIJs who investigated before 29 April 2011 – the NCIJ, ICIJ Lemonde, and/or ICIJ Blunk – were "objectively perceived to be biased";[12]

b. Claim that the NCIJ failed to rely on KHIEU Samphân's statement that Mr. MEAS Muth was a member of the Central Committee.[13] The ICP fails to explain why both the NCIJ's and ICIJ Bohlander's findings that Mr. MEAS Muth was not a member of the Central Committee should not stand on the basis of the remaining evidence;[14]

c. Repeat victim number calculations from his Final Submission.[15] The ICP fails to demonstrate how the NCIJ or ICIJ Bohlander erred in rejecting them, given that he does

[8] *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, F36 ("Case 002/01 Appeal Judgement"), para. 90, citing *inter alia Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, paras. 21-22: "Mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner are liable to be summarily dismissed." *See also Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22: "[T]he Appeals Chamber will dismiss without detailed analysis: … (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence."

[9] *See* Case 001 Appeal Judgement, para. 20. *See also Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22: "[T]he Appeals Chamber will dismiss without detailed analysis: … (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber."

[10] *See Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22: "[T]he Appeals Chamber will dismiss without detailed analysis: … (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding."

[11] ICP's Appeal, paras. 35, 43, 45.

[12] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of NUON Chea, 4 February 2008, C11/29, para. 19: "It is for the Appellant to adduce sufficient evidence to satisfy the [PTC] that the Judge in question can be objectively perceived to be biased. There is a high threshold to reach in order to rebut the presumption of impartiality."

[13] ICP's Appeal, para. 148.

[14] Dismissal Order, paras. 111, 117; Indictment, para. 150.

[15] ICP's Appeal, paras. 163-64 (crimes committed by the DK Navy), 165-66 (Stung Hav), 168 (Wat Enta Nhien), 169-70 (S-21), citing to ICP's Final Submission.

not appeal the Indictment which finds drastically different victim numbers than those the ICP alleges;[16] and

d. Claim that the Dismissal Order held that Duch is the only most responsible person.[17] The NCIJ made no such holding, nor did he premise his Dismissal Order on any such holding.[18]

B. The ICP's reliance on the ICTY's inapposite referral factors to identify those most responsible is inappropriate

7. The ICP wrongly and gratuitously invites the PTC to substitute the factors the CIJs articulated and applied to identify those most responsible[19] for the International Criminal Tribunal for the former Yugoslavia's ("ICTY") referral factors.[20] The ICP advances these factors to support his assertions that the NCIJ failed to properly consider the gravity of the crimes and Mr. MEAS Muth's level of responsibility when determining whether he fell within the ECCC's personal jurisdiction.[21] The ECCC's uniquely negotiated context renders the ICTY's referral factors inapposite.[22] In soliciting the PTC to apply them, the ICP fails to consider the CIJs' discretion in identifying those most responsible,[23] the ECCC's negotiations history,[24] mandatory legal principles,[25] and contextual circumstances in Democratic Kampuchea ("DK").[26] The PTC should ignore the ICP's misguided entreaty to apply the ICTY's referral factors and instead apply the CIJs' factors.

8. ***The CIJs articulated and applied factors for identifying those most responsible*** Based on their "close study of the negotiation history preceding the establishment of the ECCC and the development since,"[27] mandatory legal principles,[28] and the evidence they gathered throughout their investigations[29] the CIJs articulated and applied factors to protect against arbitrary action as "parameters against which the exercise of the discretion can and must

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[16] Indictment, paras. 464, 467-68.
[17] ICP's Appeal, paras. 171-90.
[18] *See infra* paras. 93-96.
[19] *See Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261 ("Case 004/1 Closing Order"), paras. 3-41.
[20] *See* ICP's Appeal, paras. 10-11.
[21] *See* ICP's Appeal, para. 200.
[22] *See* Case 004/1 Closing Order, para. 18.
[23] Both CIJs agreed that the determination of whether Mr. MEAS Muth is most responsible requires discretion. *See* Dismissal Order, para. 364; Indictment, para. 37, citing Case 004/1 Closing Order, paras. 9-10.
[24] *See* Case 004/1 Closing Order, para. 12.
[25] Case 004/1 Closing Order, paras. 26-36.
[26] *See* Case 004/1 Closing Order, paras. 37-41.
[27] Case 004/1 Closing Order, para. 12.
[28] *See* Case 004/1 Closing Order, paras. 26-36.
[29] Case 004/1 Closing Order, paras. 40-41.

be measured,"[30] considering the "flexibility" of the term most responsible.[31] These factors are:

a. *The intent of the Parties to the Agreement* The Royal Government of Cambodia ("RGC") and United Nations ("UN") intended "to restrict personal jurisdiction to those with the greatest responsibility under the DK, fully aware [of] the death toll," and that there was "a large number of potential perpetrators, who each alone could have been responsible for hundreds or thousands of deaths."[32] The ECCC's limited personal jurisdiction reflects the RGC's "goal of peace and reconciliation"[33] and its limited capacity and resources to conduct investigations and trials.[34]

b. *The principles of* in dubio pro reo *and strict construction of criminal law* These mandatory legal principles apply throughout all stages of the proceedings to both law and fact.[35] Their application is "crucial in systems where the law is often not fully settled."[36]

c. *Decision-making in DK-structures* Decisions in DK were made at the top and implemented by the lower levels on pain of personal consequence.[37] While the top echelons couched policies in general terms and lower-level cadres were "given some leeway regarding the details of their implementation … the ultimate definition of the content of policies and the means of their implementation rested with the top echelons, which could interfere at will."[38]

d. *The relative gravity of the Charged Person's acts and their effects, subject to the intent of the Parties to the Agreement* While the gravity of the crimes and level of

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[30] Case 004/1 Closing Order, para. 9.
[31] *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 ("Case 004/1 PTC Considerations") (unanimous holding), para. 20.
[32] Case 004/1 Closing Order, para. 18.
[33] Case 004/1 Closing Order, para. 16.
[34] Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 53rd Sess., Agenda Item 110(b), UN Doc. No. A/53/850-S/1999/231, 16 March 1999, Annex, Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 ("Group of Experts' Report"), paras. 126, 134 (Attachment 2).
[35] *See 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; *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.
[36] Case 004/1 Closing Order, para. 27.
[37] Case 004/1 Closing Order, paras. 40-41.
[38] Case 004/1 Closing Order, para. 40.

responsibility are relevant factors in determining personal jurisdiction, the evidence must be viewed against the backdrop of the entirety of the suffering during the DK period.[39] This "inevitably include[s] looking at the total number of deaths from execution, intentional or reckless starvation of forced labourers and prisoners, and insufficient public health services in general during the period of the DK, the number of displaced persons and those who were forced to do hard labour, etc."[40]

9. ***The ECCC's negotiations history informs the applicable personal jurisdictional factors***
After nearly four years of debate and disagreement,[41] the RGC and the UN agreed on a court of "selective justice": "only a certain small group of people will ever be prosecuted in the courts of Cambodia for the atrocities which occurred during the DK"[42] – senior leaders and "those who were most responsible for the crimes" that were committed in Cambodia between 17 April 1975 to 6 January 1979.[43] While these terms were left undefined in the Agreement and Establishment Law,[44] who would fall within the ECCC's personal jurisdiction would be left to the Co-Prosecutors' and, ultimately, the CIJs' discretion.[45]

10. The UN Secretary-General's Group of Experts tasked to explore options for bringing to justice "Khmer Rouge leaders"[46] recommended establishing an *ad hoc* international tribunal similar to the ICTY[47] with the Prosecutor having the sole authority over whom to indict.[48] While accepting the recommended focus of this future tribunal would be on "*persons most responsible* for the most serious violations of human rights" during the DK period,[49] the RGC rejected the recommendation that an ICTY-model tribunal with exclusive discretionary authority over indictment to the Prosecutor be established.[50]

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[39] Case 004/1 Closing Order, para. 317.
[40] Case 004/1 Closing Order, para. 317.
[41] According to former US Ambassador-at-Large for War Crimes Issues David Scheffer, detailed discussions over the ECCC's personal jurisdiction did not begin until 1999. *See* David Scheffer, *The Negotiating History of the ECCC's Personal Jurisdiction*, CAMBODIA TRIBUNAL MONITOR, 22 May 2011, p. 2.
[42] Case 004/1 Closing Order, para. 31.
[43] Establishment Law, Arts. 1, 2 new; Agreement, Art. 2(1).
[44] Establishment Law, Arts. 1, 23 new; Agreement, Preamble, Arts. 2, 5(3), 6(3).
[45] Case 001 Appeal Judgement, para. 74.
[46] Letter dated 31 July 1998 from the Secretary-General addressed to the President of the General Assembly, UN Doc. No. A/52/1007, 7 August 1998, p. 1 (Attachment 3).
[47] Group of Experts' Report, paras. 139-48 (Attachment 2).
[48] Group of Experts' Report, para. 110 (Attachment 2).
[49] Group of Experts' Report, para. 110 (emphasis added) (Attachment 2).
[50] *See* Letter dated 3 March 1999 from the Prime Minister of Cambodia addressed to the Secretary-General, UN Doc. Nos. A/53/851 and S/1999/230, 3 March 1999. *See also* 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.

11. In finalizing the ECCC's personal jurisdiction, the UN "added the word 'most' as an illustration of *how one could limit the scope of personal jurisdiction in a reasonable way*,"[51] finding the term "those who were responsible" in Article 1 of the RGC's 2000 draft Establishment Law[52] to be overly broad.[53] The RGC adopted the "most responsible" formula in the 2001 Establishment Law,[54] reflected in the Agreement.[55] When negotiations concluded, the UN's principal negotiator stated that who would be a senior leader or most responsible would be up to the Co-Prosecutors and CIJs.[56]

12. ***The ICTY's referral factors are inapposite*** Contrastingly, the ICTY's referral procedure was adopted to accommodate budgetary demands and give effect to the Tribunal's completion plan. The UN Security Council ("UNSC") established the ICTY with broad jurisdiction to prosecute "*persons responsible*,"[57] yet the Prosecution's unfettered discretion over whom to indict[58] would soon lead to budgetary issues in financing the Tribunal's voluminous case load.[59] The UN Secretary-General was requested to take "all necessary actions" to maximize the Tribunal's efficiency and economy.[60] The UN Secretary-General's Group of Experts, tasked to monitor the ICTY's efficiency, and the ICTY Judges agreed that "small fry" prosecutions would not serve the UNSC's goals.[61]

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[51] 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*, CAMBODIA TRIBUNAL MONITOR, 26 April 2012 ("Heder, Personal Jurisdiction"), p. 35, *available at* http://www.cambodiatribunal.org/assets/pdf/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf, quoting Phnom Penh, 7 July 2000 at 3:00 PM: Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (emphasis added).

[52] Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, UN Doc. No. RC/MP/0008/00, 18 January 2000, Arts. 1, 2 (Attachment 1).

[53] Heder, Personal Jurisdiction, p. 34-35.

[54] 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), Arts. 1, 2.

[55] *See* Agreement, Arts. 1, 2(1).

[56] *See* Statement by Under-Secretary-General Hans Corell upon leaving Phnom Penh on 17 March 2003, 17 March 2003, p. 2.

[57] Updated Statute of the International Criminal Tribunal for the former Yugoslavia, as amended by Resolution 1877 on 7 July 2009, ("ICTY Statute"), Art. 1 (emphasis added).

[58] ICTY Statute, Art. 16.

[59] By 1999, 91 Accused were publicly indicted at the ICTY. *See* Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. No. A54/634, 22 November 1999, paras. 15, 28, 30.

[60] UN General Assembly Resolution 53/212, UN Doc. No. A/RES/53/212, 10 February 1999, para. 18.

[61] Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. No. A54/634, 22 November 1999, para. 96.

13. Following the Group of Experts' Report, ICTY President Claude Jorda forwarded a completion plan to the UNSC.[62] The main purpose of referring cases was to enable the ICTY to focus its resources on higher-ranking Accused and be in a position to complete all first instance trials by 2008.[63] Effectively bypassing the need for a UNSC resolution amending the ICTY Statute to implement his proposals, President Jorda stated that, with or without an amendment to the ICTY Statute, Rule 11 *bis* of the Rules of Procedure and Evidence "would be amended."[64] Rule 11 *bis* was then amended to allow the Prosecutor to request the transfer of cases to national tribunals.[65] In 2004, Rule 11 *bis* was revised to require the Referral Bench to consider the gravity of the crimes and the Accused's level of responsibility.[66]

14. *In sum*, by ignoring the negotiations history leading to the ECCC's establishment, the ICP inappropriately invites the PTC to adopt the ICTY's referral factors which, aside from not being agreed upon by the RGC and the UN, are inapposite and impossible to apply "because measuring in such numerical categories" would make ordinary soldiers who committed crimes or their superior officers who ordered them into most responsible persons.[67] Such a wide-sweeping and downward-reaching personal jurisdiction was not envisaged by the RGC and UN who "were aware of the fact that this massive category of perpetrators existed and would not face justice."[68] The PTC should eschew the ICP's siren call to abandon the recognized factors for identifying those most responsible consistently applied by the CIJs in Cases 004/1,[69] 004/2,[70] and 003[71] – which, incidentally, the ICP

[62] Report on the Judicial Status of the International Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts (June 2002) ("ICTY President's Report"), annexed to Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. No. S/2002/678, 19 June 2002 (Attachment 4).
[63] Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. No. S/2002/678, 19 June 2002, p. 1; ICTY President's Report, para. 75 (Attachment 4).
[64] ICTY President's Report, para. 44 (Attachment 4).
[65] ICTY Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015, Rule 11 *bis* (adopted 12 November 1997, revised 30 September 2002).
[66] ICTY Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015, Rule 11 *bis* (C). Rule 11 *bis* (C) was amended on 28 July 2004 in accordance with UNSC Resolution 1534. *See also* UNSC Resolution 1534, UN Doc. No. S/RES/1534 (2004), 26 March 2004.
[67] Case 004/1 Closing Order, para. 19.
[68] Case 004/1 Closing Order, para. 19.
[69] Case 004/1 Closing Order, paras. 3-41.
[70] *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Order Dismissing the Case Against AO An, 16 August 2018, D359, paras. 421-84; *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ, Closing Order (Indictment), 16 August 2018, D360, paras. 47-56, citing Case 004/1 Closing Order, paras. 37-41.
[71] Dismissal Order, paras. 360-407; Indictment, paras. 32-39, citing Case 004/1 Closing Order, paras. 37-41.

conveniently omits to acknowledge were not overturned by the PTC[72] – for the ICTY's inapposite referral factors that would indisputably result in the denial of Mr. MEAS Muth's right to equal treatment.[73]

III. RESPONSE TO PART V – SUBMISSIONS ON OPPOSING CLOSING ORDERS

15. The ICP absurdly invites the PTC to apply a judicially perverse maxim – *when in doubt, prosecute.* He does so by calling upon the PTC to untenably ignore the constitutionally guaranteed and universally accepted principle of *in dubio pro reo*[74] and to illogically embrace a phantom "policy" of sending cases to trial when the PTC is unable to reach a supermajority on appeals of opposing Closing Orders, which he claims, unsustainably, is evidenced by Rule 77(13), Supreme Court Chamber jurisprudence, and the Agreement.[75]

16. The ICP misconstrues the applicable law in claiming that Rule 77(13) "indicates a policy choice" making it "explicitly clear" that if the Indictment is not reversed by supermajority, the case against Mr. MEAS Muth must be sent to trial.[76] If it was "explicitly clear," the CIJs would not have jointly considered that "Rule 77(13) only addresses the scenario of a joint dismissal or indictment; not that of split closing orders"[77] and that the resolution of

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[72] While the PTC unanimously found the CIJs' analysis of the ECCC's position within the Cambodian legal system to be erroneous, the PTC found no error in the CIJs' factors for determining most responsible. *See* Case 004/1 PTC Considerations (unanimous holding), paras. 64-80.

