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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO THE NATIONAL CO-PROSECUTOR'S APPEAL OF THE CASE 003 INDICTMENT

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I. INTRODUCTION

1. On 28 November 2018, the International Co-Investigating Judge ("ICIJ") issued a closing order ("Indictment") indicting Meas Muth for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code, and committing him for trial.[1] On the same day, the National Co-Investigating Judge ("NCIJ") issued a closing order ("Dismissal Order") dismissing the case against Meas Muth on the ground that "the ECCC has no personal jurisdiction over Meas Muth."[2] The National Co-Prosecutor ("NCP") appealed the Indictment ("NCP Appeal") on 5 April 2019, maintaining that the ECCC does not have personal jurisdiction over Meas Muth because he is not one of those most responsible for crimes committed during the Democratic Kampuchea ("DK") regime.[3] The International Co-Prosecutor ("ICP") now responds.

II. PROCEDURAL HISTORY AND APPLICABLE LAW

2. The ICP incorporates by reference the procedural history set out in Annex I to his appeal of the Dismissal Order.[4] The applicable law is set out in the relevant sections below. The ICP notes, however, that the NCP Appeal erroneously refers only to the charges notified by ICIJ Harmon on 3 March 2015[5] and ignores the definitive version of the charges against Meas Muth notified by ICIJ Bohlander on 14 December 2015,[6] as well as his decision to reduce the scope of the investigation pursuant to Internal Rule 66*bis*.[7]

3. On 10 May 2019, the Pre-Trial Chamber ("PTC") decided to extend the time limits for the parties' responses to the appeals of the NCIJ's Dismissal Order and ICIJ's Indictment,

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1 **D267** Closing Order (Indictment), 28 Nov 2018 ("Indictment").
2 **D266** Order Dismissing the Case Against Meas Muth, 28 Nov 2018 ("Dismissal Order"), paras 429-30.
3 **D267/3** National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 003, 5 Apr 2019 ("NCP Appeal"), paras 74-75. The English translation of the Appeal was notified on 30 April 2019.
4 **D266/2.2** International Co-Prosecutor's Appeal of the Closing Order Dismissing the Case Against Meas Muth, Annex I: Procedural History, 8 Apr 2019.
5 **D267/3** NCP Appeal, para. 55 *citing* **D128.1** Notification of Charges, 3 March 2015, Annex.
6 **D174** Written Record of Initial Appearance, 15 Dec 2015, EN 01187675-81 [charging Meas Muth with the genocide of the Vietnamese and additional counts of crimes against humanity, including rape within forced marriage, grave breaches of the Geneva Conventions and violations of Articles 501 and 506 of the 1956 Penal Code (homicide)].
7 **D226** ICIJ Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 bis, 10 Jan 2017.

instructing them to file their responses within 45 days from the notification of the translation for the appeal to which they are responding.[8] The English translation of the NCP Appeal was notified on 30 April 2019,[9] making this response due on 14 June 2019.

III. SUBMISSIONS

4. The ICP respectfully submits that the NCP Appeal (i) does not meet the standard of review on appeal as it does not demonstrate any legal or factual error in the Indictment or that the ICIJ abused his discretion in issuing the Indictment against Meas Muth; (ii) argues for a definition of personal jurisdiction that disregards the expressed intent of both the Royal Government of Cambodia ("RGC") and the United Nations ("UN") in the ECCC Agreement and fails to demonstrate that the RGC has the power to unilaterally restrict personal jurisdiction without formally amending the ECCC Agreement; and (iii) unpersuasively claims that because Cases 001 and 002 brought a measure of justice and contributed to national reconciliation in Cambodia, this is sufficient and Meas Muth should not face justice for the very serious allegations of genocide, crimes against humanity and war crimes in the Indictment, against both Cambodian and foreign nationals.

A. THE NCP APPEAL FAILS TO MEET THE STANDARD OF REVIEW

5. Internal Rule[10] 75(4) explicitly requires that submissions on appeal "contain the reasons of fact and law upon which the appeal is based".[11] As this Chamber has unanimously held,[12] a discretionary decision such as determining whether a Charged Person falls

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8 **D267/6** Decision on Requests for Extension of Time and Page Limits for Responses and Replies Relating to the Appeals Against the Closing Orders in Case 003, 10 May 2019.

9 *See* Notification from the Case File Officer of the NCP Appeal, 30 Apr 2019, 2:07 p.m.

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

11 Internal Rule 75(4) ["The submissions on appeal shall contain the reasons of fact and law upon which the appeal is based together with all supporting documents. The appellant may not raise any matters of fact or law during the hearing which are not already set out in the submissions on appeal"]. *See also* Case 002-**D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 Apr 2011 ("Decision on Ieng Sary's Closing Order Appeal"), para. 104 ["the scope of [the PTC's] review is limited to the issues raised by the Appeal"].

12 Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 Jun 2018, para. 21 (unanimous holding), quoted in full in **D266/2** ICP Appeal of the Order Dismissing the Case Against Meas Muth ("ICP Appeal"), 8 Apr 2019, para. 7. *See also* Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, 11 Apr 2011, paras 112-13, and citations therein; *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, Appeals Chamber, 3 Apr 2007, paras 7-9 [referring to Article 25 of the ICTY Statute and the caselaw of both ICTY and ICTR Appeal Chambers]; *Prosecutor*

within the category of those "most responsible" for DK crimes may be reversed only where it was based on an error of law invalidating the decision, on an error of fact occasioning a miscarriage of justice and/or was so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion.[13]

6. The NCP Appeal does not raise any discernible ground of appeal that clearly and precisely[14] articulates any legal or factual error in the Indictment explaining why that error would invalidate the Indictment or occasion a miscarriage of justice, and/or that

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v. Rutaganda, ICTR-96-3-A, Judgment, Appeals Chamber, 26 May 2003, paras 17-18 [referring to Article 24 of the ICTR Statute].

13 It is well established in ECCC and international law that an appeal against an indictment or judgment that manifestly fails to meet these minimum requirements can be summarily dismissed without any examination of its merits. *See e.g.*, Case 001-**F28** Appeal Judgment, 3 Feb 2012 ("Duch AJ"), para. 20 ["Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and need not be considered on the merits [...] The Supreme Court Chamber may dismiss arguments that are evidently unfounded without providing detailed reasoning"]; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, Appeals Chamber, 26 May 2003, para. 18 ["The Appeals Chamber is, in principle, not required to consider the arguments of a party if they do not allege an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice [...] Logically, therefore, where the arguments presented by a party do not have the potential to cause the impugned decision to be reversed or revised, the Appeals Chamber may immediately dismiss them as being misconceived, and would not have to consider them on the merits"]; *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment, Appeals Chamber, 17 Mar 2009, para. 16 [**[**"In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. As well, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies"], paras 18, 20; *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, Appeals Chamber, 3 Apr 2007, para. 16 ["Arguments of a party which are evidently unfounded or do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits"], paras 19-31 [listing eight categories of appeal arguments that will be summarily dismissed including the arguments that are clearly irrelevant or lend support to the challenged findings or are contrary to common sense]; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 Jun 2002, para. 48; *Prosecutor v. Vasiljević*, IT-98-32-A, Judgment, Appeals Chamber, 25 Feb 2004, paras 10, 16-23.