[73] 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, Art. 14(2); Rule 21(1)(b).

[74] 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"), 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* 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." *See also 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 (holding that the principle of *in dubio pro reo* applies at all stages of the proceedings at the International Criminal Court).

[75] ICP's Appeal, paras. 191-98.

[76] ICP's Appeal, para. 194. *See also* ICP's Appeal, paras. 192-93.

[77] *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.

the appeals of opposing Closing Orders lies with the PTC.[78] Both CIJs are members of the Plenary entitled to vote on the Rules relating to the ECCC's procedure[79] and thus would have had a firm grasp of the procedure applicable to their Closing Orders.

17. The ICP misinforms in asserting that Rule 77(13)(b) is "*lex specialis* relating to indictments," prevailing over the general terms of Rule 77(13)(a).[80] Such a proposition is perverse and contrary to the principle of *in dubio pro reo*.[81] 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.[82]

18. The Supreme Court Chamber's *obiter dictum* does not support the ICP's interpretation of Rule 77(13).[83] It relates to disagreements between the CIJs in the context of the PTC's dispute resolution procedure *before* the CIJs conclude their investigation – i.e. when "*proposing to issue* an Indictment or Dismissal Order."[84] The CIJs did not request the PTC to settle their opposing views before issuing their Closing Orders,[85] instead agreeing to issue opposing Closing Orders simultaneously.[86] The PTC's role on appeal is not to "settle the specific issue upon which the [CIJs] … disagree."[87] Rather, its role is to determine whether the CIJs properly exercised their discretion in reaching their opposing conclusions.[88] Misleadingly, the ICP attempts to bypass the CIJs' joint discretionary decision *not* to send their disagreement concerning the results of their investigations to the PTC for resolution.[89]

19. The ICP misinforms in asserting that his interpretation of Rule 77(13) is consistent with the spirit and structure of the ECCC framework which "firmly embrace[s]" a policy of sending cases forward to trial.[90] He misleadingly analogizes the dispute resolution

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[78] *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.
[79] Rules 3, 18(3)(b).
[80] ICP's Appeal, para. 194.
[81] *See supra* para. 15, fn. 74.
[82] The Defence incorporates by reference arguments made in MEAS Muth's Appeal, paras. 45-46.
[83] ICP's Appeal, para. 195, citing Case 001 Appeal Judgement, para. 65. *See also* ICP's Appeal, para. 196.
[84] Case 001 Appeal Judgement, para. 65 (emphasis added), citing Establishment Law, Art. 23 new; Agreement, Art. 7(4); Rule 72(4)(d).
[85] *See* Indictment, para. 27.
[86] *See* Dismissal Order, para. 6.
[87] Case 001 Appeal Judgement, para. 65 (internal citation omitted).
[88] *See* Case 004/1 PTC Considerations (unanimous holding), para. 21.
[89] *See* Rule 72(1)-(2).
[90] ICP's Appeal, para. 197.

procedure under Article 7(4) of the Agreement with the resolution of appeals of opposing closing orders.[91] Inappositely relying on David Scheffer[92] – who is not legal authority and did not disclose relevant negotiations materials[93] – the ICP fails to substantiate his assertion that the Agreement "provides clear guidance" that cases proceed to trial when the PTC is unable to resolve appeals of opposing Closing Orders.[94] The cited portions of Mr. Scheffer's book concern the dispute resolution procedure, not appeals of opposing Closing Orders.[95]

20. *In sum*, the ICP's claims are as unsound as they are unconstitutional. His scheme promoting the scenario that the case against Mr. MEAS Muth would not proceed to trial only if the Indictment is reversed by supermajority on appeal ignores the principle of *in dubio pro reo*. Other than masquerading these vacuous suppositions as rigorously interpreted binding legal authority, the ICP woefully fails to demonstrate that the RGC and the UN adopted a "policy" of dispensing, when convenient, constitutionally guaranteed and universally accepted principles and fair trial rights in favor of a laid-back, capricious, prosecution-oriented approach of sending cases to trial when two equal and independent CIJs issue opposing Closing Orders of equal force. Absent a finding by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of

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[91] ICP's Appeal, paras. 197-98.

[92] ICP's Appeal, para. 198, fn. 754, citing David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia, in* INTERNATIONAL CRIMINAL LAW, 219, 246 (M. Cherif Bassiouni 3rd ed. 2008).

[93] Noteworthy, the Defence, exercising its duty of due diligence, made concerted efforts to obtain relevant source material to gain an understanding of the context and substance of the ECCC's negotiations history. The Defence wrote to Mr. Scheffer, who – as US Ambassador-at-Large for War Crimes Issues – was involved in the negotiations leading up to the ECCC's establishment (*See* David Scheffer, *The Negotiating History of the ECCC's Personal Jurisdiction*, CAMBODIA TRIBUNAL MONITOR, 22 May 2011), and Stephen Heder, a former OCP and OCIJ investigator/analyst, who wrote about the ECCC's negotiation history (*See* 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*, CAMBODIA TRIBUNAL MONITOR, 26 April 2012), requesting them to provide all relevant source material. ICIJ Bohlander considered that the Defence's letters were investigative actions solely within the CIJs' purview and requested Mr. Scheffer and Mr. Heder to direct their responses to him. Mr. Scheffer informed the ICIJ that, "upon consultation with the Legal Adviser's Office of the U.S. Department of State and with the United Nations' Office for Legal Affairs, certain documents sought by the Defence could not be disclosed." In relation to other documents, Mr. Scheffer advised the ICIJ to contact the US Department of State. The US Department of State never responded to the ICIJ's request for the documents. Mr. Heder informed the ICIJ that the vast majority of the documents sought by the Defence were no longer in his possession. Written Record of Investigation Action, 10 January 2017, D224, EN 01375463-01375464; Letter to David Scheffer titled "Request for source material related to the personal jurisdiction of the Extraordinary Chambers in the Courts of Cambodia," 6 November 2015, D224.1; Letter to Stephen Heder titled "Request for source material related to the personal jurisdiction of the Extraordinary Chambers in the Courts of Cambodia," 6 November 2015, D224.2; Notice of Unsuccessful Attempt to Obtain Strictly Confidential United Nations' Archive Materials, 3 May 2016, D181/1.

[94] ICP's Appeal, para. 198.

[95] David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia, in* INTERNATIONAL CRIMINAL LAW, 219, 246 (M. Cherif Bassiouni 3rd ed. 2008).

discretion that would impede the application of the principle of *in dubio pro reo* – none of which exist – the Dismissal Order cannot be set aside. 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.[96]

IV. RESPONSE TO GROUNDS OF APPEAL

A. Response to Ground B: The NCIJ did not err in law in not considering evidence gathered after 29 April 2011

21. The ICP misconstrues the CIJs' investigative duties in claiming that the investigation prior to the 29 April 2011 Notice of Conclusion was incomplete because the CIJs did not "genuinely, impartially and effectively investigate" the facts of which they were seized[97] and that the reopening of the investigation by Reserve ICIJ Laurent Kasper-Ansermet and its continuation by ICIJ Harmon and ICIJ Bohlander "legally void[ed]" the Notice of Conclusion.[98] The investigation was complete when the NCIJ and ICIJ Blunk jointly issued their Notice of Conclusion. The Notice of Conclusion did not lapse when Reserve ICIJ Kasper-Ansermet reopened the investigation, nor was it voided by investigative actions carried out after its reopening. The NCIJ was not required to consider the evidence gathered after 29 April 2011 to correctly exercise his discretion in reaching his personal jurisdiction determination.

22. ***The investigation was complete when the NCIJ and ICIJ Blunk jointly issued their Notice of Conclusion*** The NCIJ and ICIJ Blunk investigated all the facts of which they were seized and gathered the material necessary to consider their investigation complete before issuing their Notice of Conclusion. The ICP fails to substantiate his claims that the investigation was not "genuine, impartial and effective."[99] Aside from generally claiming that the CIJs derogated from their "obligation to exercise due diligence in conducting a genuine and effective investigation,"[100] the ICP fails to recognize that these requirements do not create an "absolute right … to obtain a prosecution or conviction"[101] and to demonstrate how the investigation concluded on 29 April 2011 was incapable of "leading to the establishment of the facts … and of identifying and – if appropriate – punishing

[96] *See* MEAS Muth's Appeal, para. 46.
[97] ICP's Appeal, para. 35. *See also* ICP's Appeal, paras. 43-57.
[98] ICP's Appeal, para. 35. *See also* ICP's Appeal, paras. 36-42.
[99] ICP's Appeal, para. 43. *See also* ICP's Appeal, paras. 35, 44-57.
[100] ICP's Appeal, para. 45 (internal citation omitted).
[101] *Brecknell v. The United Kingdom*, ECtHR App. No. 32457/04, Judgment, 27 November 2007, para. 66.

those responsible."[102] In claiming that the investigation lacked impartiality, the ICP also fails to advance *any* argument, let alone demonstrate, that any or both CIJs were "objectively perceived to be biased."[103] Accordingly, the PTC should summarily dismiss the undeveloped and unsupported assertion that the investigation lacked impartiality.[104]

23. As they were required by the ECCC Code of Judicial Ethics, the NCIJ and ICIJ Blunk acted diligently,[105] properly,[106] and expeditiously[107] in conducting a genuine and effective investigation. They gathered evidence concerning all the facts of which they were seized, thoroughly analyzed the ECCC's personal jurisdiction, and developed factors to assess whether Mr. MEAS Muth is responsible for the facts they investigated.

24. *The CIJs investigated diligently* The ICP fails to appreciate the diligence with which the NCIJ and ICIJ Blunk conducted a genuine and effective investigation.[108] When the investigation began on 7 September 2009,[109] the NCIJ and ICIJ Lemonde developed a detailed work plan to investigate Mr. MEAS Muth.[110] By the time ICIJ Lemonde resigned on 30 November 2010, the investigation was well underway.[111] When ICIJ Blunk took over from ICIJ Lemonde on 1 December 2010,[112] he continued investigating alongside the NCIJ, picking up where the investigation left off.[113] They "established joint working groups,"[114] "agreed on the investigative methods,"[115] and investigated "in a smooth manner and in complete agreement."[116]

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[102] *Armani Da Silva v. The United Kingdom*, ECtHR App. No. 5878/08, Judgment, 30 March 2016, para. 233.
[103] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of NUON Chea, 4 February 2008, C11/29, para. 19.
[104] Case 001 Appeal Judgement, para. 20. *See also Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22.
[105] ECCC Code of Judicial Ethics, Art. 5(1).
[106] ECCC Code of Judicial Ethics, Art. 5(3).
[107] ECCC Code of Judicial Ethics, Arts. 5(3), 5(4).
[108] ICP's Appeal, para. 45.
[109] 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").
[110] 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.
[111] *See* MEAS Muth's Appeal, para. 14.
[112] 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.
[113] *See* MEAS Muth's Appeal, para. 15.
[114] ECCC Court Report: Issue 33 (February 2011), p. 7, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_February_2011.pdf.
[115] Dismissal Order, para. 48.
[116] Dismissal Order, para. 41.

25. Showing diligence in investigating all the facts of which they were seized by the Introductory Submission, and *only* those facts,[117] ICIJ Blunk asked the ICP to clarify whether the Introductory Submission intended to seize the CIJs of an investigation into all Revolutionary Army of Kampuchea ("RAK") security centers and other crime sites throughout Cambodia where RAK purges were alleged to have occurred.[118] The ICP clarified that the CIJs were not requested to investigate all RAK security centers or other crime sites except "to establish the existence of a joint criminal enterprise and the occurrence of widespread and systematic crimes"[119] and Prison 810 which "was already investigated … in Case 002."[120] With the scope of their investigation clarified, the NCIJ and ICIJ Blunk continued reviewing documentary evidence and placed over a thousand pages of materials relevant to Case 003 on the Case File.[121] This included telegrams, minutes of meetings, statements from insider witnesses such as DK cadres, other witness interviews, and materials from the Documentation Center of Cambodia ("DC-Cam").[122]

26. By the time they jointly issued their Notice of Conclusion on 29 April 2011,[123] the NCIJ and ICIJ Blunk had placed on the Case File materials relating to all the facts of which they were seized by the Introductory Submission, including crime sites linked to facts mentioned in its annexes.[124] The ICP misleads in claiming that successive ICIJs placed

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[117] Rule 55(2); *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. 35-36.

[118] Request for Clarification in Case 003, 8 February 2011, D1/2, referring to Introductory Submission, paras. 1(3), 65-66.

[119] Response of International Co-Prosecutor to Request for Clarification, 16 February 2011, D1/2/1, para. 2, referring to Introductory Submission, paras. 65-66.

[120] Response of International Co-Prosecutor to Request for Clarification, 16 February 2011, D1/2/1, para. 3, referring to Introductory Submission, paras. 63-64.

[121] Note on the Placement of Documents from Case File 002 on Case File 003, 5 April 2011, D4 (placing 1,156 documents into Case File 003); Note on the Placement of Documents, 25 April 2011, D9 (placing three annexes compiling the lists of S-21 prisoners from Divisions 164, 502, and 801); Note on the Placement of Documents from Case File 002 on Case File 003, 25 April 2011, D10 (placing 131 documents into Case File 003).

[122] Dismissal Order, paras. 2, 42, 48.

[123] Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

[124] *See e.g.*, Tuek Sap security center: Written Record of Interview of Hem Sambath, 17 July 2008, D4.1.477; Statement of Som Sok (POW/MIA), 19 December 2002, D4.1.746; Mayaguez Incident - Khmer Communist Movie Crew Films Tang Island after the Mayaguez Incident, 20 September 2005, D4.1.757; Written Record of Interview of Nhoung Chrong, 24 August 2010, D2/6; Durian Plantation: Written Record of Interview of Nhoung Chrong, 24 August 2010, D2/6; Written Record of Interview of In Saroeun, 12 November 2010, D2/17; Written Record of Interview of Touch Soeuli, 11 November 2010, D2/16; DC-Cam Report entitled "CGP Site Form" Sihanouk Ville Genocide Report including Koh Khyang Site Report , 17 November 1995, D4.1.1026; Written Record of Interview of Touch Soeuli, 10 November 2010, D2/15; Ream area worksites (including Bet Trang and Kang Keng): Written Record of Interview of Touch Soeuli, 11 November 2010, D2/16; Written Record of Interview of Pen Sarin, 26 August 2010, D2/7; Written Record of Interview of Say Born, 7 September 2010, D2/9;Written Record of Interview of Nhoung Chrong, 24 August 2010, D2/6; Written Record of Interview of In Saroeun, 12 November 2010, D2/17; Statement of Ek Ny (POW/MIA), 19 December 2002, D4.1.747; Debriefing of Seng Sin and Khieu Nuok, Location of Remains, Land Mines on Tang Island, 28 January 2003, D4.1.749; Telegram titled "Eleventh telegram to Brother Mut about

"around 2,467 documents and numerous civil party applications" on the Case File after the investigation was reopened.[125] Statistical comparisons are irrelevant to assessing whether the investigation was genuine and effective and whether it was complete.