14 *See Prosecutor v. Krajišnik*, IT-00-39-A, Judgment, Appeals Chamber, 17 Mar 2009, para. 26 ["dismiss undeveloped arguments and alleged errors, as well as submissions where the appellant fails to articulate the precise error"]; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, Appeals Chamber, 26 May 2003, para. 19 ["An appellant must therefore clearly set out his grounds of appeal as well as the arguments in support of each ground [...] the Appeals Chamber will dismiss, without providing detailed reasons, those submissions made by appellants in their briefs or in their replies, or presented orally during the appeal hearing, which are evidently unfounded"]; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 Jun 2002, paras 43-44 ["It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner. One cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague, or if they suffer from other formal and obvious insufficiencies. [...] An appellant must therefore clearly set out his grounds of appeal as well as the arguments in support of each ground"]; *Prosecutor v. Kupreškić*, IT-95-16-A, Judgment, Appeals Chamber, 23 Oct 2001, para. 27 ["a party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber [...] If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal"]; Case 001-**F28** Duch AJ, para. 20.

alleges that the ICIJ abused his discretion in issuing the Indictment. While the Appeal mentions the Indictment in its introduction,[15] it does not cite, quote or refer to it anywhere else. Instead, the Appeal simply enumerates lists of NCP's conclusions on the case that either remain very general or have no direct or apparent connection with the Indictment's legal or factual findings, merely reiterating that "the NCP still considers that Meas Muth does not fall within the ECCC personal jurisdiction".[16]

1. The NCP Appeal Demonstrates no Factual Errors

7. In its first part, the NCP Appeal discusses the establishment, structure and functioning of the RAK (paragraphs 14-32), the structure of Division 164 and the Navy (paragraphs 32-41) as well as the communications between the RAK divisions and the Central Committee, including the communications between Meas Muth and the Party Centre (paragraphs 42-47) and the role of Meas Muth (paragraphs 48-54). However, those factual sections make no reference to the relevant parts of the Indictment and do not contain any argument why the ICIJ erred in coming to the conclusions he did. Instead, they merely seek to suggest another interpretation of the evidence.[17] The NCP Appeal therefore fails to discharge its burden to clearly identify the challenged factual findings[18] and demonstrate that no reasonable trier of fact could have reached the challenged findings, which occasioned a miscarriage of justice.[19]

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15 **D267/3** NCP Appeal, paras 1-2, 5-6 (Introduction).

16 **D267/3** NCP Appeal, para. 74.

17 Where an appellant merely seeks to suggest another interpretation or substitute its own evaluation of the evidence, the appeal is liable to be summarily dismissed. *See e.g.*, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment, Appeals Chamber, 17 Mar 2009, para 27 ["assertions about giving sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed. Similarly, where an appellant merely seeks to substitute its own evaluation of the evidence"]; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 Jun 2002, para. 48 ["Objections will be dismissed without detailed reasoning where: [...] 3. The appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber"]; *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment, Appeals Chamber, 17 Sep 2003, para. 22 ["the Defence merely suggests another interpretation of the evidence and does not indicate how the Trial Chamber's evaluation was erroneous [...] submissions must also be presented as to the possible error made [...], not by reference to possible interpretations of the evidence"]; *Prosecutor v. Simić*, IT-95-9-A, Judgment, Appeals Chamber, 20 Nov 2006, para. 14; *Prosecutor v. Halilović*, IT-01-48-A, Judgment, Appeals Chamber, 16 Oct 2007, para. 12.

18 *See, e.g. Prosecutor v. Martić*, IT-95-11-A, Judgment, Appeals Chamber, 8 Oct 2008, para. 18 ["The Appeals Chamber recalls that an appellant is expected to identify the challenged factual finding and put forward its factual arguments with specific reference to the page number and paragraph number [...] As a general rule, where an appellant's references to the Trial Judgement are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument"].

19 *See, e.g.* Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, 11 Apr 2011, para. 113; *Prosecutor v. Haradinaj, et al.*, IT-04-84-A, Judgement, Appeals Chamber, 19 July 2010, para. 12;

8. Morever, the NCP Appeal contains contradictory factual submissions. For example, the Appeal is unclear what Indictment findings regarding Meas Muth's role on the CPK Central Committee and its impact on personal jurisdiction it contests, if any. The NCP Appeal concludes that Meas Muth was "*either* a member of the Central Committee of the CPK *or* a member of the Assisting Committee of the Central Committee of the CPK".[20] However, following its previous analysis of the evidence, the Appeal concludes unambiguously that in addition to his positions of "Secretary of Division 164 of the RAK and Commander of the DK Navy" and his role as chairman of the Kampong Som City Committee,[21] "*Meas Muth was a member of the Central Committee of the CPK*",[22] and that among the Central Committee's full-rights and alternate members were "ministers, zone, sector, and division secretaries", just like Meas Muth.[23]

9. The NCP Appeal twice confirms the importance and impact of such membership on personal jurisdiction, stating that the tasks of the Central Committee "includ[ed] implementing the Party political line, instructing all the zone and sector committees to carry out activities according to the Party political line, and govern and arrange cadres and Party members",[24] and that it was "the most influential institution known as the Central Committee of the CPK who made major decisions concerning the fate of the country. The committee consisted of approximately 30 members who met regularly (once every six months)".[25] It also underlines that it is after the Central Committee's decision dated 30 June 1976[26] that the arrest and execution of internal enemies increased.[27]

10. Indeed, the NCP Appeal confirms that when concluding the ECCC Agreement, the RGC envisaged that Central Committee members would fall within the ECCC's personal

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Prosecutor v. Krajišnik, IT-00-39-A, Judgment, Appeals Chamber, 17 March 2009, para. 14; *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, Appeals Chamber, 3 Apr 2007, para. 19 [A miscarriage of justice "has been defined as a 'grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime'"].

20 **D267/3** NCP Appeal, para. 54 [citing Khieu Samphan and Duch respectively] (emphasis added).

21 **D267/3** NCP Appeal, para. 51; *see also* para. 37 ["Chairman of the Kampong Som City Committee"].