27. *The CIJs investigated properly* The ICP misinforms in claiming that the CIJs were required to take the "obvious investigative step" of seeking statements from the DC-Cam,[126] conducting field investigations,[127] or interviewing more witnesses[128] for their investigation to be genuine and effective. The CIJs had discretion to carry out *any* investigative action they deemed necessary to ascertaining the truth[129] in relation to all the facts of which they were seized.[130] While the CIJs – who have discretion to "formulate the *strategy* for the conduct of the judicial investigation"[131] – were not required to disclose their investigative methodology,[132] ICIJ Blunk explained:

> My 30 years experience as a judge and prosecutor taught me that documents are the most reliable evidence, wherefore the resources of the Office [of the CIJs] were focused for a while on analyzing the 10,000 evidentiary documents and 700 witness interviews compiled in Case 002 for their relevance to Cases 003

Enemy situation in along border", 24 September 1976, D4.1.699; Organisation of Sector 37 and 3rd/164th Division Forces on Tang Island after the Mayaguez Incident, 7 June 2005, D4.1.754; Office of the Co-Prosecutors' Report titled "The Khmer Rouge Communication Document 1975-1978", 27 April 2011, D4.1.655; Written Record of Interview of Say Born, 9 September 2010, D2/10; Written Record of Interview of Civil Party Loeung Bunny, 11 September 2009, D4.1.889; Statement of Kam Men (POW/MIA), 2 November 2000, D4.1.762; Written Record of Interview of Sam Bung Leng, 5 March 2011, D8; Report titled "Report of sea fishery group about external situation of the enemy and Internal situation," 20 February 1978, D4.1.1023; Written Record of Interview of Sau Khon, 25 October 2009, D4.1.795.

[125] ICP's Appeal, para. 55.

[126] ICP's Appeal, para. 51. The NCIJ and ICIJ Bohlander jointly considered that DC-Cam statements, collected without judicial supervision, must be accorded less weight than interviews generated by the Office of the CIJs. *See* Case 004/1 Closing Order, paras. 103-04.

[127] ICP's Appeal, para. 51.

[128] ICP's Appeal, para. 50.

[129] Rule 55(5); *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; *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; *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.

[130] Rule 55(2); *Case of NUON Chea et al.,* 002/19-09-2007-ECCC/OCIJ, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1, para. 6, fn. 1.

[131] *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 (emphasis in original).

[132] *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. 40.

and 004. After this was accomplished, field investigations resumed and key witnesses were questioned, including Duch.[133]

28. The ICP misstates the contents of the Case File on 29 April 2011 in claiming that it contained "only 20 written records of interview … from 17 witnesses."[134] There were more than 430.[135] Whether the 20 written records of interviews the ICP mentions originated from other Case Files or from Case File 003, and whether further interviews were required, was a matter solely within the CIJs' discretion.

29. The ICP accuses the NCIJ and ICIJ Blunk of deliberately violating their oath in claiming that they "actively refrained" from placing eight investigation reports (and their attachments) on the Case File.[136] In all likelihood, it was an oversight. The eight investigation reports (and their attachments) were drafted pursuant to a rogatory letter issued by ICIJ Lemonde alone,[137] all of which were submitted to him before his resignation.[138] As the ICP concedes, they were not listed in the rogatory letter completion report submitted to the NCIJ and ICIJ Blunk after ICIJ Lemonde's departure.[139] Given that the NCIJ and ICIJ Blunk placed on the Case File all other documents attached to the rogatory letter completion report,[140] that Reserve ICIJ Kasper-Ansermet did not place the eight investigation reports on the Case File, and that ICIJ Harmon and ICIJ Bohlander only placed them on the Case File on 17 June 2013[141] and 5 January 2017,[142] the ICP's claim is as bold as it is misguided. That the NCIJ and ICIJ Blunk placed on the Case File 39 of the

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[133] Thomas Miller, *KRT judge talks court controversies*, PHNOM PENH POST, 18 August 2011, *available at* https://www.phnompenhpost.com/national/krt-judge-talks-court-controversies.
[134] ICP's Appeal, para. 50.
[135] A search on ZyLAB reveals that the Office of the CIJs placed 436 written records of interviews with witnesses, in English only, on the Case File prior to 29 April 2011. *See* ZyLAB "Case File: CF003," "Language: English," "Title: written record of interview*," "Filing Date: before 29 April 2011," "Document Date: before 29 April 2011," and "Filing Party: OCIJ." Some documents placed on the Case File during this period may be duplicates.
[136] ICP's Appeal, para. 51.
[137] Rogatory Letter, 9 June 2010, D2.
[138] *See* Written Record of Investigation Action, 15 June 2010, D64.1.1; Written Record of Investigation Action, 15 June 2010, D64.1.13; Written Record of Investigation Action, 20 June 2010, D2/24; Written Record of Investigation Action, 27 July 2010, D64.1.14; Written Record of Investigation Action, 3 August 2010, D64.1.16; Written Record of Investigation Action, 3 September 2010, D64.1.17; Written Record of Investigation Action, 16 September 2010, D64.1.20; Written Record of Investigation Action, 21 September 2010, D64.1.21; Written Record of Investigation Action, 16 November 2010, D64.1.49.
[139] ICP's Appeal, para. 51. *See* Rogatory Letter Completion Report, 10 February 2011, D2/1; Recapitulative List of Documents, 10 February 2011, D2/1.1.
[140] Recapitulative List of Documents, 10 February 2011, D2/1.1.
[141] *See* Written Record of Investigation Action, 15 June 2010, D64.1.1; Written Record of Investigation Action, 15 June 2010, D64.1.13; Written Record of Investigation Action, 27 July 2010, D64.1.14; Written Record of Investigation Action, 3 August 2010, D64.1.16; Written Record of Investigation Action, 3 September 2010, D64.1.17; Written Record of Investigation Action, 16 September 2010, D64.1.20; Written Record of Investigation Action, 21 September 2010, D64.1.21; Written Record of Investigation Action, 16 November 2010, D64.1.49.
[142] *See* Written Record of Investigation Action, 20 June 2010, D2/24.

documents that also happened to be attached to the eight investigation reports, based on their review of Case 002 materials,[143] simply shows that they acted properly and in good faith in conducting a genuine and effective investigation.

30. *The CIJs investigated expeditiously* The ICP mischaracterizes the NCIJ's and ICIJ Blunk's assessment of the ECCC's personal jurisdiction over Mr. MEAS Muth, after a 20-month investigation, as "preliminary."[144] On 29 April 2011, personal jurisdiction was not a novel legal issue for the CIJs. The NCIJ had investigated Duch for 10 months[145] and determined that he was most responsible.[146] He had also investigated NUON Chea, KHIEU Samphân, IENG Sary, and IENG Thirith for 30 months[147] and determined that they were senior leaders or, in the alternative, most responsible.[148]

31. In conducting a genuine and effective investigation, the CIJs were required to not only establish the facts, but also identify those responsible.[149] While investigating all the facts of which they were seized, the NCIJ and ICIJ Blunk conducted an "in-depth analysis of the origin and meaning of the term 'most responsible'" and developed factors "based on the ECCC Law, and the jurisprudence of international tribunals."[150] They were required to remain satisfied that they had jurisdiction to proceed with their investigation[151] because to "proceed without jurisdiction would strike at the root of the ECCC's mandate."[152]

32. In balancing the results of their investigation against the factors they devised to assess personal jurisdiction, the NCIJ and ICIJ Blunk reached the conclusion that it was "doubtful" that Mr. MEAS Muth fell within the ECCC's personal jurisdiction and

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[143] Note on the Placement of Documents from Case File 002 on Case File 003, 5 April 2011, D4; Annex: List of Documents to be Transferred from CF002 to CF003, 5 April 2011, D4.1.
[144] ICP's Appeal, para. 46.
[145] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order indicting KAING Guek Eav alias Duch, 8 August 2008, D99 ("Case 001 Closing Order"), paras. 4, 7.
[146] Case 001 Closing Order, para. 129.
[147] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427 ("Case 002 Closing Order"), paras. 3, 13.
[148] Case 002 Closing Order, paras. 1327-28.
[149] *See e.g.*, *Armani Da Silva v. The United Kingdom*, ECtHR App. No. 5878/08, Judgment, 30 March 2016, para. 233.
[150] Thomas Miller, *KRT judge talks court controversies*, PHNOM PENH POST, 18 August 2011, *available at* https://www.phnompenhpost.com/national/krt-judge-talks-court-controversies.
[151] Case 001 Appeal Judgement, paras. 34, 37. *See also* Répertoire de droit pénal et de procédure pénale (Dalloz), Frédérique Agostini, Compétence (February 2005, updated February 2007), para. 213: "Comme toute juridiction pénale, le juge d'instruction a le droit mais aussi le devoir, une fois qu'il est saisi, de vérifier sa compétence territoriale, matérielle et personnelle." [unofficial translation: "Like any criminal court, the investigating judge has the right but also the duty, once seized, to ascertain his territorial, subject-matter, and personal jurisdiction"] (Attachment 8).
[152] Case 001 Appeal Judgement, para. 34.

"unanimously agreed" not to charge him.[153] Without charging him, they could not have indicted him.[154] The standard they had to meet to consider their investigation complete was that of necessary materials allowing them to decide *whether or not* to issue an indictment;[155] not that of "sufficient evidence to indict,"[156] which would have required them to continue investigating *until* they could have issued an indictment. Because they were not satisfied that Mr. MEAS Muth fell within the ECCC's jurisdiction, they could not have investigated further. Any investigative action taken in excess of their jurisdiction would have been null and void.[157] It would also have been an injudicious use of their Office's resources, which was also in the midst of investigating IM Chaem, AO An, and YIM Tith.

33. ***The Notice of Conclusion jointly issued by the NCIJ and ICIJ Blunk was final and was not voided by Reserve ICIJ Kasper-Ansermet reopening the investigation*** Because the CIJs enjoy equal status,[158] "are independent in the way they conduct their investigation"[159]

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[153] Dismissal Order, para. 53. The CIJs have the power, but not the obligation, to charge a Suspect. *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1, para. 10.

[154] *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, paras. 35-36. As a pre-requisite for indictment, the CIJs may only charge a Suspect if it is established that there is "clear and consistent evidence" that he or she may be criminally responsible for the commission of crimes within the scope of their investigation. *See* Rule 55(4); *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1, para. 10.

[155] *See* Droit et pratique de l'instruction préparatoire (Dalloz), Christian Guéry and Pierre Chambon, Formalités de fin de procédure (2018-19), para. 612.11: "La procédure est complète lorsqu'elle réunit les éléments nécessaires pour décider s'il y a lieu de prononcer la mise en prévention de l'inculpé et pour déterminer la juridiction compétente." [unofficial translation: "The procedure is complete when it gathers the elements necessary to decide whether or not to issue an indictment against the charged person and to determine the competent jurisdiction"] (Attachment 10).

[156] *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. 36.

[157] Droit et pratique de l'instruction préparatoire (Dalloz), Christian Guéry and Pierre Chambon, Obstacles à la poursuite de l'instruction (2018-19), para. 611.11: "Cette vérification s'impose, car la déclaration d'incompétence entraîne l'annulation des actes de l'instruction." [unofficial translation: "This verification is required, because a declaration of incompetence leads to the annulment of the investigative acts taken"] (Attachment 9); Cass. Crim., 26 June 1995, 95-82.333: "L'incompétence du juge est une cause de nullité des actes accomplis en dehors de ses attributions légales et peut être soulevée en tout état de la procédure." [unofficial translation: "The judge's incompetence is a cause for annulment of the acts accomplished in excess of his legal attribution and can be raised at any stage of the proceedings"] (Attachment 7); Cass. Crim, 25 May 1993, 93-80.079: "L'exception d'incompétence étant accueillie, la cassation entraine, par voie de conséquence, l'annulation de la procédure." [unofficial translation: "Because the challenge to the judge's competence is granted, the cassation leads, by way of consequence, to the annulment of the proceedings"] (Attachment 6). *See also* Rule 76.

[158] Agreement, Art. 5(1); Establishment law, Art. 27 new.

[159] *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.

and have independent discretion in deciding when to conclude their investigation,[160] the NCIJ was not required to consider evidence gathered after 29 April 2011 to reach his personal jurisdiction determination simply because the investigation was reopened or continued by successive ICIJs. The ICP fails to substantiate his claims that the Notice of Conclusion "simply lapsed" when Reserve ICIJ Kasper-Ansermet reopened the investigation[161] and was voided by the investigative actions carried out by ICIJ Harmon and ICIJ Bohlander.[162] Even if the NCIJ considered evidence after 29 April 2011, including evidence concerning genocide,[163] it would not have altered his personal jurisdiction determination (*see infra* Response to Ground G (paras. 89-92)).

34. The ICP concedes that, from the moment "any denial had been litigated and the appeal process exhausted" in relation to the Notice of Conclusion, the NCIJ was entitled to issue his Forwarding Order for the Co-Prosecutors to file their Final Submission.[164] After the NCIJ and ICIJ Blunk jointly issued their Notice of Conclusion on 29 April 2011, the ICP had 15 days to request additional investigative actions,[165] which the CIJs had discretion to deny[166] in light of their "familiarity with the investigation and the case file."[167] The NCIJ's and ICIJ Blunk's denial of the ICP's requests for investigative actions[168] stood and the Notice of Conclusion became final after the PTC dealt with the ICP's Appeals on 2 and 15 November 2011.[169] The NCIJ did not "immediately" issue his Forwarding Order[170] as provided by the Rules,[171] because he considered that to do so without first discussing the

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[160] Rule 66(1); Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 5.
[161] ICP's Appeal, para. 38.
[162] ICP's Appeal, para. 40.
[163] *See* ICP's Appeal, paras. 60-62.
[164] *See* ICP's Appeal, para. 36.
[165] Rule 66(1).
[166] *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. 21.
[167] *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC33), Decision on Appeal Against the Decision on [REDACTED] Sixth Request for Investigative Action, 16 March 2017, D276/1/1/3, paras. 12, 22. *See also 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. 21: "The parties can suggest, but not oblige, the [CIJs] to undertake investigative actions."
[168] Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 7 June 2011, D20/3; Decision on International Co-Prosecutor's Re-Filing of Three Investigative Requests in Case 003, 27 July 2011, D26.
[169] 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.
[170] Forwarding Order dated 07 February 2013, 7 February 2013, D52.
[171] Rule 66(4).

status of the investigation with a duly-appointed ICIJ would have been a "rushed action that could lead to a violation of procedural principles."[172]

35. While the Rules provide that the Co-Prosecutors issue their Final Submission where they "consider, like the [CIJs], that the investigation has been concluded,"[173] the ICP was not permitted to frustrate the proceedings by refusing to issue his Final Submission.[174] It would effectively allow him to paralyze the proceedings at will, stripping the CIJs of their independent discretionary authority over the investigation[175] and diminishing the PTC's hierarchical role in deciding upon appeals against the CIJs decisions.[176] The NCIJ had discretion to decide when to issue his Closing Order.[177] Bearing in mind the interests of

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[172] ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, https://www.eccc.gov.kh/en/node/17495. *See also* 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). On the same day, the NCIJ issued the Forwarding Order, considering the investigation complete since 29 April 2011. *See* Forwarding Order dated 07 February 2013, 7 February 2013, D52.

[173] Rule 66(5).