22 **D267/3** NCP Appeal, para. 51 [emphasis added]. The source cited at fn. 179 is Khieu Samphan, a fellow Central Committee member since January 1976.

23 **D267/3** NCP Appeal, para. 52.

24 **D267/3** NCP Appeal, para. 52.

25 **D267/3** NCP Appeal, para. 57.

26 The translation of the date is erroneous here as the original document is dated 30 March 1976: **D1.3.19.1** Decision of the Central Committee Regarding a Number of Matters, 30 March 1976 (correctly cited under fn. 190).

27 **D267/3** NCP Appeal, paras 59-60.

jurisdiction: "The RGC idea was to screen just a small number of "senior leaders" within the ECCC personal jurisdiction, i.e. aiming at the members of the Party Central and Standing Committees", including Ieng Thirith or Van Rith,[28] who in fact ranked lower than Meas Muth in the CPK hierarchy.[29]

11. The NCP Appeal's submissions concerning whether or not Meas Muth had the authority to "smash" RAK personnel within his own Division 164 are similarly ambiguous. The NCP Appeal first affirms in paragraph 20 that "In exercising this right to smash RAK personnel, the General Staff sometimes dispatched cadres into the field", but then states that "it appears that the right to smash was usually delegated to the commanders of RAK Divisions, often in direct consultation with S-21",[30] a submission repeated in paragraph 31.[31] This delegation of power to "smash' is further supported in the NCP Appeal by the fact that "Meas Muth reported to Son Sen about the arrests of Thai fishermen, the purge in units",[32] which suggests that the arrests and purges were first conducted by Meas Muth before being reported to Son Sen. Despite this recognition of Meas Muth's power to smash within his own ranks, the NCP Appeal reaches the conflicting conclusions that Meas Muth was either not invested with such power to kill and acted only pursuant to the specific orders of Son Sen, or had no choice but implement the purge policy imposed by the Party Centre on high-ranking cadres such as the zone leaders.[33]

12. The NCP Appeal also fails to challenge other key findings in the Indictment about Meas Muth's role and authority, and the nature and gravity of the crimes committed, that, taken together, establish the ECCC's personal jurisdiction in this case. For example, the Appeal does not claim that the Indictment erred in fact when affirming that (1) Meas Muth was one of Son Sen's deputies within the General Staff from the establishment of the Navy

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28 **D267/3** NCP Appeal, para. 68.
29 *See further* **D266/2** ICP Appeal, paras 148-54.
30 **D267/3** NCP Appeal, para. 20.
31 **D267/3** NCP Appeal, para. 31 ["RAK divisions were also responsible for internal security, which meant identifying "enemies", "traitors" and other undesirable elements. Many of these personnel were sent to S-21, where they were executed. While the Central Committee formally authorised the General Staff to decide who to "smash" amongst RAK personnel, in practice it appears that senior division cadres often made the decisions about who to arrest and smash within their own division"].
32 **D267/3** NCP Appeal, para. 47. *See also*, **D267/3** NCP Appeal, para. 39 [discussing how the DK navy sought to capture and destroy any Thai or Vietnamese vessels that entered DK waters, which resulted in attacks against Thai fishing vessels and the capture or killing of Thai fishermen].
33 **D267/3** NCP Appeal, paras 45, 56-60.

and a reserve member of the General Staff since its creation;[34] (2) Meas Muth's position in the hierarchy combined with the nature and gravity of his actions clearly surpass those of Ao An, Im Chaem, and Kaing Guek Eav *alias* Duch (the latter being tried and convicted as 'most responsible');[35] (3) under the command of Meas Muth, foreigners arrested at sea, in particular *all* the Vietnamese (military, perceived spies and numerous civilians, including fishermen and refugees) and many Thai nationals were killed at sea, on the islands or in the Kampong Som area, in addition to those who were transferred and executed at S-21;[36] (4) a minimum of 1,200 Thai and 3,276 Vietnamese (the latter being victims of genocide) were killed following their attack and/or capture by the DK Navy under Meas Muth's command;[37] (5) as Central Division 164 commander, Meas Muth, had the authority to operate in the Koh Kong area and issue orders to Division 1, West Zone, regarding the arrest of foreigners at sea around Koh Kong;[38] (6) in late 1978, Meas Muth was directly involved in carrying out the removal and replacement of the Division 117 (and Sector 505) leadership in Kratie, resulting in the execution of the leaders in S-21 and other cadres in Kratie;[39] (7) Meas Muth had the authority to plan and order the mass purges of Division 164, including the soldiers from the East Zone, Battalions 310, 385 and 386 and many others, resulting in at least 719 executions in the Kampong Som area (including in Toek Sap, Stung Hav and Ream Area worksites and villages and communes) or in S-21;[40] (8) Thousands of soldiers and civilians were enslaved at the Kampong Som crime sites, including in the Kang Keng and Bet Trang (Ream area) woksites, the Stung Hav worksites, and Toek Sap security centre;[41] and (9) Meas Muth disseminated and implemented through his personnel the CPK policy of

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34 **D267** Indictment, paras 162, 459, 477 and 565. In fact, the NCP Appeal, although discussing the roles and activities of the General Staff (paras 18-24), fails to address the General Staff membership of Meas Muth, even in the section referring to the specific roles of Meas Muth (paras 51-54). For further details about the importance of that membership for the determination of the ECCC's personal jurisdiction over Meas Muth, *see* **D266/2** ICP Appeal, paras 142-47, 199.

35 **D267** Indictment, para. 460 ["Meas Muth is among those most responsible because of the combination of his rank and scope of authority in the hierarchy of the DK, and based on the character and magnitude of his crimes. This finding bears comparison with other charged or convicted persons. His position combined with the nature and impact of his actions clearly surpass those of Ao An, Im Chaem, and Kaing Guak Eav alias Duch"], paras 461-69.

36 **D267** Indictment, paras 195, 217-24, 231-47, 265.

37 **D267** Indictment, paras 248-57, 482-87.

38 **D267** Indictment, paras 225-30.

39 **D267** Indictment, paras 163, 188, 316-29.

40 **D267** Indictment, paras 271-91, 467.

41 **D267** Indictment, paras 531, 537, 545

forced marriage and forced consummation in the Kampong Som area, for both civilians and Division 164 troops.[42]

2. The NCP Appeal Demonstrates no Legal Errors

13. In its second part, particularly in paragraphs 61 to 74, the Appeal argues why in the view of the NCP the PTC should dismiss the case for lack of personal jurisdiction over Meas Muth.[43] However, the Appeal fails to refer precisely to the Indictment, identify or substantiate any error of law contained therein, or explain any error invalidates the Indictment.[44]

14. The NCP Appeal does not challenge key legal findings about Meas Muth's role and authority and the nature and gravity of the crimes committed that establish the ECCC's personal jurisdiction over him as one of those 'most responsible' for the crimes of the DK regime. For instance, the Appeal does not dispute the Indictment's findings that: (1) the main charges that "alone put him solidly within the bracket of personal jurisdiction, are those of the genocide of the Vietnamese as well as the extermination of the Thai captured by the DK Navy in the waters and islands off the DK coast";[45] and that (2) Meas Muth shared the common purpose of implementing the criminal CPK policies (establishment of forced labour worksites, re-education of 'bad elements' and killing 'enemies', targeting specific groups and implementing the forced marriage of civilians and soldiers) with Son Sen, Sou Met, Ta Mok and other senior RAK cadres on the basis

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42 **D267** Indictment, paras 200-05, 444-55.

43 In the NCP Appeal, under the title "NCP's Viewpoint", paragraphs 56-60 discuss why Meas Muth should not be held accountable for the crimes he committed and paragraphs 61-74 the non-applicability of personal jurisdiction.

44 For the reasons set out above, this is sufficient to justify a summary dismissal. *See above*, para. 5, fn.13. *See also*, *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, Appeals Chamber, 3 Apr 2007, para. 9 ["A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground"]; *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment, Appeals Chamber, 17 Sep 2003, para.10.

45 **D267** Indictment, para. 463. *See also* para 464 [according to a very conservative calculation, the ICIJ estimates that a minimum of 1,200 Thai and 3,276 Vietmanese were killed by the Navy under Meas Muth's reign], 465 [compares the methods used by the DK Navy to kill those foreigners to the killing practices in the Nazi concentration camps]. The ICP, as mentioned in para. 2 above, notes that the NCP Appeal omitted to mention the new charge of genocide of the Vietnamese notified on 14 December 2015 by ICIJ Bohlander and significantly does not address at all the indictment of Meas Muth for the crime of genocide. The significance of the role played by Meas Muth in the genocide of the Vietnamese is obviously a major element to determine his categorisation as "most reponsible person": *see*, the developments made in the **D266/2** ICP Appeal, paras 24, 60-62.

of a JCE through the commission of international crimes.[46]

15. Instead, the NCP Appeal argues that (1) the category "most responsible" refers only to Kaing Guek Eav *alias* Duch;[47] (2) the RGC is entitled to unilaterally restrict the scope of personal jurisdiction at this stage;[48] and (3) expanding the scope of the ECCC's personal jurisdiction to include Meas Muth would undermine national reconciliation.[49] For the reasons set out below, the ICP submits that these arguments are unpersuasive.

B. THE RGC AND THE UN BOTH INTENDED THAT "THOSE WHO WERE MOST RESPONSIBLE" BE AN OPEN CATEGORY WHOSE MEMBERSHIP WOULD BE JUDICIALLY DETERMINED

16. The NCP Appeal correctly notes that the ECCC's personal jurisdiction was established by the agreement between the RGC and the UN ("ECCC Agreement") and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia ("ECCC Law").[50] Both provide that jurisdiction is limited to senior leaders of Democratic Kampuchea ("DK") and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia.[51] However, the Appeal wrongly asserts that the RGC's "idea for the ECCC Agreement" was that "those who were most responsible" only referred to "S-21 Security Centre Chairman Kaing Guek Eav *alias* Duch", and therefore, pursuing a case against Meas Muth would improperly expand the scope of the Court's personal jurisdiction.[52]

17. Such an interpretation is not supported by the plain language used in the ECCC Agreement and ECCC Law which includes the pronoun "*those* who were most

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46 **D267** Indictment, paras 562-70. The ICP notes that the NCP does not challenge the ICIJ's legal characterisation of *any* of the crimes for which he found Meas Muth responsible.
47 **D267/3** NCP Appeal, para. 68.
48 **D267/3** NCP Appeal, paras 63-67.
49 **D267/3** NCP Appeal, paras 71-73.
50 **D267/3** NCP Appeal, para. 62; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 June 2003 ("ECCC Agreement"); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) ("ECCC Law").
51 ECCC Agreement, art. 1; ECCC Law, art. 1.
52 **D267/3** NCP Appeal, paras 68, 73. *See also*, **D256/6** NCP Final Submission concerning Meas Muth Pursuant to Internal Rule 66, 14 Nov 2017, paras 29, 30 & 32.

responsible"[53] within the ECCC's personal jurisdiction.[54] Written in the plural, this clearly refers to a category of people rather than an individual. The ECCC Agreement text is presumed to be an authentic expression of the intention of its two parties, the RGC and the UN.[55] If they had reached an understanding that Duch was the only candidate for those who could be a "most responsible" person for the purposes of prosecution at the ECCC, they could have expressly provided for this in their Agreement, which the RGC would then have implemented in the ECCC Law. The text of the ECCC Agreement makes clear that they did not.

18. The NCP's interpretation is similarly contradicted by the statements of RGC officials at the time of the ECCC Agreement negotiations and passage of the ECCC Law. For example, Prime Minister Hun Sen during the negotiation period publicly promised that the RGC would not interfere in any way with the ECCC. In March and April 1999, he affirmed to both the UN Secretary General and US Senotor Kerry, that the RGC respected the complete independence of the judiciary and its exclusive competence in the prosecution and indictment of Khmer Rouge leaders.[56]

19. The NCP Appeal correctly states that the issue of the number of those to be brought to trial was "hotly debated during the National Assembly sessions before passing the ECCC Draft Law", but fails to provide details of the discussion about what the RGC meant by

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53 This plural language occurs in all three (English, French and Khmer) versions of the ECCC Agreement and the ECCC Law. The French version refers to "les principaux responsables" and the Khmer version specifies "ជនទាំងឡាយដែលទទួលខុសត្រូវខ្ពស់បំផុត".

54 ECCC Agreement, art. 1 (emphasis added); ECCC Law, arts 1, 2*new* (emphasis added).

55 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, ("Vienna Convention"), 1155 UNTS 331, art. 31(1) ["A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."]. The parties expressly agreed that the Vienna Convention applies to the ECCC Agreement. *See* ECCC Agreement, art. 2(2). *See also* **D266/2.1.45** *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 Feb 1994, ICJ Reports 1994, p. 6, para. 41 ["Interpretation must be based above all upon the text of the treaty."]; **D266/2.1.44** *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 15 Dec 2004, ICJ Reports 2004, p. 279, para. 100; **D266/2.1.43** Interpretation of Peace Treaties (second phase), Advisory Opinion, 18 Jul 1950, ICJ Reports 1950, p. 229 ["It is the duty of the Court to interpret the Treaties, not to revise them."]; **D266/2.1.136** ILC Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p. 220, para. 11 ["Commentary to article 27 [...] [Article 27 (now article 31)] as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this – the textual- approach to treaty interpretation."].