[174] International Co-Prosecutor's Response to Forwarding Order of 7 February 2013, 8 February 2013, D52/1. *Compare* Notice of Conclusion of Judicial Investigation against MEAS Muth, 10 January 2017, D225, para. 7 (in which ICIJ Bohlander provided the Parties the opportunity to request additional investigative actions within 30 days); Forwarding Order Pursuant to Rule 66(4), 25 July 2017, D256, para. 14 (in which ICIJ Bohlander informed the Co-Prosecutors that they had three months to issue their Final Submissions). *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Forwarding Order, 19 July 2010, D385, EN 00564272: "Considering that we have now decided upon all of the requests for investigative action filed with us; that all investigative action that was accepted has now been conducted and rejection orders issued for those requests which were refused; and that the Pre-Trial Chamber has disposed of all the outstanding appeals resulting from such Orders; **Hereby** forward the Case File of the judicial investigation to the ECCC Co-Prosecutors for the purposes of their final submission." (bold in original).

[175] Rule 55(5); *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; *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; *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.

[176] *See* Rule 73(a) (providing that the PTC has sole jurisdiction over appeals against decisions of the CIJs); Rule 77(13) (providing that PTC decisions are not subject to appeal). *See also* Decision on MEAS Muth's Appeal against the Co-Investigating Judges' Constructive Denial of Fourteen of MEAS Muth's Submissions to the [Office of the Co-Investigating Judges], 23 April 2014, D87/2/2, para. 27 (recognizing the binding character of PTC decisions on the CIJs, supported by the "jurisdictional hierarchy of the [PTC] over the [CIJs] under the ECCC legal system"). At the time the ICP was requested to issue his Final Submission, the PTC had dealt with all appeals concerning the NCIJ's and ICIJ Blunk's denial of the ICP's requests for investigative actions. *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.

[177] French Code of Criminal Procedure, Art. 175(VII): "A l'issue, selon les cas, du délai d'un mois ou de trois mois prévu [pour le procureur de la République pour adresser ses réquisitions motivées au juge d'instruction] … le juge d'instruction peut rendre son ordonnance de règlement, y compris s'il n'a pas reçu de réquisitions ou d'observations dans ces délais." [unofficial translation: "At the expiry of the one- or three-month time limit [for

the Parties,[178] the NCIJ patiently waited for the reopened investigation to conclude until he and ICIJ Bohlander simultaneously issued separate Closing Orders based on the results of their respective investigations.

36. The ICP erroneously claims that the Notice of Conclusion "simply lapsed" with the reopening of the investigation.[179] Because the CIJs have independent discretion in deciding when to conclude their investigation,[180] the reopening of the investigation by Reserve ICIJ Kasper-Ansermet had no bearing on the finality of the Notice of Conclusion for the NCIJ, which remained in effect so long as he did not carry out further investigative action.[181] While Reserve ICIJ Kasper-Ansermet was entitled to exercise his inherent discretionary authority to unilaterally reconsider the Notice of Conclusion and reopen the investigation before the issuance of the Closing Orders, the NCIJ was equally entitled to exercise his inherent discretionary authority *not* to reconsider it.[182]

37. The actions carried out by ICIJ Harmon and ICIJ Bohlander were not "in themselves sufficient to void the Notice of Conclusion" issued on 29 April 2011 either.[183] After the reopening of the investigation, all future ICIJs had independent discretion to carry out any investigation they deemed necessary to ascertain the truth until they considered their investigation complete.[184] The Notice of Conclusion was not voided given that the investigation against Mr. MEAS Muth was unilaterally reopened,[185] that it continued pursuant to a disagreement between the NCIJ and ICIJ Harmon concerning the status of

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the Prosecutor to issue his final submission to the investigating judge], as applicable, … the investigating judge can issue his closing order, even if he has not received any submission or observation within this time limit"] (Attachment 5). *See also* Droit et pratique de l'instruction préparatoire (Dalloz), Christian Guéry and Pierre Chambon, Formalités de fin de procédure (2018-19), para. 612.61: "Le juge d'instruction qui ne reçoit pas de réquisitions dans le délai prescrit (un ou trois mois) peut rendre l'ordonnance de règlement." [unofficial translation: "The investigating judge who does not receive any submission within the prescribed time limit (one or three months) can issue his closing order"] (Attachment 10).

[178] Dismissal Order, para. 6.

[179] ICP's Appeal, para. 38.

[180] Rule 66(1); Decision by the International Co-Investigating Judge to Place Case No. 002 Transcripts on the Case File, 7 February 2013, D53/2, para. 5.

[181] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Order on Request for Adoption of Certain Procedural Measures, 25 November 2009, D235/2, para. 9. *See e.g.*, Second Notice of Conclusion of Judicial Investigation against MEAS Muth, 24 May 2017, D252; *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Second Notice of Conclusion of Judicial Investigation against AO An, 29 March 2017, D334/2, paras. 12-16.

[182] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC03), Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25.

[183] ICP's Appeal, para. 40.

[184] *See supra* paras. 27, 32.

[185] *See* Order on Resuming the Judicial Investigation, 2 December 2011, D28.

the investigation,[186] that ICIJ Bohlander issued his Notice of Conclusion noting all disagreements registered with the NCIJ,[187] and that the NCIJ did not carry out further investigative action that would have required him to issue another Notice of Conclusion.

38. The ICP misleads in claiming that the Notice of Conclusion was voided because Mr. MEAS Muth never argued that the investigation had terminated on 29 April 2011[188] and the PTC unanimously considered 10 written records of interview taken after 29 April 2011 "permissible."[189] It is irrelevant to supporting his claim that the NCIJ was required to consider the evidence gathered after the reopening of the investigation. It simply shows that the reopened investigation was allowed to proceed until ICIJ Bohlander considered his investigation complete, that Mr. MEAS Muth exercised his fundamental fair trial rights to participate in the reopened investigation, and that the PTC exercised its role as an appellate chamber.

39. *In sum*, simply because the investigation was reopened and successive ICIJs gathered additional materials they deemed necessary to ascertain the truth neither rendered the investigation concluded by the NCIJ and ICIJ Blunk on 29 April 2011 incomplete nor voided their jointly issued Notice of Conclusion. As they were required, the CIJs acted diligently, properly, and expeditiously in conducting a genuine and effective investigation into all the facts of which they were seized. They collated the materials necessary to consider their investigation complete, having established the facts and identified that Mr. MEAS Muth cannot be held responsible for them because the ECCC lacks personal jurisdiction over him. As such, the NCIJ was not required to consider the evidence gathered after the reopening of the investigation to correctly exercise his discretion. Having failed to demonstrate any error of law in the NCIJ's decision not to consider the evidence after 29 April 2011 that would invalidate his personal jurisdiction determination, or that the NCIJ's decision not to consider this evidence was so unfair or unreasonable as to constitute an abuse of discretion, the ICP fails to demonstrate how, individually or collectively, the NCIJ committed any errors of law or abuses fundamentally determinative of his exercise of discretion. Ground B should be dismissed.

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[186] *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.
[187] Second Notice of Conclusion of Judicial Investigation against MEAS Muth, 24 May 2017, D252.
[188] ICP's Appeal, para. 41.
[189] ICP's Appeal, para. 42.

B. Response to Ground C (in part): The NCIJ did not err in law in considering and issuing a decision on all the facts within the scope of Case 003

40. The ICP concedes that "facts" are not synonymous with "crime sites"[190] yet conflates and confuses by claiming that the NCIJ should have issued a decision on each *crime site* forming part of the *facts* of which he was seized – in addition to the facts themselves – to reach his personal jurisdiction determination.[191] The NCIJ correctly considered and issued a decision on all the facts of which he was seized. He was not required to make explicit findings on each individual crime site forming part of the facts so long as he considered them in deciding on the facts of which he was seized. The remainder of the ICP's arguments in Ground C, alleging an error in the NCIJ's decision not to legally characterize crimes to reach his personal jurisdiction determination,[192] will be addressed in Response to Ground A to avoid repetition[193] because they overlap with arguments raised in Ground A.[194]

41. Acknowledging that Tuek Sap, Durian Plantation, Bet Trang, Kang Keng, *Centre d'Instruction*, and other Ream area worksites and execution sites form part of the facts of which the CIJs were seized,[195] the ICP concedes that crime sites are mere circumstances of the facts within the scope of the investigation.[196] This is consistent with the PTC International Judges' opinion that crime sites not "explicitly enfolded by the Introductory Submission"[197] do not constitute new facts[198] if they are linked to facts already included in the scope of the investigation.[199]

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[190] ICP's Appeal, para. 64.
[191] ICP's Appeal, paras. 63-69.
[192] *See* ICP's Appeal, paras. 70-82.
[193] *See infra* paras. 45-54.
[194] *See* ICP's Appeal, paras. 23-34.
[195] ICP's Appeal, paras. 65-69. Specifically: Tuek Sap is "an integral part" of crimes committed by the DK Navy (para. 66); Durian Plantation falls "within the same facts" (para. 66); Ream area worksites and execution sites are "also indivisibly linked" to crimes committed by the DK Navy (para. 67); a "clear direct nexus" exists between Tuek Sap and purges of RAK divisions (para. 66); Kang Keng and Bet Trang fall "squarely within" purges of RAK divisions (para. 67); Durian Plantation and Centre d'Instruction are "intrinsically connected" to purges of RAK division (para. 67).
[196] *See* ICP's Appeal, para. 64, fn. 238 (footnotes omitted).
[197] Decision on MEAS Muth's Appeal Against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (opinion of Judges Beauvallet and Bwana), para. 19.
[198] Decision on MEAS Muth's Appeal Against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (opinion of Judges Beauvallet and Bwana), paras. 55-56.
[199] *See e.g.*, Decision on MEAS Muth's Appeal Against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (opinion of Judges Beauvallet and Bwana), paras. 33, 46.

42. The ICP misreads the Dismissal Order in claiming that the NCIJ failed to consider crime sites and criminal events in making factual findings.[200] The NCIJ was required to issue a decision "on all, but only, the facts that were part of their investigation."[201] Exercising due diligence, the NCIJ listed all the facts of which he was seized,[202] made findings on them,[203] and cited evidence concerning all the crime sites forming part of the facts.[204] In the context of the ECCC's voluminous investigations, it would be impracticable for the CIJs to make explicit findings on each crime site forming part of the facts of which they are seized by the "content of hundreds of annexes" attached to the Introductory Submission, as the ICP claims the NCIJ should have done.[205]

43. Even if the PTC were to find that the NCIJ was required to make explicit findings on each individual crime site, the PTC would lack the resources necessary to review the contents of the Case File and make findings itself because it is neither "established" nor "equip[p]ed to conduct investigations" in the context of the unique nature of ECCC cases.[206] The only sensible course of action would be to remand the Case File to the NCIJ for him to make the required findings[207] in light of his familiarity with the investigation.

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[200] ICP's Appeal, para. 63.

[201] *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, para. 37. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1, para. 10.

[202] Dismissal Order, para. 54, fn. 64.

[203] *See* Dismissal Order, paras. 55-353. *See also* MEAS Muth's Appeal, para. 24.

[204] *See e.g.*, Dismissal Order, fns. 526, 547-48, 551, 552, 562, 565, 614 (citing Written Record of Interview of Nhoung Chrong, 24 August 2010, D2/6 (Durian Plantation)); fns. 570, 646-47, 828, 891, 893-95, 897, 899, 900-01, 904, 908, 909, 912-13 (citing Written Record of Interview of Touch Soeuli, 10 November 2010, D2/15 (Durian Plantation)); fns. 568, 586, 618, 621 (citing Written Record of Touch Soeuli, 11 November 2010, D2/16 (Durian Plantation)); fn. 192 (citing Written Record of Interview of Hem Sambath, 17 July 2008, D4.1.477 (Tuek Sap)); fns. 595, 898 (citing OCP Interview with Pen Sarin, 13 August 2008, D1.3.13.8 (Tuek Sap)); fns. 504, 662, 693, 700, 817-18 (citing Report titled "Reported to Brother 89," 22 February 1976, D1.3.12.3 (Tuek Sap)); fns. 623-24, 627-28, 632-35, 638-40, 642, 682, 825, 827, 931, 954-58, 962 (citing Written Record of Interview of Say Born, 9 September 2010, D2/10 (Ream area worksites); fns. 550, 565, 567, 570, 583-84, 586, 590, 592-93, 612, 616-17, 619, 623, 625-26, 629-30, 636, 641, 722, 939, 954, 963, 967 (citing Written Record of Interview of Say Born, 7 September 2010, D2/9 (Ream area worksites)); fns. 128, 260 (citing Written Record of Interview of Sau Khon, 25 October 2009, D4.1.795 (Ream area worksites)).

[205] ICP's Appeal, para. 64.

[206] *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.

[207] *See* Droit et pratique de l'instruction préparatoire (Dalloz), Christian Guéry and Pierre Chambon, Ordonnances de règlement (2018-19), para. 614.22: "… Le juge d'instruction, dessaisi par son ordonnance de règlement de la procédure, ne saurait poursuivre son information sur les faits qu'il aurait omis de viser dans cette ordonnance, à moins d'en être saisi à nouveau régulièrement. En un tel cas, la chambre d'accusation statuant sur l'appel de cette ordonnance, après avoir annulé celle-ci doit procéder dans les conditions prévues par l'article 206 du Code de procédure pénale, et peut donc renvoyer le dossier au même juge d'instruction, afin de poursuivre l'information sur les faits omis par l'ordonnance de règlement." [unofficial translation: "… The investigating judge, who is *functus officio* when issuing his closing order, cannot continue investigating on the facts he omitted from his

44. *In sum*, the Dismissal Order is not "legally defective"[208] because the NCIJ did not make explicit findings on each individual crime site forming part of the facts of which he was seized. Citing to evidence concerning the crime sites in making his factual findings, the NCIJ undoubtedly considered them[209] in determining that the ECCC lacks personal jurisdiction over Mr. MEAS Muth. Having failed to demonstrate any error of law in the NCIJ's consideration of the facts of which he was seized that would invalidate his personal jurisdiction determination, or that the NCIJ's decision not to make explicit findings on crime sites forming part of the facts was so unfair or unreasonable as to constitute an abuse of discretion, the ICP fails to demonstrate how, individually or collectively, the NCIJ committed any errors of law or abuses fundamentally determinative of his exercise of discretion. This part of Ground C should be dismissed.

C. Response to Grounds A and C (in part): The NCIJ did not err in law in reasoning his Dismissal Order by failing to make requisite findings and legally characterize them

45. The ICP erroneously claims that the NCIJ could not have reached his personal jurisdiction determination without first legally characterizing the factual findings he made in his Dismissal Order and the factual findings the ICP alleges he failed to make.[210] The NCIJ, having made the requisite findings to reach his personal jurisdiction determination and for the PTC to review it, was not required to legally characterize crimes and modes of liability. Even if the NCIJ erred in law as the ICP claims, it would not have been fundamentally determinative of his personal jurisdiction determination (*see infra* Response to Ground G (paras. 89-92)).

46. The ICP misinforms by asserting that only once facts have been legally characterized can the NCIJ determine whether Mr. MEAS Muth falls within the ECCC's personal jurisdiction.[211] He misinterprets the PTC's holding that, to review personal jurisdiction determinations, it "must be able to review the findings that led to it, including those

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closing order, unless he is validly seized again. In such case, the investigation chamber deciding on the appeal against the closing order, after having annulled it, must proceed in accordance with Article 206 of the Code of criminal procedure, and can therefore remand the case file to the same investigating judge for him to continue investigating the facts omitted in his closing order"] (Attachment 11).

[208] *Contra* ICP's Appeal, para. 63.

[209] *See* Case 002/01 Appeal Judgement, para. 304. *See also Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 23; *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para. 141.