56 *For further details, see* **D266/2** ICP Appeal, paras 181-82 [statements by Prime Minister Hun Sen to the UN Secretary General and to U.S. Senator John Kerry].

"most responsible".[57] The transcript of that October 2004 debate, during which several government lawmakers asked for clarification as to what the drafters meant by "those most responsible",[58] memorialises this discussion, and the ICP submits that the representations made to the National Assembly by Deputy Prime Minister Sok An, who headed negotiations for the RGC, are the best evidence of the intent of the Cambodian government at the time the ECCC Agreement was made. He stated that only the ECCC could precisely decide who to indict, while the United Nations and the RGC agreed to identify two targets: the 'senior leaders' and 'those most responsible'. He referred to the senior leaders as "no more than 10 people" and stated that "There is no specific amount of people in the second group to be indicted".[59]

20. The Group of Experts assigned by the Secretary-General in early 1999 shared the same understanding, as they did "not wish to offer a numerical limit on the number of such persons who could be targets of investigation", but still estimated "that the number of persons to be tried might well be in the range of some 20 to 30".[60]

21. These recommendations formed the basis for the UN's negotiating position at the time. David Scheffer recalled in an article published in 2011 that UN negotiator Ralph Zacklin visited Phnom Penh in late August 1999 and left with the impression that Cambodian authorities only wanted to prosecute Ta Mok and Duch, but the RGC's position changed as negotiations progressed through the rest of 1999 and 2000.[61] The article details Scheffer's own involvement in the negotiations, particularly relating to the considerations regarding Duch and the "most responsible" category.[62] He wrote: "we were only interested in the surviving senior leaders who demonstrated significant responsibility *as well as other top functionaries, like Duch*, who had such instrumental roles in the atrocities."[63] Clearly, the UN understanding was that the category would not

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57 **D267/3** NCP Appeal, para. 68.
58 *See the details in* **D266/2** ICP Appeal, para. 179 [Ly Thuch, Keo Remy and Eng Chhay Eang asked such clarifications].
59 **D128.1/1/10.1.1** Cambodian National Assembly Transcript, 4-5 Oct 2004, EN 01125994 (emphasis added). *See also* the full Sok An's quote cited in **D266/2** ICP Appeal, para. 180.
60 **D181/2.15** Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850, S/1999/231, 16 March 1999 ("UN Group of Experts Report"), para. 110, as cited in **D266/2** ICP Appeal, para 183.
61 **D170.1.7** Scheffer, D.J., "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 22 May 2011 ("Scheffer article"), p. 3.
62 **D170.1.7** Scheffer article, particularly pp. 3-5.
63 **D170.1.7** Scheffer article, p. 5 (emphasis removed and added).

be limited only to Duch.

22. As set out in the ICP Appeal,[64] by March 2000, the Cambodian government had proposed the wording "those responsible", which broadened the category beyond what the UN had intended, and UN Secretary-General Kofi Annan and UN Legal Counsel Hans Corell both expressed concern to the RGC that the group was now too large.[65] On 2 January 2001, the Cambodian National Assembly adopted the ECCC Law with the wording "those who were most responsible".[66] Notably, Scheffer did not recall that during the negotiations any "concession by U.N. negotiators to interpret the personal jurisdiction language so as to limit the suspect pool to only five specific individuals".[67]

23. In sum, the ECCC negotiating history shows that the intent of both the RGC and the UN at the time of the ECCC Agreement was that "those who were most responsible" was an open category whose membership would only be determined by the Co-Prosecutors and Judges of the ECCC based on the totality of the evidence and acting impartially and independently of any instructions. This interpretation has been confirmed by the Supreme Court Chamber in its Case 001 Appeal Judgment[68] and supported by the NCIJ in the Case 004/1 Closing Order and Case 004/2 Dismissal Order[69] as well as the Case 003 Dismissal

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64 **D266/2** ICP Appeal, para. 185.
65 **D170.1.7** Scheffer article, pp. 5-8.
66 **D170.1.7** Scheffer article, p. 8.
67 **D170.1.7** Scheffer article, p. 10.
68 Case 001-**F28** Duch AJ, paras 62-81, in particular para. 62 ["interpreting the term most responsible as a jurisdictional requirement of the ECCC would be inconsistent with the object and purpose of the UN RGC Agreement and would lead to an unreasonable result [...] the determination of whether an accused is 'most responsible' requires a large amount of discretion], para. 63 ["the term 'most responsible' should be interpreted as investigatorial and prosecutorial policy for the Co-Investigating Judges and Co-prosecutors that is not justiciable before the Trial Chamber"], para. 69 ["a close comparison of the ICTY and ICTR with the ECCC militates in favour of treating the term 'most responsible' as investigatorial and prosecutorial policy rather than a jurisdictional requirement of the ECCC"], para. 70, fn. 133 ["As the term 'most responsible' is not a jurisdictional requirement of the ECCC [but constitutes investigatorial and prosecutorial policy], neither could a charged person appeal to the Pre-Trial Chamber under Internal Rule 74(3)(a) (Rev.8) on the basis that s/he falls outside of the ECCC's jurisdiction because s/he is not 'most responsible'", absent an abuse of discretion].
The SCC Appeal Judgment findings were cited and summarised in the **D267** Indictment, para.39 ["the SCC also implicitly held that [...] the selection of persons to be investigated and indicted was and is purely a matter for the discretion of the OCP and OCIJ, and based entirely on the merits of each individual case"], and para. 37 ["the SCC found that these two categories were not jurisdictional criteria *stricto sensu*, but merely described the outlines of the prosecution and investigation policies"].
69 Case 004/2-**D359** Case 004/2 Order Dismissing the case Against Ao An, para. 461 (This particular paragraph was previously filed in Case 003 under **D266/2.1.23)**; **D261** Closing Order (Reasons) in Case 004/1, para. 37.

Order itself.[70]

C. NEITHER PARTY TO THE ECCC AGREEMENT CAN NOW UNILATERALLY CHANGE THE SCOPE OF PERSONAL JURISDICTION

24. The NCP Appeal argues that "founders of international tribunals may have an influence on the scope of the personal jurisidiction and judicial affairs without prejudice to impartiality and independence of tribunals" and that "[f]or the restriction of the ECCC personal jurisdiction, the RGC is playing a role as the UN Security Council did with the ICTY, ICTR and SCSL."[71] Based on this, the Appeal "urges the ICIJ and the Chamber to act in line with the RGC determination and the spirit of the ECCC Law"[72] on personal jurisdiction.