[210] ICP's Appeal, paras. 20-34, 70-82.

[211] ICP's Appeal, para. 23.

regarding the existence of crimes or the likelihood of [a Suspect's] criminal responsibility."[212]

47. The PTC never held that legal characterization is a pre-requisite to a personal jurisdiction determination. Rather, the PTC insisted on the requirement that findings made in the Dismissal Order assist the PTC in reviewing CIJs' personal jurisdiction determinations.[213] In other words, the PTC requires that the Dismissal Order be reasoned, as provided by the Rules.[214] Had the PTC wished for the Dismissal Order to legally characterize crimes and modes of liability as a pre-requisite to determining personal jurisdiction, it would have explicitly used these terms, and would have cited supporting authority.[215]

48. The ICP misinforms in claiming that legal characterization is necessary because "the precise crime is important to the gravity assessment."[216] There is no "inherent hierarchy … among the crimes"[217] listed in the Establishment Law and the Agreement; all are "serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia…."[218] Even though the CIJs legally characterized crimes in relation to the facts with which IM Chaem was charged in their Dismissal Order,[219] this was not fundamentally determinative of their discretion in finding that IM Chaem is not most responsible.[220] Fundamental to the CIJs' conclusion were other factors such as IM Chaem's low hierarchical position in the Communist Party of Kampuchea ("CPK"),[221] limited contribution to the alleged joint criminal enterprise ("JCE"),[222] and the relative gravity of her acts in comparison to the gravity of the atrocities that occurred throughout DK.[223]

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[212] ICP's Appeal, para. 20, citing Case 004/1 PTC Considerations (unanimous holding), para. 26. *See also* ICP's Appeal, para. 14.
[213] Case 004/1 PTC Considerations (unanimous holding), para. 26.
[214] Rule 67(4).
[215] *See* Case 004/1 PTC Considerations (unanimous holding), para. 26.
[216] *See* ICP's Appeal, paras. 23-24.
[217] The ICTY and International Criminal Tribunal for Rwanda Appeals Chamber has repeatedly held that "no inherent hierarchy exists among the crimes over which the Tribunal has jurisdiction," i.e., war crimes, genocide, and crimes against humanity. *See Prosecutor v. Tadić*, IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000, para. 69; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 171; *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para. 375; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 590; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 367.
[218] Agreement, Art. 1; Establishment Law, Arts. 1, 2 new.
[219] Case 004/1 Closing Order, paras. 281-305.
[220] *See* Case 004/1 Closing Order, paras. 306-25.
[221] Case 004/1 Closing Order, para. 316.
[222] Case 004/1 Closing Order, para. 313.
[223] Case 004/1 Closing Order, paras. 317-18.

49. The ICP's only illustration in support of his claim that the NCIJ failed to issue a "reasoned opinion" on all the facts of which he was seized – Wat Enta Nhien – is deceptive.[224] The NCIJ found that the site was used as a security center,[225] that it may have been under the control of a Division 164 battalion,[226] that witnesses mention arrests, detention, and killings,[227] yet that there was no evidence that the 200 bodies exhumed after the end of the DK regime near the site were those of victims killed at Wat Enta Nhien,[228] and that no documents show Mr. MEAS Muth's presence during arrests or inspections at the site.[229] These findings are almost identical to those of the ICIJ[230] and enable the PTC to review the NCIJ's personal jurisdiction determination.

50. The ICP absurdly claims that, because the NCIJ does not explicitly refer to Wat Enta Nhien in the "reasoning and conclusion" section of his Dismissal Order, it is "impossible to identify the basis upon which the Dismissal Order reaches the conclusions it does."[231] The "reasoning and conclusion" section merely summarizes the Dismissal Order; it is not the sole basis for the NCIJ's personal jurisdiction determination. It would have been superfluous for the NCIJ to explicitly mention Wat Enta Nhien in this section only to repeat his findings that the evidence does not confirm that victims were killed at the site and that there is no evidence of Mr. MEAS Muth's presence at the site.

51. The ICP concedes that the NCIJ made findings in his Dismissal Order, albeit selectively listing findings concerning crimes committed by the DK Navy,[232] the policy to purge internal enemies and Mr. MEAS Muth's involvement in its creation and implementation,[233] and the policy to create and operate cooperatives and forced labor worksites and Mr. MEAS Muth's involvement in its implementation.[234] Not only do these findings place the PTC in a position to review the NCIJ's personal jurisdiction determination but, should it consider it necessary to legally characterize them, it can

[224] ICP's Appeal, paras. 21-22.
[225] Dismissal Order, para. 292.
[226] Dismissal Order, para. 297.
[227] Dismissal Order, paras. 294-95.
[228] Dismissal Order, para. 296.
[229] Dismissal Order, para. 297.
[230] Indictment, para. 429 (Wat Enta Nhien was under the control of a Division 164 battalion but evidence stating that Mr. MEAS Muth was in charge of the site is inconclusive), paras. 430-34 (Wat Enta Nhien was used as a detention center), paras. 435-36 (evidence of interrogation at the site is uncorroborated), para. 443 (there is no reliable evidence of Mr. MEAS Muth visiting the site).
[231] ICP's Appeal, para. 22.
[232] ICP's Appeal, para. 28.
[233] ICP's Appeal, paras. 29-30.
[234] ICP's Appeal, para. 31.

evidently do so given that the ICP considered them sufficiently specific to suggest legal characterizations himself.[235]

52. The ICP merely takes the opportunity to suggest additional legal characterization by repeating arguments from his Final Submission[236] to support the erroneous claim that the NCIJ failed to consider crime sites forming part of the facts of which he was seized in making factual findings (*see supra* Response to Ground C (paras. 40-44)). The ICP fails to explain why he cites his Final Submission rather than the ICIJ's findings, given that he does not appeal the Indictment and requests that Mr. MEAS Muth be sent to trial "on the basis of the Indictment."[237]

53. Even if the PTC were to consider that the NCIJ should have legally characterized crimes and modes of liability before reaching his personal jurisdiction determination, the NCIJ could not have done so. In a Closing Order, the CIJs may only legally characterize facts against a *Charged Person* for the purpose of determining whether the threshold for indictment is met.[238] The NCIJ and ICIJ Blunk did not charge Mr. MEAS Muth in relation to any fact before jointly concluding their investigation on 29 April 2011,[239] their Notice of Conclusion was not voided,[240] and the NCIJ did not charge Mr. MEAS Muth with either ICIJ Harmon[241] or ICIJ Bohlander.[242]

54. *In sum*, the NCIJ was not required to legally characterize crimes and modes of liability to reach his personal jurisdiction determination. Having made the requisite findings on all the facts of which he was seized, the Dismissal Order was sufficiently reasoned for the PTC to review the NCIJ's determination that the ECCC lacks personal jurisdiction over Mr. MEAS Muth. Having failed to demonstrate any error of law in the NCIJ's decision not to

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[235] ICP's Appeal, para. 33.
[236] ICP's Appeal, paras. 71-82.
[237] ICP's Appeal, paras. 3, 203.
[238] *See* Rules 67(1) (providing that the CIJs "shall conclude the investigation by issuing a Closing Order either indicting a *Charged Person* … or dismissing the case") (emphasis added), 67(2) (requiring that an Indictment "sets out the identity of the *Accused*" and legally characterize crimes and modes of liability) (emphasis added), 67(3)(c) (providing that the CIJs "shall issue a Dismissal Order … [*inter alia* when] there is not sufficient evidence against the *Charged Person*") (emphasis added). *See also* Droit et pratique de l'instruction préparatoire (Dalloz), Christian Guéry and Pierre Chambon, Ordonnances de règlement (2018-19), para. 614.14: "Les ordonnances de règlement indiquent la qualification légale du fait imputé à la *personne mise en examen*, et de façon précise, les motifs pour lesquels il existe ou non des charges suffisantes [pour ordonner un renvoi]." [unofficial translation: closing orders legally characterize the facts against the *charged person*, and in a precise manner, whether or not there is sufficient evidence [to indict]"] (emphasis added) (Attachment 11).
[239] *See supra* para. 32.
[240] *See supra* paras. 33-38.
[241] *See* Decision to Charge MEAS Muth *In Absentia*, 3 March 2015, D128.
[242] *See* Written Record of Initial Appearance, 14 December 2015, D174.

legally characterize crimes and modes of liability that would invalidate his personal jurisdiction determination, or that the NCIJ's decision not to legally characterize them was so unfair or unreasonable as to constitute an abuse of discretion, the ICP fails to demonstrate how, individually or collectively, the NCIJ committed any errors of law or abuses fundamentally determinative of his exercise of discretion. Ground A and the remainder of Ground C should be dismissed.

D. Response to Ground D: The NCIJ did not err in law or fact in his treatment of coercion, duress, and superior orders when determining Mr. MEAS Muth's level of responsibility

55. The ICP misconstrues the law applicable at trial and the law applicable in determining personal jurisdiction in claiming that the NCIJ erred in law and fact in considering that Mr. MEAS Muth acted under coercion, duress, and superior orders in determining his level of responsibility.[243] Both CIJs considered in their personal jurisdiction analyses that in DK, decisions were made at the top and implemented at the lower levels, that lower-level cadres tasked to disseminate and/or implement policies had narrowly defined discretion in carrying out their tasks, that a failure to follow orders would lead to severe consequences, and that the system of reporting and self-criticism created an "unsafe environment."[244] The NCIJ correctly considered Mr. MEAS Muth's level of responsibility based on his position and roles within the DK hierarchy. While coercion, duress, and superior orders are not a defense to *criminal liability*,[245] these factors can be considered for other purposes such as sentencing[246] and personal jurisdiction.[247]

56. The ICP misinforms by relying on the Supreme Court Chamber's *obiter dictum* noting that assessing the relative criminal responsibility of Khmer Rouge cadres would "amount to indirectly permitting a defence of superior orders" and frustrate Article 29 of the

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[243] ICP's Appeal, para. 83, citing Dismissal Order, paras. 97-98, 121, 166-67, 212, 216, 226, 232, 248, 252, 257, 277, 305, 316, 322, 386-87, 412, 415-16, 418, 420, 424, 425 (Mr. MEAS Muth was merely tasked with implementing and disseminating CPK policy); paras. 98, 100, 256, 284, 386, 412, 415, 420 (Mr. MEAS Muth was acting under the coercive system created by the CPK).

[244] *See* Dismissal Order, paras. 386-88. *See also* Dismissal Order, para. 420: "Cadres of all levels had to follow Party polices…. Those who did not follow or criticised these polices were accused of being traitors and smashed." *See also* Indictment, para. 39, citing Case 004/1 Closing Order, paras. 40-41.

[245] *See* ICP's Appeal, paras. 85-86.

[246] In determining Duch's sentence, the Trial Chamber considered that he failed to establish superior orders and duress as mitigating factors but placed limited weight on "the coercive climate in DK and his subordinate position within the CPK." *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188 ("Case 001 Trial Judgement"), paras. 558, 607-08.

[247] *See* Dismissal Order, paras. 386-89. *See also* Indictment, para. 38, citing Case 004/1 Closing Order, paras. 40-41.

Establishment Law.[248] The CIJs rightly rejected the Supreme Court Chamber's analysis.[249] While Article 29 of the Establishment Law states that "[t]he position or rank of any Suspect shall not relieve a person of *criminal responsibility*," it only applies to those who fall within the ECCC's personal jurisdiction. Article 29 of the Establishment Law says nothing about those who *do not* fall within the ECCC's personal jurisdiction. Contradicting his claim, the ICP concedes that Mr. MEAS Muth's "hierarchical rank … including … the hierarchical echelons above him" are relevant factors in determining his level of responsibility.[250]

57. The ICP obfuscates in claiming that if following superior orders excluded a person from being a senior leader or most responsible, no one could have been prosecuted because all could claim Pol Pot was above them and tolerated no dissent.[251] NUON Chea and KHIEU Samphân were involved in the *creation of CPK policies*.[252] Both wielded considerable authority within DK: NUON Chea was a full-rights member of the Standing Committee and CPK Deputy Secretary[253] and KHIEU Samphân was a full-rights member of the Central Committee and President of the State Presidium.[254] Duch is an anomaly. Although he did not hold a leading position in the CPK, he confessed to the crimes at S-21, was detained in a military prison,[255] and was readily available for trial. The failure to indict him would have raised questions.[256]

58. The ICP misstates the Dismissal Order in claiming that the NCIJ cited only one statement by Mr. MEAS Muth supporting an assertion that he acted under duress or coercion in implementing orders.[257] The NCIJ's finding that cadres of all levels had to follow Party policies[258] rests on other evidence of self-criticism meetings,[259] various forms for punishment applied when soldiers made mistakes,[260] and testimony that "any commander

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[248] *See* ICP's Appeal, para. 85, citing Case 001 Appeal Judgement, para. 62.
[249] Case 004/1 Closing Order, para. 9, fn. 7 citing Case 001 Appeal Judgement, para. 62 and questioning "the correctness of the reference to Article 29 [of the Establishment Law] in this context."
[250] ICP's Appeal, para. 11.
[251] ICP's Appeal, para. 84.
[252] Case 002 Closing Order, paras. 903, 916-18, 976, 1165, 1173, 1192.
[253] Case 002 Closing Order, paras. 870-71.
[254] Case 002 Closing Order, paras. 1131, 1135.
[255] Case 001 Trial Judgement, Annex I, para. 1.
[256] *See* Heder, Personal Jurisdiction, p. 27.
[257] ICP's Appeal, para. 88.
[258] Dismissal Order, para. 420.
[259] Dismissal Order, para. 227, citing Written Record of Interview of Kev Kin, 12 February 2009, D4.1.504; Report titled "Presentation by the Comrade Party Secretary during the session of the first Meeting of the Council of Ministers", 22 April 1976, D4.1.739.
[260] Dismissal Order, para. 228, citing Written Record of Interview of Sous Siyat, 17 January 2008, D4.1.1138; Written Record of Interview of Prak Yoeun, 4 March 2008, D4.1.1151.

who disobeyed or was considered traitorous would be arrested and later executed."[261] The ICP misleads in claiming that the NCIJ omitted a portion of Mr. MEAS Muth's statement[262] in which he stated that, like Duch and Herman Göring, he had to follow orders.[263] The ICP's assertion only serves to draw inapposite comparisons between Mr. MEAS Muth, Duch, and Göring for emotive effect.

59. The ICP misrepresents Mr. MEAS Muth's other statements in claiming that they "show his absolute commitment and loyalty to the Party."[264] Both CIJs found that Son Sen instructed subordinates on the Party line and policies.[265] MEAS Muth repeated the Party line because to do otherwise would have branded him an opponent of the revolution.[266] Both CIJs considered that the CPK's chain of command and the principle of secrecy did not permit, encourage, or facilitate the "free, egalitarian horizontal exchange" of information by those under the senior leaders[267] and that the DK system "thrived, on the outside as much as on the inside, on a rule by terror and fear through the intentional very use of cruelty and mass atrocities."[268]

60. The ICP misleads in claiming that the NCIJ's findings in Case 001 "provide a stark rebuttal of the assertion that acting pursuant to superior orders removes an individual from the category of most responsible,"[269] citing portions of Duch's Indictment that are not the CIJs' findings but Duch's own self-serving statements.[270] In finding Duch most responsible, the CIJs considered *inter alia* that Duch selected his own subordinates;[271] that he decided to move prisoners to the current site of S-21;[272] that from the time he became S-21 Chairman, "specific instructions to and from [S-21] regarding security matters were conveyed

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[261] Dismissal Order, para. 228, citing Written Record of Interview of Witness Chhouk Rin, 21 May 2008, D4.1.408.
[262] Transcript titled "Interview with Meas Muth, former secretary of central committee for Division 164," 20 July 2001, D1.3.33.16.
[263] ICP's Appeal, para. 88.
[264] ICP's Appeal, para. 90, citing Telegram by MEAS Muth titled "Telegram 00 – Radio Band 354 – Respectfully Presented to the Office 870 Committee," 31 December 1977, D1.3.34.60, EN 00184995; Military Meeting Minutes titled "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments," 9 October 1976, D1.3.27.20, EN 00940350-00940351; Erika Kinetz and Yun Samean, Let Bygones be Bygones, CAMBODIA DAILY, 1 March 2008, D1.3.7.8, EN 00165821.
[265] *See* Dismissal Order, para. 164; Indictment, para. 178.
[266] *See* Written Record of Interview of Ke Pich Vannak, 4 June 2009, D4.1.520, EN 00346160. *See also* Case 004/1 Closing Order, para. 40.
[267] Case 004/1 Closing Order, para. 41.
[268] Case 004/1 Closing Order, para. 324.
[269] ICP's Appeal, para. 108.
[270] ICP's Appeal, para. 108, citing Case 001 Closing Order, paras. 31, 33, 44, 51-53, 68, 70, 85, 99, 111.
[271] Case 001 Closing Order, para. 29.
[272] Case 001 Closing Order, para. 27.

exclusively through him;"[273] that Duch personally played a role in decisions to arrest;[274] that Duch "admitted, to different degrees, that he ordered the torture of prisoners;"[275] and that there was an "implicit standing order" from Duch to kill prisoners at S-21.[276]

61. The ICP fails to substantiate his claim that Mr. MEAS Muth committed crimes willingly and enthusiastically without need for coercion or duress.[277] Both CIJs considered that Mr. MEAS Muth was subject to orders from Son Sen and the General Staff;[278] that decisions were implemented by the lower levels on pain of personal consequence;[279] and that openly discussing the top echelon's instructions "could easily have been considered by the superior levels as the first step to insubordination."[280]

62. The ICP fails to substantiate his claim that Son Sen delegated to Mr. MEAS Muth his authority to arrest and smash.[281] Neither CIJ found that Son Sen delegated any authority to Mr. MEAS Muth. While the ICIJ, in legally characterizing crimes, stated that Mr. MEAS Muth had "specific delegated authority to conduct the purge of Division 117,"[282] he made no factual finding supporting this conclusion. Instead, he found that Mr. MEAS Muth was "*assigned by Son Sen* to assist or command specific military operations for the General Staff."[283] None of the evidence cited by the ICIJ in this finding supports a conclusion that Son Sen delegated any authority to Mr. MEAS Muth; only that Son Sen *tasked* Mr. MEAS Muth.[284]

63. The ICP fails to support his claim that Mr. MEAS Muth established and participated in mechanisms for identifying perceived enemies and ordered their arrest and transfer to S-

[273] Case 001 Closing Order, para. 42.
[274] Case 001 Closing Order, paras. 55-59.
[275] Case 001 Closing Order, para. 98.
[276] Case 001 Closing Order, para. 107.
[277] ICP's Appeal, paras. 92-97.
[278] Dismissal Order, paras. 121, 166, 212, 216, 226, 252, 257, 316, 322, 415, 424; Indictment, paras. 150, 157, 270.
[279] Dismissal Order, paras. 386-89; Indictment, para. 39, citing Case 004/1 Closing Order, paras. 37-41.
[280] Dismissal Order, paras. 386-89; Indictment, para. 39, citing Case 004/1 Closing Order, para. 39.
[281] ICP's Appeal, paras. 98-102.
[282] Indictment, para. 573.
[283] Indictment, para. 163 (emphasis added).
[284] *See* Indictment, para. 163, fn. 334, citing Written Record of Interview of Liet Lan, 24 October 2013, D54/29, A13 ("I was just aware of [Mr. MEAS Muth's] new role as an assistant at the time the Vietnamese were about to arrive in Cambodia"); Written Record of Interview of Moeng Vet, 13 February 2014, D54/62, A22, A25 (A22: "As I knew it, MEAS Mut was Deputy of the Military General Staff, meaning that he was the deputy of Son Sen." A25: "From what I knew, in the name of Deputy of the General Staff, he had to go to examine the situation locations where disputes occurred along the border"); Written Record of Interview of Prum Sarat, 29 April 2014, D54/87, A73-75 (stating that Saroeun told him that Mr. MEAS Muth went to Memot District in Kampong Cham, on Son Sen's command, and that Son Sen ordered Mr. MEAS Muth to lead troops to suppress rebels in the East Zone).

21 security center.[285] Neither CIJ found that Mr. MEAS Muth had any independent authority to arrest and transfer to S-21.

64. *In sum*, the NCIJ correctly considered Mr. MEAS Muth's level of responsibility based on his position and roles within the DK hierarchy. Even were the PTC to apply the ICTY's inapposite referral factors the ICP suggests to determine Mr. MEAS Muth's level of responsibility,[286] the referral jurisprudence supports the NCIJ's analysis.[287] The NCIJ analyzed Mr. MEAS Muth's positions within the overall chain of responsible actors,[288] his superior-subordinate relationship with other DK cadres such as Son Sen,[289] his degree of authority,[290] whether he orchestrated or merely implemented the orders of others,[291] and his actual role and degree of participation in the alleged crimes.[292] Having failed to demonstrate any error of law in the NCIJ's treatment of coercion, duress, and superior orders that invalidates his personal jurisdiction determination, that the NCIJ reached any factual findings no reasonable CIJ could have reached that occasion a miscarriage of justice, or that the NCIJ's analysis of Mr. MEAS Muth's level of responsibility was so unfair or unreasonable as to constitute an abuse of discretion, the ICP fails to demonstrate how, individually or collectively, the NCIJ committed any errors or abuses fundamentally determinative of his exercise of discretion. Ground D should be dismissed.

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[285] ICP's Appeal, paras. 103-07.
[286] ICP's Appeal, para. 11.
[287] Dismissal Order, paras. 409-30.
[288] *See* Dismissal Order, paras. 111, 117, 121, 143, 153 163, 187-88, 416, 420. *See also Prosecutor v. Rašević and Todović*, IT-97-25/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annexes I and II, 8 July 2005, para. 23.
[289] *See* Dismissal Order, paras. 153, 417. *See also Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential and Partly Ex Parte Annexes, 17 November 2006, para. 20; *Prosecutor v. Rašević & Todović*, IT-97-25/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annexes I and II, 8 July 2005, para. 23.
[290] *See* Dismissal Order, paras. 122, 141, 169, 187-88, 416, 418. *See also Prosecutor v. Dragomir Milošević*, IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, 8 July 2005, para. 22; *Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 20; *Prosecutor v. Lukić and Lukić*, IT-98/32/1-AR11*bis*.1, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, para. 21.
[291] *See* Dismissal Order, paras. 416, 420, 422, 424. *See also Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 20.
[292] *See* Dismissal Order, paras. 220-25, 425-26. *See also Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 20; *Prosecutor v. Lukić and Lukić*, IT-98/32/1-AR11*bis*.1, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, para. 21; *Prosecutor v. Ademi and Norac*, IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, 14 September 2005, paras. 28, 30.

E. Response to Ground E: The NCIJ did not err in law or fact in his treatment of Mr. MEAS Muth's direct participation in and proximity to crimes when determining his level of responsibility

65. The ICP misleadingly cites inapposite jurisprudence on the law on modes of liability at trial[293] to support his assertion that the NCIJ erred in law and fact in his treatment of direct participation in and proximity to crimes when determining Mr. MEAS Muth's level of responsibility.[294] The NCIJ correctly considered Mr. MEAS Muth's level of responsibility based on his actual participation in the commission of crimes. While participation in crimes does not require physical proximity, the Charged Person's actual participation in the commission of crimes – i.e. his or her underlying acts and conduct – is a relevant factor to consider in determining personal jurisdiction,[295] just as it is in sentencing.[296]

66. The ICP misleads in claiming that the "conduct that contributes to the commission of international crimes can be, and for those most responsible often is, geographically and temporally removed from the physical act of commission itself."[297] While physical participation is not required for conviction under most of the modes of liability, this is not the basis upon which the NCIJ premised his Dismissal Order. The NCIJ, aside from finding that Mr. MEAS Muth was not present at many of the crime sites,[298] focused on the "scope of [Mr. MEAS Muth's] direct acts *and the effective authority of those acts*,"[299] his "effective hierarchical authority," and his "level of … participation in the policy-making and/or policy implementation."[300] The NCIJ found that Mr. MEAS Muth was primarily in charge of political affairs and his activities consisted of disseminating CPK policy.[301]

67. The ICP misrepresents the Dismissal Order in claiming that the NCIJ created an "illegal dichotomy" between senior leaders and those most responsible.[302] The NCIJ found, in line

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[293] ICP's Appeal, para. 115, fns. 462-69.
[294] ICP's Appeal, paras. 113-14.
[295] *See* Case 004/1 Closing Order, para. 38.
[296] *See* Case 001 Trial Judgement, para. 596 (in evaluating the gravity of the crimes, the Trial Chamber found that it "should consider the role of the Accused in their commission); *NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313 ("Case 002/01 Trial Judgement"), para. 1067 ("The sentence must be proportionate and individualised in order to reflect the culpability of the accused based on an objective, reasoned and measured analysis of the accused's conduct and its consequential harm. These principles are also recognized in Cambodian law").
[297] ICP's Appeal, para. 115.
[298] Dismissal Order, paras. 297, 305, 311.
[299] Dismissal Order, para. 368 (emphasis added).
[300] Dismissal Order, para. 369.
[301] Dismissal Order, paras. 416, 422.
[302] ICP's Appeal, para. 117.

with Supreme Court Chamber jurisprudence,[303] that senior leaders "who did not actively participate" in the DK's criminal activities may fall outside the scope of the ECCC's personal jurisdiction, while "anyone in the lower ranks may be regarded as those who were most responsible, depending on their personal participation in brutal acts."[304] The NCIJ also did not "ignore the recognised principle" that in assessing Mr. MEAS Muth's level of responsibility, his "hierarchical rank or position … must be considered."[305]

68. The ICP misleads in claiming that the NCIJ's findings on personal jurisdiction in Case 002 contradict those in Case 003 because the CIJs did not find that the four Charged Persons directly participated in crimes.[306] As the ICP concedes, the CIJs found the Charged Persons in Case 002 were senior leaders and/or most responsible "due to their *personal participation in the implementation* of the CPK's common purpose."[307] More specifically, the CIJs found that the Charged Persons in Case 002 were involved in the *creation of CPK policies* that set into motion the crimes occurring throughout DK;[308] a finding neither CIJ made regarding Mr. MEAS Muth. The CIJs similarly focused on Duch's "formal and effective hierarchical authority and his personal participation" in crimes at S-21 – i.e. his "presence and participation in all aspects of the security complex" – in finding him most responsible.[309]

69. The ICP misleads in claiming that "in none of the decisions by the ICTY Referral Bench where the individual was confirmed to be most responsible was any substantive weight given to proximity to the crimes or direct perpetration."[310] He omits other ICTY Referral Bench decisions considering the Accused's "actual role and degree of participation in each

[303] Case 001 Appeal Judgement, para. 57.
[304] Dismissal Order, para. 368. *See also* Indictment, para. 39, citing Case 004/1 Closing Order, paras. 38-39.
[305] ICP's Appeal, para. 117. *See supra* para. 64.
[306] ICP's Appeal, para. 118.
[307] Case 002 Closing Order, paras. 1327-28 (emphasis added).
[308] *See supra* para. 57, fn. 25; *infra* para. 87, fn. 373.
[309] Case 001 Closing Order, paras. 129, 160.
[310] ICP's Appeal, para. 119, citing *Prosecutor v. Dragomir Milošević*, IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, 8 July 2005, paras. 21-23; *Prosecutor v. Lukić and Lukić*, IT-98/32/1-AR11bis.1, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, paras. 21-23. *Prosecutor v. Delić,* IT-04-83-PT, Decision on Motion for Referral of Case Pursuant to Rule 11 *bis,* 9 July 2007, paras. 20-25.

crime,"[311] including the Accused's actual participation in alleged JCEs (i.e. their underlying acts and conduct).[312]

70. The ICP fails to substantiate his claim that Mr. MEAS Muth played a direct and active role in the commission of crimes.[313] Neither CIJ found that Mr. MEAS Muth played a direct or active role in the commission of crimes.[314] The ICIJ, who indicted Mr. MEAS Muth, found that Mr. MEAS Muth was absent from many crime sites and criminal events alleged in Case 003.[315]

71. *In sum*, the NCIJ correctly considered Mr. MEAS Muth's level of responsibility based on his actual participation in the commission of crimes. Having failed to demonstrate any error of law in the NCIJ's treatment of direct participation in and proximity to crimes that invalidates his personal jurisdiction determination, that the NCIJ reached any factual findings no reasonable CIJ could have reached that occasion a miscarriage of justice, or that the NCIJ's analysis of Mr. MEAS Muth's level of responsibility was so unfair or unreasonable as to constitute an abuse of discretion, the ICP fails to demonstrate how, individually or collectively, the NCIJ committed any errors or abuses fundamentally determinative of his exercise of discretion. Ground E should be dismissed.

F. Response to Ground F: The NCIJ did not make erroneous factual findings with a determinative impact on the issue of personal jurisdiction

72. The ICP fails to substantiate his claims that by ignoring evidence gathered before and after 29 April 2011, the NCIJ made "several unreasonable" factual findings that "played a key role" in assessing personal jurisdiction.[316] The NCIJ did not make erroneous factual findings with a determinative impact on his personal jurisdiction determination as a result

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[311] *Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 20. *See also Prosecutor v. Lukić and Lukić*, IT-98/32/1-AR11*bis*.1, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, para. 21; *Prosecutor v. Ademi and Norac*, IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, 14 September 2005, para. 28.

[312] *Prosecutor v. Ademi and Norac*, IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, 14 September 2005, para. 30.

[313] ICP's Appeal, paras. 121-34.

[314] Dismissal Order, para. 428; Indictment, paras. 303, 315, 425, 435, 443.

[315] Indictment, paras. 303, 315 (Mr. MEAS Muth had no "direct involvement" in the purge of Divisions 502 or 310), para. 354 (finding that while there is no evidence that Mr. MEAS visited Bet Trang, he did visit Kang Keng), para. 425 ("there is no reliable evidence that Meas Muth visited the site personally"), para. 435 (finding that the only evidence of Mr. MEAS Muth participating in interrogations at Wat Enta Nhien is an uncorroborated and unreliable Documentation Center of Cambodia statement); para. 443 (there is no reliable evidence that Mr. MEAS Muth ever visited Wat Enta Nhien); para. 455 (finding that there is no evidence Mr. MEAS Muth conducted weddings or attended ceremonies).

[316] ICP's Appeal, para. 135.

of any failure to assess the evidence.[317] None of the ICP's claims in Ground F demonstrate that Mr. MEAS Muth had a higher position or level or authority than found by the ICIJ.