25. The NCP Appeal bases this argument on Security Council Resolutions 1503 and 1534 which were adopted approximately 10 years after the founding of the ICTY and ICTR and related to the completion plans of the two tribunals. These resolutions directed the ICTY and ICTR to focus their efforts on "the most senior leaders suspected of being most responsible for crimes" and refer other cases to national jurisdictions in order to achieve the goals in the tribunals' completion plans.[73] From this, the NCP Appeal concludes that "[t]he RGC, a founder of the ECCC Agreement, may have an influence on the functioning of the ECCC and the termination of its mandate" and that "[a] method acceptable for terminating the ECCC mandate is a restriction on the scope of personal jurisdiction."[74]

26. This is an inapt analogy. The ICTY and ICTR were originally established by Security Council resolutions,[75] and in adopting Resolutions 1503 and 1534 relating to the completion plans, the Security Council went through precisely the same process, with all of the same procedural safeguards, as it had when it initially set up the *ad hoc* tribunals. All of the members of the Security Council had the right to participate in the debate on Resolutions 1503 and 1534 and to be heard on the merits of changing the tribunals' case

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70 *See* **D266/2** ICP Appeal, para. 190, *citing* **D266** Dismissal Order, para. 364 [*See also*, paras 368, 405].
71 **D267/3** NCP Appeal, para. 67.
72 **D267/3** NCP Appeal, para. 67.
73 **D267/3** NCP Appeal, para. 64, fn. 192-93, para. 65; **D26/1/1.1.18** Security Council Resolution 1503, 28 August 2003 ("Resolution 1503"), S/RES/1503 (2003), pp. 1-2; **D26/1/1.1.19** Security Council Resolution 1534, 26 March 2004 ("Resolution 1534"), S/RES/1534 (2004), paras 4-5.
74 **D267/3** NCP Appeal, para. 63.
75 Security Council Resolution 827, 25 May 1993, S/RES/827 (1993) [establishing the ICTY]; Security Council Resolution 955, 8 Nov 1994, S/RES/955 (1994) [establishing the ICTR].

selection strategy. Every member of the Security Council then had the right to vote on the proposed resolutions before they were adopted. Clearly, if a single member of the Security Council had expressed a view that the *ad hoc* tribunals should change their case selection strategy, to have any effect, it would have had to first go through the process of debate and a vote to adopt a formal resolution.

27. In the case of te ECCC, the proper analogy to the Security Council resolutions establishing the *ad hoc* tribunals is the ECCC Agreement, which was approved by both the UN and the RGC following negotiations in which the parties were equal participants. The ECCC Agreement provides that "[i]n case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties."[76] This provision makes it clear that any change in policy regarding matters addressed by the ECCC Agreement (which includes personal jurisdiction) must be approved by *both* parties following a discussion in which *both* parties participate. To date, neither the RGC nor the UN have sought to amend the provision regarding the personal jurisdiction of the ECCC. Accordingly, the scope of personal jurisdiction set out in the ECCC Agreement and ECCC Law defines the personal jurisdiction of the ECCC and constitutes the law that the PTC must apply.

28. Recognising the UN's right to participate in changes to the policy on personal jurisdiction in no way diminishes Cambodia's sovereignty: all states have the power to voluntarily enter into binding agreements, and, having done so, every state from the largest to the smallest is obligated to follow such agreements unless and until they are amended or the state formally withdraws. Having ratified the ECCC Agreement, both sides are bound by its terms, and neither side can modify the meaning of those terms by unilateral policy declarations made after its adoption.[77] If the RGC no longer wishes to entrust the ECCC with the responsibility of bringing to trial those most responsible for crimes committed during the DK regime, the Government could seek to withdraw from the Agreement[78] or amend the ECCC Law with the consent of the UN. No effort has been made to do either.

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76 ECCC Agreement, art. 2(3).

77 It is presumably obvious that if a UN official were to state that the term "most responsible" included, for example, any Khmer Rouge cadre of any level who had killed more than 25 people, this would not be a persuasive basis for arguing that that was the proper definition of the term.

78 Vienna Convention, arts 54, 56.

29. Unlike the RGC's "influence on the functioning of the ECCC",[79] Resolutions 1503 and 1534 did not purport to have any effect on whether a given case was prosecuted; rather, they affected only the court in which a particular case was tried. Resolution 1503 instructed the *ad hoc* tribunals to focus on cases against "the most senior leaders suspected of being most responsible", but other cases were not dismissed—rather, they were to be "transferr[ed] [...] to competent national jurisdictions."[80] Indeed, the Security Council emphasised that the adoption of Resolution 1503 was not intended to reduce the number of people to be investigated and tried for mass atrocity crimes: the Resolution explicitly stated that the tribunals' completion plans "in no way alter the obligation of Rwanda and the countries of the former Yugoslavia to investigate those accused whose cases would not be tried by the ICTR or ICTY and take appropriate action with respect to indictment and prosecution".[81] Resolutions 1503 and 1534 did not promote impunity for crimes within the jurisdiction of the *ad hoc* tribunals; rather, they simply divided the task of investigation and prosecution between the *ad hoc* tribunals and national courts. Critically the Security Council respected judicial independence by never expressing any views on the appropriate disposition of any particular case at the ICTY or ICTR. While the Council *did* set out the criterion of "the most senior leaders suspected of being most responsible for crimes" as the test for which cases should be retained, it never expressed any view as to whether any particular case met that test. The application of the test was appropriately left entirely to the independent discretion of the ICTY's and ICTR's judges who chose to refer some cases to national courts while determining that others were best prosecuted at the Tribunals.

30. The ECCC Agreement and ECCC Law both require that ECCC judges be free to undertake the same exercise of independent discretion. Article 10 *new* of the ECCC Law provides, in part, that "Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source." The prohibition on judges accepting instructions from governments or any outside source also appears in Article 3(3) of the ECCC Agreement.

31. The requirement for an independent judiciary is also reflected in the Cambodian

79 **D267/3** NCP Appeal, para. 63.
80 **D26/1/1.1.18** Resolution 1503, pp. 1-2.
81 **D26/1/1.1.18** Resolution 1503, p. 2.

Constitution,[82] in multiple human rights instruments and statements of best practices and minimum standards, including the Beijing Statement of Principles of the Independence of the Judiciary promulgated by the Law Association for Asia and the Pacific,[83] the New Delhi Code of Minimum Standards of Judicial Independence adopted by the International Bar Association,[84] and the Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly.[85] These principles require that "The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole."[86]

32. A fundamental principle of the Rule of Law is that while the legislature or executive is responsible for *making the law* through legislation, executive acts, and treaties, it is solely the judiciary that decides *how to apply the law* to individual cases. In a system governed by the Rule of Law, judicial independence is respected. Judges must make their rulings based on the law, the evidence, and their own judgement and conscience without taking instructions from governments or any outside sources.