73. ***The NCIJ did not err in fact in determining Mr. MEAS Muth's positions as Division 164 Commander or Kampong Som Autonomous Sector Secretary*** The ICP misinforms in claiming that the NCIJ erred in fact in finding that Mr. MEAS Muth became Division 164 Commander "at least between January 1976 and April 1978 and Chairman of the Committee Kampong Som City."[318] The NCIJ did not conclude that Mr. MEAS Muth was Division 164 Commander and Kampong Som Autonomous Sector Secretary *only* between the time period of January 1976 and April 1978. Even if the NCIJ erred in determining the time period during which Mr. MEAS Muth occupied these positions, the ICP fails to show how this error was fundamentally determinative of the NCIJ's personal jurisdiction determination.

74. Citing official DK documents – "the first surviving telegram from Meas Muth, and his last documented telephone message"[319] – the NCIJ considered that Mr. MEAS Muth was Division 164 Secretary in Kampong Som "*at least* between January 1976 and April 1978."[320] The words "at least" indicate that the NCIJ did not conclude with certainty that Mr. MEAS Muth was Division 164 Commander only during this time frame. To the contrary, other findings in the Dismissal Order show that the NCIJ found that Mr. MEAS Muth assumed his role as a Division Commander prior to 1975 and continued to command Division 164 after April 1978.

75. The NCIJ, like the ICIJ, found that Mr. MEAS Muth was Division 3 Commander prior to April 1975,[321] that Division 3 was renamed Division 164 after its relocation to Kampong Som;[322] and that Mr. MEAS Muth was Commander when Division 3 became Division 164.[323] The NCIJ found that Division 3 became Division 164 on 22 July 1975,[324] as the

[317] ICP's Appeal, paras. 58, 135, 156.
[318] ICP's Appeal, paras. 137-41; Dismissal Order, para. 188.
[319] ICP's Appeal, para. 139, citing Dismissal Order, para. 188; Report titled "Report from MEAS Muth to Brother 89", 5 January 1976, D1.3.30.2; Report titled "Confidential Telephone Messages from Mut", 1 April 1978, D1.3.30.25; Report titled "DK Report from Teanh", 4 January 1976, EN 00233962, D1.3.12.1.
[320] Dismissal Order, para. 188 (emphasis added).
[321] Dismissal Order, para. 182; Indictment, para. 156.
[322] Dismissal Order, para. 187; Indictment, para. 154.
[323] Dismissal Order, para. 187; Indictment, para. 156.
[324] Dismissal Order, para. 187.

ICP alleged in his Final Submission.[325] The ICP concedes that "the evidence relied on by the Dismissal Order to make … these findings explicitly acknowledge[s] Meas Muth as Secretary of Division 3/164 since at least 1974."[326] That a "wealth of other evidence" collected after 29 April 2011[327] corroborates that Mr. MEAS Muth was Division 3 Commander prior to becoming Division 164 Commander defeats the ICP's claim that any failure to consider evidence led the NCIJ to an erroneous finding.

76. While the NCIJ did not specify the end date of Mr. MEAS Muth's position as Division 164 Commander, he made findings showing that Mr. MEAS Muth continued to command Division 164. In describing the composition of Division 164, the NCIJ found that Division 164's Regiment 162 was sent to the Vietnamese border after 1978,[328] and that Han, who commanded Division 164's Battalion 144, was promoted to chairman of Regiment 140 in mid-1978.[329] The NCIJ made no finding that Mr. MEAS Muth (or Division 164) was not in control of these Regiments or Battalions beyond April 1978.

77. The ICP fails to explain how, even if the NCIJ erred in finding that Mr. MEAS Muth was Division 164 Commander and Kampong Som Autonomous Sector Secretary *only* until April 1978, this nine-month discrepancy in the timeframe – April 1978 to January 1979 – was fundamentally determinative of the NCIJ's personal jurisdiction determination. Nowhere in his Appeal does the ICP explain the significance of this timeframe; how it would have changed the NCIJ's assessment of Mr. MEAS Muth's role and position in the DK hierarchy, Mr. MEAS Muth's ability to devise and/or implement CPK policy, or the gravity of Mr. MEAS Muth's acts and conduct.[330]

78. Neither CIJ made explicit findings as to the start and end dates of Mr. MEAS Muth's position as Kampong Som Autonomous Sector Secretary.[331] While the ICIJ found that no evidence showed that Mr. MEAS Muth was ever relieved of his position as Kampong Som Autonomous Sector Secretary,[332] neither CIJ considered his position as Kampong Som

[325] ICP's Final Submission, para. 60: "Following the announcement of the formation of the RAK in July 1975, **Meas Muth**'s Division 3 was restructured and became a Centre division, reporting directly to the General Staff. Division 3 was combined with other forces and renamed Division 164…." (bold in original).
[326] ICP's Appeal, para. 139.
[327] ICP's Appeal, para. 139.
[328] Dismissal Order, para. 194.
[329] Dismissal Order, para. 200.
[330] *See supra* para. 8.
[331] Dismissal Order, para. 188; Indictment, para. 159.
[332] Indictment, para. 163.

Autonomous Sector Secretary as a high position in the DK hierarchy in determining Mr. MEAS Muth's level of responsibility.[333]

79. ***The NCIJ did not err in fact in determining Mr. MEAS Muth's positions and roles in the General Staff*** The ICP fails to substantiate his claim that the NCIJ erred in fact in finding that Mr. MEAS Muth was not member of the General Staff Committee, and that even if he became a member or even a Deputy in 1978, his position would have only lasted 50 days.[334] The NCIJ did not err in making this finding. Even if the NCIJ erred in making this finding, the ICP fails to show how it was fundamentally determinative of the NCIJ's personal jurisdiction determination.

80. The NCIJ considered evidence indicating that Mr. MEAS Muth *may* have been appointed as a political *assistant* to the General Staff at the 1975 Party Congress when Son Sen was assigned to establish the Navy and Air Force.[335] Relying on a DK document issued just two months before the end of the regime – the Fifth Party Congress showing the composition of the General Staff on 2 November 1978 and not listing Mr. MEAS Muth[336] – he concluded that there were "considerable doubts" as to Mr. MEAS Muth's membership in the General Staff Committee.[337] In light of this doubt, and absent credible evidence to the contrary, the NCIJ applied the principle of *in dubio pro reo*[338] in concluding that Mr. MEAS Muth was not a member of the General Staff Committee.[339]

81. The NCIJ, like the ICIJ, relied on Duch's testimony that Mr. MEAS Muth may have become a Deputy of the General Staff in 1978.[340] While the ICIJ found that Mr. MEAS Muth was also Son Sen's deputy from the Navy's establishment,[341] he made no findings on his authority in this position, other than finding that he was "*assigned by Son Sen*" to carry out specific military operations for the General Staff.[342] Even if Mr. MEAS Muth was a member or Deputy of the General Staff Committee in 1978, the ICP fails to show

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[333] Dismissal Order, paras. 416-20; Indictment, para. 459. The ICIJ considered that Mr. MEAS Muth occupied a high rank in the DK hierarchy because he was Division 164 Commander, responsible for DK's territorial waters, a reserve member of the General Staff Committee and one of Son Sen's deputies, and from late 1978, a reserve member of the Central Committee.
[334] ICP's Appeal, para. 142, citing Dismissal Order, paras. 163, 418.
[335] Dismissal Order, para. 162
[336] Dismissal Order, para. 163.
[337] Dismissal Order, para. 163.
[338] *See supra* fn. 74.
[339] Dismissal Order, para. 163.
[340] Dismissal Order, para. 163; Indictment, para. 162, fn. 333.
[341] Indictment, para. 162.
[342] Indictment, para. 163 (emphasis added).

how having a higher position for a period of 50 days impacts on the NCIJ's personal jurisdiction determination. Having a higher-level position for 50 days in a period of intense chaos while the regime was collapsing is not indicative of having a higher level of authority.[343]

82. ***The NCIJ did not err in fact in finding that Mr. MEAS Muth was not a member of the Central Committee*** The ICP fails to substantiate his claim that the NCIJ erred in fact in finding that Mr. MEAS Muth was an *assistant* to the Central Committee, with no voting or participatory rights within the Central Committee,[344] challenging the NCIJ's failure to rely on KHIEU Samphân's statement[345] without explaining why the NCIJ's finding cannot stand on the basis of the remaining evidence.[346] As the ICP concedes, it is presumed that the CIJs properly evaluated all the evidence[347] and the CIJs have "discretion to find some pieces of evidence more persuasive than others."[348] Accordingly, the PTC should summarily dismiss this claim.

83. The ICP misinforms in asserting that Mr. MEAS Muth's membership in the Central Committee is "well established by the most reliable source on this issue," KHIEU Samphân.[349] KHIEU Samphân passingly stated that Division commanders, including Mr. MEAS Muth, were members of the Central Committee[350] without indicating how or when he learned this, what this membership entailed, or the degree to which Mr. MEAS Muth could participate in discussions or decision-making within the Committee.

84. Both CIJs relied on Duch, rather than KHIEU Samphân, in finding that Mr. MEAS Muth was an assistant to the Central Committee, occupying the fourth echelon of the CPK.[351]

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[343] *See* Case 004/1 Closing Order, para. 316.
[344] ICP's Appeal, para. 148, citing Dismissal Order, paras. 108-15, 117-22.
[345] ICP's Appeal, paras. 148-49.
[346] *See* Case 002/01 Appeal Judgement, para. 90, citing *inter alia Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, paras. 21-22. *See also Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22.
[347] ICP's Appeal, para. 136, citing Case 002/01 Appeal Judgement, para. 304.
[348] ICP's Appeal, para. 136, citing *Prosecutor v. Muvunyi,* ICTR-2000-55A-A, Judgement, 29 August 2008, para. 144.
[349] ICP's Appeal, para. 148.
[350] Written Record of Interview of Charged Person KHIEU Samphân, 13 December 2007, D1.3.33.15, EN 00156751.
[351] Dismissal Order, para. 111, fn. 298 (citing Written Record of Interview of Charged Person KAING Guek Eav, 4 June 1999, D1.3.33.7; Written Record of Interview of Charged Person KAING Guek Eav, 4 December 2007, D1.3.33.13; Written Record of Interview of Charged Person KAING Guek Eav, 7 July 2002, D4.1.948; Written Record of Interview of Charged Person KAING Guek Eav, 27 April 2011, D12), para. 117, fn. 312 (citing Written Record of Interview of Charged Person KAING Guek Eav, 4 June 1999, D1.3.33.7; Written Record of Interview of Charged Person KAING Guek Eav, 4 December 2007, D1.3.33.13; *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 9 June 2009, E1/29.1, EN 00339336; Written Record of Interview of Charged Person KAING Guek Eav, 27 April 2011, D12); Indictment, para. 150, fn. 295 (citing Written Record of Interview of

Duch consistently maintained from the time he was detained in the Cambodian Military Court in 1999[352] that Mr. MEAS Muth was only an assistant to the Central Committee.[353] Specifically, Duch maintained that assistants could only attend Central Committee meetings, take instructions, and had no participatory or voting rights.[354] Duch specified the source of his knowledge: he was constantly monitored by an assistant to the Central Committee, Chhim Sam Aok (*alias* Pang), who was "Number 1 among the Assistants to the Party Center."[355] The ICP fails to show how any evidence added to the Case File after 29 April 2011 would have altered the NCIJ's finding. Duch's post-29 April-2011 interviews only confirm his pre-29 April 2011 statements regarding Mr. MEAS Muth's position as an assistant to the Central Committee and the limited authority of assistants.[356]

85. The ICP obfuscates in claiming that the NCIJ had no "objective reason" not to rely on KHIEU Samphân to establish Mr. MEAS Muth's membership in the Central Committee when he did so for other members of the Central Committee.[357] While KHIEU Samphân may have been reliable or may have corroborated evidence concerning other individuals, KHIEU Samphân's claim regarding Mr. MEAS Muth is not supported by other evidence.[358] That there is no surviving "complete list of Central Committee members,"[359] cannot be interpreted to Mr. MEAS Muth's detriment under the principle of *in dubio pro reo*.[360] "The fact that after such a long time some of the crucial evidence … may have deteriorated … is not something which can ever be laid at the feet of the defence in criminal investigations or give rise to a lesser standard of proof for indictment or conviction."[361]

Charged Person KAING Guek Eav, 2 June 2008, D1.3.33.10; Written Record of Interview of Charged Person KAING Guek Eav, 1 February 2016, D114/158; Written Record of Interview of Charged Person KAING Guek Eav, 2 February 2016, D114/159), fn. 296 (citing Written Record of Interview of Charged Person KAING Guek Eav, 4 December 2007, D1.3.33.13; Written Record of Interview of Charged Person KAING Guek Eav, 23 August 2007, D1.3.33.11).

[352] Cambodian Military Court, Written Record of Witness Interview, 4 June 1999, D1.3.33.7, EN 00184830.

[353] Written Record of Interview of Charged Person KAING Guek Eav, 4 December 2007, D1.3.33.13, EN 00154911.

[354] Written Record of Interview of Charged Person KAING Guek Eav, 25 June 2008, D4.1.1119; Written Record of Interview of Charged Person KAING Guek Eav, 23 August 2007, D1.3.33.11; Written Record of Interview of Charged Person KAING Guek Eav, 4 December 2007, D1.3.33.13, EN 00154911; *Case of KAING Guek Eav*, 001/18-07-2007/ECCC-TC, Written Final Submission of the Accused, 23 November 2009, D10.1.64, para. 57; *Case of Kaing Guek Eav*, Transcript, 9 June 2009, E1/29.1, EN 00339336.

[355] Written Record of Interview of Charged Person KAING Guek Eav, 7 August 2007, D1.3.33.3, EN 00147521.

[356] Written Record of Interview of Charged Person KAING Guek Eav, 1 February 2016, D114/158, A32, 35; Written Record of Interview of Charged Person KAING Guek Eav, D114/159, 2 February 2016, A10.

[357] ICP's Appeal, para. 149.

[358] No Central Committee meeting minutes or other Party documents indicate MEAS Muth was a member of the Committee or attended any meetings.

[359] ICP's Appeal, para. 150.

[360] *See supra* fn. 74.

[361] Case 004/1 Closing Order, para. 36.

86. The ICP misinforms in claiming that the NCIJ placed undue emphasis on Mr. MEAS Muth's denial of his membership in the Central Committee to minimize his role.[362] The NCIJ considered Mr. MEAS Muth's statement in light of contradictory testimony from Duch, KHIEU Samphân, and other witnesses,[363] the DK's administrative structure,[364] and his review of documentary evidence showing the composition of the Central Committee.[365]

87. The ICP misrepresents the Case 002 Closing Order in absurdly claiming that IENG Thirith occupied a lower level in the CPK hierarchy than Mr. MEAS Muth because she was not a member of the Central Committee.[366] While the CIJs found that she was not a member of the Standing or Central Committees,[367] the NCIJ and ICIJ Lemonde found that IENG Thirth was a senior leader – or in the alternative, most responsible[368] – based on the significant authority she wielded in her position as Minister for Social Affairs[369] and responsibility over culture, social action, and foreign affairs;[370] her involvement "throughout the regime in the activities of the senior leaders of the CPK;"[371] her acts and participation in CPK policies;[372] and in particular, her participation in the *creation* of CPK policies.[373]

88. *In sum*, the NCIJ correctly assessed Mr. MEAS Muth's positions in determining personal jurisdiction. Having failed to substantiate his claims that any failure to consider evidence impacted the NCIJ's factual findings, that the NCIJ reached factual findings no reasonable CIJ could have reached, or that the NCIJ's findings on Mr. MEAS Muth's positions were so unfair or unreasonable as to constitute an abuse of discretion, the ICP fails to demonstrate how, individually or collectively, the NCIJ committed any errors of fact or

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[362] ICP's Appeal, para. 150.
[363] Dismissal Order, paras. 111, 113, 115, 117. *See esp.*, Dismissal Order, para. 115, fn. 310.
[364] Dismissal Order, paras. 116, 121. *See esp.*, Dismissal Order, para. 116, fn. 311, para. 119, fn. 322.
[365] Dismissal Order, para. 119.
[366] ICP's Appeal, para. 153.
[367] Case 002 Closing Order, para. 1207.
[368] Case 002 Closing Order, paras. 1327-28.
[369] Case 002 Closing Order, paras. 1209-21.
[370] Case 002 Closing Order, paras. 1222-23.
[371] Case 002 Closing Order, para. 1226.
[372] Case 002 Closing Order, paras. 1227-34 (movements of population); paras. 1235-46 (establishment of worksites and cooperatives); paras.1247-87 (reeducation of bad enemies and killing of enemies); paras. 1288-92 (targeting of specific groups); paras. 1293-95 (regulation of marriage).
[373] Case 002 Closing Order, paras. 1236-39 (finding that IENG Thirith "assisted with the planning" of the CPK policy of establishing cooperatives and worksites through her role in the Council of Ministers and as Minister of Social Affairs); paras. 1248-50 (finding that IENG Thirith "assisted with the planning" of the CPK's policy to reeducate "bad elements" and killing "enemies" inside and outside the Party ranks).

abuses fundamentally determinative of his exercise of discretion. Ground F should be dismissed.