D. AN INDEPENDENT JUDICIAL RESOLUTION OF CASES 003, 004 AND 004/2 WILL PROMOTE BOTH JUSTICE AND RECONCILIATION

33. The NCP Appeal asserts that the Preamble of the ECCC Agreement, reflecting UN General Assembly Resolution 57/228 adopted on 18 December 2002,[87] requires "striking a balance between 'justice' and 'national reconciliation'",[88] avers that Cases 001 and 002 have already brought justice to the victims, and implies that the continuation of proceedings against Meas Muth would undermine national reconciliation.[89] However, the Appeal does not provide any evidence that bringing Meas Muth to account for the

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82 The Constitution of the Kingdom of Cambodia, adopted 21 September 1993, arts 51 ["[t]he legislative, executive, and judicial powers shall be separate."], 128 ["[t]he judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens"], 129 ["[o]nly judges shall have the right to adjudicate"], 130 ["[j]udicial power shall not be granted to the legislative or executive branches."].

83 **D266/2.1.27** Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, The Law Association for Asia and the Pacific, 28 August 1997, arts 3(a), 4-5.

84 **D266/2.1.30** New Delhi Code of Minimum Standards of Judicial Independence, International Bar Association, 22 October 1982 ("New Delhi Code"), art. 16.

85 Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras 1-2, 4.

86 **D266/2.1.30** New Delhi Code, art. 16.

87 United Nations General Assembly Resolution 57/228, 18 Dec 2002, UN doc. A/RES/57/228 ("UNGA Res 57/228"), p. 1 ["Recognizing the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security"].

88 **D267/3** NCP Appeal, para. 71.

89 **D267/3** NCP Appeal, para. 73.

very serious crimes with which he is charged would in any way hinder national reconciliation. On the contrary, it is clear that making Meas Muth answer at trial to the compelling evidence of his role in genocide and other international crimes that affected tens of thousands of Cambodians would help achieve some measure of justice for additional victims, thus addressing the Preamble's concerns.

34. There is simply no indication whatsoever that an independent judicial resolution of Cases 004/2, 003 and 004 on the merits—whatever that resolution might be—would threaten the peace and security of Cambodia. As the UN Group of Experts on Cambodia stated in their report to the Secretary-General in 1999, "Accountability for the past and national reconciliation for the future are thus not innate opposites or even competing goals. [...] if justice is brought about with sensitivity to a country's own situation, accountability and national reconciliation are, in fact, complementary, even inseparable."[90] Indeed, UN General Assembly Resolution 57/228 itself underlines that "the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State".[91]

35. As the ICP has previously observed, the resolutions of Cases 001 and 002 with convictions and life sentences have not negatively affected national reconciliation or peace; to the contrary, the convictions were widely lauded both within and outside of Cambodia and they appear to have *promoted* reconciliation.[92] These cases involved accused both more junior than Meas Muth (Duch) and above him in the CPK hierarchy (Nuon Chea and Khieu Samphan). In addition, there have been no negative public reactions to the announcements that Meas Muth and Ao An and have been indicted or that Yim Tith is under judicial investigation[93] and therefore no reason to believe that sending Meas Muth to trial would threaten national reconciliation. Moreover, Cambodia has now enjoyed over two decades of peace and stability.[94] There are no armed groups

90 **D181/2.15** UN Group of Experts Report, para. 3.
91 UNGA Res 57/228, p.1.
92 **D256/7** International Co-Prosecutor's Rule 66 Final Submission, 14 Nov 2017 ["ICP Final Submission"], paras 1101-03.
93 **D256/7** ICP Final Submission, para. 1101.
94 Even in 1998, during the visit of the Group of Experts to Cambodia, members of the Cambodian public and of the government did not express support for the absolute precedence of issues of security over the

exercising power over Cambodian territory. The Khmer Rouge has ceased to exist as a political or military organisation, former cadres are now elderly, the Pol Pot regime is almost universally reviled, and there is no evidence of any support for a resurgence of the movement.[95] A revived Khmer Rouge armed insurrection is simply not a plausible possibility in Cambodia today.

36. In contrast, there are strong indications that victims do not agree with the NCP Appeal's contention that no further justice is needed after the trial of Cases 001 and 002. Since the inception of the ECCC, several studies concerning the Cambodian public's perception of the ECCC have been published. While these studies all differ in their approach, target groups, and research questions, they all indicate that the Cambodian public has a strong interest in seeing the remaining cases proceed.

37. The most recent study was published in November 2018 and was conducted by the Marburg Centre for Conflict Studies, the Phnom Penh Centre for the Study of Humanitarian Law, and Swiss Peace (the "Marburg Study").[96] The study focused on victim participation, so it surveyed 439 victims of the Khmer Rouge who were randomly selected from four predetermined groups.[97] Notably, when asked whether the ECCC should address Cases 003 and 004 (also encompassing Case 004/2), 80.2 percent of the respondents were in favour of the cases going ahead. The five main reasons cited, from most to least frequent, were (1) it would provide the respondent with a sense of justice, (2) it would mean justice for the victims generally, (3) it would mean Khmer Rouge leaders could not escape justice, (4) it would provide more truth about the Khmer Rouge

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interest of justice. As the Group of Experts observed, "Concerning public opinion, the Group did hear a strong desire among Cambodians in and out of Government for peace. But none suggested that peace and trials were irreconcilable, or that Cambodians saw peace as a substitute for justice." *See* **D181/2.15** UN Group of Experts Report, para. 100. *See also* **D256/7** ICP Final Submission, para. 1105.

95 **D256/7** ICP Final Submission, para. 1105.

96 Williams, T., et al., "Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process", Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: swisspeace, November 2018 ("Marburg Study"). Data collection for the study ran from 29 January until 7 June 2018 (*see* Marburg Study, p. 23).