G. Response to Ground G: The NCIJ did not err in fact in his treatment of victims

89. The ICP misinforms in claiming that the NCIJ made erroneous factual findings leading him to grossly underestimate the gravity of the crimes[374] because he failed to consider all the evidence on the Case File, make requisite findings, and legally characterize them.[375] The NCIJ properly considered the victims of crimes in his personal jurisdiction analysis. While the pre- and post-29 April 2011 evidence the ICP claims the NCIJ did not consider may have added additional crime sites and victims of crimes,[376] victim numbers must be considered "against the background of the entirety of the suffering caused by the implementation of the regime's policies"[377] and determining the gravity of the crimes requires "consideration of the particular circumstances of the case, as well as the form and degree of the participation of the Accused in the crime."[378]

90. The ICP misleads in claiming that the NCIJ concluded that "the number of victims who suffered as a result of MEAS Muth's direct acts differs greatly from those who suffered as a result of Duch's direct acts" because he did not consider all the evidence on the Case File, make requisite findings, and legally characterize them.[379] The NCIJ made requisite factual findings and was not required to legally characterize them.[380] The words "direct acts" in the NCIJ's finding indicates that he considered the effect of Duch's *underlying acts and conduct* in comparison to Mr. MEAS Muth's,[381] which the NCIJ found to be "inactive, unimportant, and not proximate to the commission of crimes."[382] Even if the NCIJ found that genocide of the Vietnamese occurred in areas under Mr. MEAS Muth's authority,[383] it would not have altered his gravity analysis, considering his focus on Mr. MEAS Muth's underlying acts and conduct.[384]

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[374] ICP's Appeal, para. 156.
[375] ICP's Appeal, paras. 58-62 (Ground B), paras. 26-34 (Ground A), paras. 70-82 (Ground C).
[376] *See* ICP's Appeal, paras. 156, 158-70.
[377] Case 004/1 Closing Order, para. 317.
[378] *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Case 002/02 Judgement, 16 November 2018, E465, para. 4349. *See also* Case 002/01 Appeal Judgement, para. 1107; Case 001 Trial Judgement, para. 596; Case 002/01 Trial Judgement, para. 1073.
[379] ICP's Appeal, para. 155, citing Dismissal Order, para. 428.
[380] *See supra* paras. 45-54.
[381] *See* Dismissal Order, paras. 371-74, 427-28.
[382] *See* Dismissal Order, para. 428.
[383] *See* ICP's Appeal, paras. 60-62.
[384] Dismissal Order, paras. 421-28.

91. The PTC should summarily dismiss the victim numbers the ICP repeats from his Final Submission[385] that were not accepted by either CIJ.[386] The ICIJ, who found Mr. MEAS Muth most responsible,[387] recognized that his calculations were mere estimates, being unable to calculate the number of victims of crimes with any degree of precision:[388]

a. *Crimes committed by the DK Navy* The ICIJ acknowledged that "[e]stimates provided by former Division 164 members are limited in time and to the locations of their duty stations," and that efforts to obtain Vietnam's and Thailand's cooperation in establishing victim numbers was unsuccessful.[389]

b. *Durian Plantation* The ICIJ found "no direct eyewitness testimony to an actual event of killing" and that all evidence of killings was "hearsay or even double hearsay."[390]

c. *Purges of Divisions 164, 117, 502, and 310* The ICIJ did not find the victim numbers alleged by the ICP[391] or hold Mr. MEAS Muth responsible for *all* members of RAK Center Divisions and Independent Regiment and General Staff personnel.[392]

d. *Ream Area worksites* The ICIJ found that "[d]etermining the precise number of workers is impossible" because the worksites operated at different times, numbers of workers fluctuated, and it "is not possible to identify the exact location and delineation of worksites … referred to by witnesses who often gave the numbers of their own worksite or unit, rather than a location."[393]

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[385] *See* ICP's Appeal, paras. 163-64 (crimes committed by the DK Navy); paras. 165-66 (Stung Hav); paras. 167-8 (Wat Enta Nhien); paras. 169-70 (S-21), citing to ICP's Final Submission.
[386] *See* Case 001 Appeal Judgement, para. 20. *See also Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22. Notably, the ICP only cites the Indictment's victim numbers regarding the number of workers at Ream area work site. *See* ICP's Appeal, para. 158, fn. 636.
[387] Indictment, paras. 456, 460.
[388] Indictment, paras. 341, 424.
[389] Indictment, para. 248.
[390] Indictment, para. 264.
[391] *See* ICP's Appeal, para. 79, citing ICP's Final Submission, paras. 550-51, 861, 868-69 (alleging that 32 victims from Divisions 117 and Sector 505 were purged and executed at S-21); para. 80, citing ICP's Final Submission, paras. 172, 552 (alleging that 372 cadres from Division 502 and 1,117 from Division 310 were sent to S-21); para. 81 citing ICP's Final Submission, paras. 172, 552 (alleging that in addition to Divisions 164, 117, 502, and 310, Mr. MEAS Muth should also be responsible for the 3,330 other RAK cadres sent to S-21). *Cf.* Indictment, para. 467 (finding that 719 Division 164 cadres, 478 Division 502 cadres, 928 Division 310 cadres, and 27 Division 117 cadres were sent to S-21 during purges).
[392] ICP's Appeal, para. 170; Indictment, para. 467.
[393] Indictment, para. 341.

e. *Stung Hav* The ICIJ found witness accounts "not precise enough to allow specific conclusions to be drawn," and that it was thus "not possible to conclude exactly how many people worked" at the site.[394]

f. *Tuek Sap* The ICIJ found that it was "not possible to determine the exact number of people detained at Toek Sap."[395] When investigators surveyed the alleged mass grave site at Tuek Sap in 2015, the site had been bulldozed and the investigators could not find any human remains or indications of graves there.[396]

g. *Wat Enta Nhien* The ICIJ found "no eye-witness evidence of killings at the site during DK,"[397] inconsistency in the evidence surrounding bodies allegedly found at the site in mid-1979,[398] and that the accuracy of witness accounts of the body count at the site was "questionable."[399]

h. *Forced marriage* The ICIJ made no victim number calculations and noted that "eye-witness accounts of forced marriage in Kampong Som are not particularly numerous."[400]

92. *In sum*, the NCIJ correctly considered the gravity of the crimes based on Mr. MEAS Muth's underlying acts and conduct.[401] Even were the PTC to apply the ICTY's inapposite referral factors the ICP suggests to determine Mr. MEAS Muth's level of responsibility,[402] the referral jurisprudence supports the NCIJ's analysis.[403] The ICTY Referral Bench found that the gravity of the crimes did not prevent referral even where an Accused was charged with participating in two separate JCEs involving genocide, conspiracy to commit genocide, as well as crimes against humanity and war crimes[404] because "no inherent hierarchy exists among the crimes over which the Tribunal has jurisdiction; a Chamber must look instead to the underlying conduct allegedly constituting a given crime, as well as the surrounding circumstances, to determine that crime's gravity."[405] Having failed to

[394] Indictment, paras. 368, 370.
[395] Indictment, para. 417.
[396] Indictment, para. 423.
[397] Indictment, para. 437.
[398] Indictment, para. 440.
[399] Indictment, para. 441.
[400] Indictment, para. 450.
[401] Dismissal Order, para. 416.
[402] ICP's Appeal, para. 11.
[403] *See* Dismissal Order, paras. 421-28.
[404] *Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, paras. 11-12, 24.
[405] *Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, paras. 19, 24.

show that the NCIJ reached factual findings no reasonable CIJ would have reached or that the NCIJ's consideration of Mr. MEAS Muth's underlying acts and conduct in assessing the gravity of the crimes was so unfair or unreasonable as to constitute an abuse of discretion, the ICP fails to demonstrate how, individually or collectively, the NCIJ committed any errors of fact or abuses fundamentally determinative of his exercise of discretion. Ground G should be dismissed.

H. Response to Ground H: The NCIJ did not err in law in holding Duch as the only most responsible person

93. The ICP misrepresents the Dismissal Order in claiming that "an alternative basis" for finding Mr. MEAS Muth not most responsible is that the NCIJ held "*ex ante* and as a matter of law," that the category of most responsible "could *only ever* apply to Duch."[406] The NCIJ never held that only Duch is most responsible nor did he premise his Dismissal Order on any such holding. Contradictorily, the ICP concedes that the NCIJ "correctly highlights on a number of occasions that the question of who would be among 'those most responsible' was not predetermined."[407] The PTC should summarily dismiss Ground H because the ICP challenges a finding upon which the NCIJ did not rely to determine personal jurisdiction.[408]

94. The ICP misinforms by asserting that the NCIJ contradicted[409] the CIJs' holding in Case 004/1 that the ECCC's negotiations history shows no joint and binding understanding that only a finite number of named individuals would fall under the ECCC's jurisdiction.[410] The NCIJ – who had access to the same negotiations history and articulated and applied the same factors for identifying those most responsible as ICIJ Bohlander[411] – held that the term most responsible refers to a *category* of persons.[412]

95. While the NCIJ mistakenly stated that the term "most responsible" was included in the Establishment Law because of Duch[413] and that the prosecution of senior leaders "shall not extend to low-level cadres besides Duch whose name had already been considered by

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[406] ICP's Appeal, para. 171 (emphasis added).
[407] ICP's Appeal, para. 190, citing Dismissal Order, paras. 364, 368, 405. *See* Dismissal Order, para. 364: "[C]lassifying the criteria as "senior leaders" and "those most responsible" is the form of the discretionary power of the prosecutions of the Co-Prosecutors and the independent investigations of the Co-Investigating Judges."
[408] *See Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22.
[409] ICP's Appeal, para. 189.
[410] Case 004/1 Closing Order, para. 37.
[411] Case 004/1 Closing Order, para. 19. *See also supra* para. 8.
[412] Dismissal Order, para. 397: "While both categories of persons considered to fall under the jurisdiction of the ECCC, both "**senior**" and "**most responsible**," reflect that only a limited number of leaders may fall under the jurisdiction of the ECCC." (bold in original).
[413] Dismissal Order, para. 396.

the drafters,"[414] this was not the basis for his personal jurisdiction determination. The term most responsible was neither intended to refer to Duch nor meant that Duch should be used as a benchmark in determining whether others are most responsible. It was assumed throughout the negotiations that Duch would appear before the ECCC.[415] Duch confessed to crimes at S-21,[416] a site specifically focused on by the Group of Experts,[417] and was readily available for trial. "If he were not indicted, there would definitely be questions."[418] Had the NCIJ formed a pre-determined view that only Duch is most responsible, he would have had no reason to review the ECCC's negotiations history, law and jurisprudence on personal jurisdiction,[419] or review the evidence in his analysis of the ECCC's jurisdiction over IM Chaem,[420] AO An,[421] or Mr. MEAS Muth[422] to reason his Dismissal Orders.

96. *In sum*, having misrepresented the Dismissal Order and challenged a holding upon which the Dismissal Order did not rely, the ICP fails to demonstrate that the NCIJ committed an error of law or abuse of discretion fundamentally determinative of his exercise of discretion in reaching his personal jurisdiction conclusion. Ground H should be summarily dismissed.

V. CONCLUSION

97. Failing to demonstrate how, individually or collectively, the errors he alleges were fundamentally determinative of the NCIJ's exercise of discretion determining that the ECCC lacks personal jurisdiction over Mr. MEAS Muth, the ICP:

    a. Fails to demonstrate that the NCIJ erred in law in not considering evidence gathered after 29 April 2011 to determine personal jurisdiction;

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[414] Dismissal Order, para. 401.
[415] *See* David Scheffer, *The Negotiating History of the ECCC's Personal Jurisdiction*, CAMBODIA TRIBUNAL MONITOR, 22 May 2011, p. 4.
[416] *See* Christophe Peschoux, Interview with Kaing Guek Eav, also known as Duch, Chairman of S-21, 28-29 April 1999 Ta Sanh village, 4-6 May 1999, Battambang, pp. 1-10 (Attachment 12).
[417] *See* Group of Experts' Report, para. 55: "As for the documentary record that clearly points to the role of specific individuals as immediate participants or as superiors, it appears quite extensive for some atrocities, most notably the operation of the interrogation centre at Tuol Sleng. For other atrocities, documentary evidence that directly implicates individuals, whether at the senior governmental level or the regional or local level, is currently not available and may never be found" (Attachment 2).
[418] *See* Heder, Personal Jurisdiction, p. 27, quoting Thomas Hammarberg to Ralph Zacklin, 2 July 1999.
[419] Dismissal Order, paras. 361-74.
[420] Case 004/1 Closing Order, paras. 140-280.
[421] Case 004/2 Dismissal Order, paras. 77-484.
[422] Dismissal Order, paras. 55-353. *See also* MEAS Muth's Appeal, paras. 52-60.

b. Fails to demonstrate that the NCIJ erred in law in considering and issuing a decision on all the facts within the scope of Case 003;

c. Fails to demonstrate that the NCIJ erred in law in reasoning his Dismissal Order by failing to make requisite findings and legally characterize them;

d. Fails to demonstrate that the NCIJ erred in law or fact in his treatment of coercion, duress, and superior orders when determining Mr. MEAS Muth's level of responsibility;

e. Fails to demonstrate that the NCIJ erred in law or fact in his treatment of Mr. MEAS Muth's direct participation in and proximity to crimes when determining his level of responsibility;

f. Fails to demonstrate that the NCIJ made erroneous factual findings with a determinative impact on the issue of personal jurisdiction;

g. Fails to demonstrate that the NCIJ erred in fact in his treatment of victims; and

h. Fails to demonstrate that the NCIJ erred in law in holding Duch is the only most responsible person.

98. Absent a finding by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his discretion, the Dismissal Order cannot be set aside, and, as such the principle of *in dubio pro reo* mandates that the PTC dismiss the case against Mr. MEAS Muth. Even were the Dismissal Order to be set aside by supermajority, the PTC would still need to uphold the Indictment by supermajority for the case to proceed to trial.

WHEREFORE, for the reasons stated herein, the ICP's Appeal should be dismissed, as should the case against Mr. MEAS Muth.

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ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **24th** day of **June, 2019**