97 ECCC civil party applicants comprised the first group, accounting for more than half of the respondents. These civil party applicants were divided into eight subgroups with varying degrees of participation in the proceedings, and some were civil parties in Cases 003 and 004 (Case 004 was used as an umbrella term to also encompass Case 004/2). The second group was comprised of complainants, *i.e.* individuals registered with the Court because they provided information, but they had not applied to become civil parties. The third group contained victims who had participated in NGO activities related to transitional justice in Cambodia. The fourth group was made up of individuals who neither took part in ECCC proceedings nor in such NGO projects. As all but two of the respondents considered themselves victims of the Khmer Rouge, the average age of the respondents was 62.4 years. *See* Marburg Study, pp. 19, 21-22, 28.

regime, and (5) it would bring justice to Cambodia.[98] Only 2.77 percent of the respondents believed the cases should not proceed because they could lead to conflict, but the authors of the study believed this fear of unrest could be linked to the "adamant rhetoric of the government expressing no intention to support additional cases of the ECCC beyond 002".[99]

38. The Open Society Justice Initiative conducted a study from October 2013 until January 2014 ("OSJI Study") that focused on the impact of the ECCC on ordinary Cambodians.[100] The sample size of the respondents interviewed was smaller than the Marburg Study, but more diverse, including victims/survivors, accused, perpetrators, bystanders, and youth.[101] At the time the data was collected, of the 49 respondents who were asked about and had knowledge of Cases 003 and 004, 29 wanted the cases to continue, while six were ambivalent.[102] The 14 respondents who did *not* want the cases to continue thought the proceedings were too lengthy and/or cited concerns about government interference and fears of unrest in their communities, particularly those who lived in former Khmer Rouge strongholds or were former cadres themselves.[103] The OSJI Study noted, however, that the respondents' fears of unrest were often based on two misconceptions: (1) that Cases 003 and 004 would target low-level leaders, and (2) that cases beyond 003 and 004 would follow, moving further down the DK hierarchy.[104]

39. The WSD HANDA Center for Human Rights and International Justice at Stanford University and the East-West Center conducted a study in 2017 with eight focus groups comprised of 83 students from four universities in Phnom Penh.[105] Although the sample was small, skewed toward those with a prior interest, and comprised solely of young

98 Marburg Study, p. 63. *Note* that the respondents were allowed to give multiple answers.
99 Marburg Study, pp. 62-63. Only 14% of the 19.8% of respondents who did not support Cases 003 and 004 cited this reason, comprising only 2.77% of the entire respondent group.
100 Ryan, H. and McGrew, L., "Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia", New York: Open Society Justice Initiative, 2016 ("OSJI Study"), pp. 126-127, en. 210.
101 OSJI Study, pp. 126-127, en. 210. *Note* that the respondents were drawn from OSJI's existing contacts in Cambodia and therefore the sample group was not random. Out of the 122 total respondents, 109 were Cambodian.
102 OSJI Study, p. 82.
103 OSJI Study, pp. 82-83.
104 OSJI Study, p. 83.
105 McCaffrie, C., *et al.*, "So We Can Know What Happened: The Educational Potential of the Extraordinary Chambers in the Courts of Cambodia", Stanford: WSD HANDA Center for Human Rights and International Justice, East-West Center, January 2018 ("Handa Study"), p. 6.

people able to pursue higher education,[106] the participating students identified the most important legacies of the ECCC, in order, as: (1) teaching/advising the next generation about what happened/learning the truth; (2) providing justice and reconciliation for victims/Cambodian people; (3) healing/addressing the suffering of the past; (4) preventing repetition of the crimes; and (5) prosecuting and/or punishing the Khmer Rouge leaders.[107] Similarly, a 2011 study conducted by the Human Rights Center at the Berkeley School of Law selected 1,000 participants from 250 randomly chosen villages to assess Cambodians' knowledge, perception and attitudes toward social reconstruction and the ECCC.[108] A large majority (83 percent) agreed that the ECCC should be involved in responding to what happened during the DK regime, 93 percent agreed that it was necessary to find the truth about what happened during the DK period, and 83 percent believed that people could not feel better if they did not know what happened to their loved ones.[109] All of these aims would be further fulfilled by Cases 003, 004, and 004/2 moving ahead (should the evidence warrant it) and were the very goals that led to the establishment of this Court.

40. In light of the results from these studies and considering that Cases 003, 004 and 004/2 all include issues and crime sites that have not been the subject of Cases 001 or 002, there are numerous Cambodians, victims, and family members of victims with a strong interest in hearing the truth about what happened at these locations and about who was responsible for the crimes. In Case 003 specifically, 646 persons applied to become civil parties and take part in the proceedings: although on 28 November 2018[110] only 22 have been certified as admissible by the ICIJ[111] and 20 others have been declared as

106 Handa Study, p. 7.
107 Handa Study, p. 19.
108 Pham, PN, *et al.*, "After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia", Human Rights Center, University of California, Berkeley, June 2011 ("Berkeley Study"), p. 16. *Note* that although the study was published in June 2011, the information was collected in the first 20 days of December 2010.
109 Berkeley Study, pp. 26, 31. *Note* that these three figures reflect the 2010/2011 study results (rather than the 2008 baseline results).
110 **D269** Order on Admissibility of Civil Party Applications, 28 Nov 2018.
111 **D269.1** Annex A – List of Civil Party Applications Admissible, EN 01596686-87 (Keth Loch, San Saret, Din Kan, Phan Rim, Suon Doeun, Ung Chan Thea, Neak Sitha, Dom Khean, Oeung Aun, Pheng Kimla, Sam Vuthy, Nap Somaly, Soem Ream, Che Heap, Chum Neou, Ou Dav, Robert Hamill, Timothy Scott Deeds, Niev Sova, Vong Nhen, El Sok, Teu Ry). Among them, three had previously been rejected as civil parties by Judges Blunk and You Bunleng in 2011: Robert Hamill (**D11/2/3**, Order on the Admissibility of the Civil Party Application of Rob Hamill, 29 Apr 2011), Chum Neou (**D11/3/3,** Order on the Admissibility of the Civil Party Application of Chum Neou, 27 Jul 2011) and Timothy Scott Deeds (**D11/4/3** Order on the Admissibility of the Civil Party Application of Timothy Scott Deeds, 9 Sep 2011).

complainants,[112] the others[113] filed an appeal to the PTC requesting to declare the admissibility of their applications, showing their renewed interest in participating in the proceedings if it goes ahead.[114] Their appeal is pending. Those 646 persons clearly did not believe that justice had been fully served by Cases 001 and 002, or they would not have applied to participate in additional proceedings. Moreover, not all the victims who wish that justice is rendered in Case 003 manifested that interest through a formal civil party application. It would be presumptuous to affirm that all those direct victims or family members of deceased victims would have been satisfied with the holding of the trials in Case 001, Case 002/01 and Case 002/02 against three Khmer Rouge senior leaders and/or most responsible, particularly for the specific crimes committed at sea, on the Cambodian islands or within the area of the Kampong Som Autonomous Sector.

41. For the foregoing reasons, the NCP Appeal's argument that Meas Muth should not face trial because "justice has been brought" to the victims through the trial of Cases 001 and 002 is unpersuasive.[115]

IV. RELIEF SOUGHT

42. The ICP respectfully requests that the PTC dismiss the NCP Appeal, uphold the ICIJ's finding that Meas Muth was one of "those who were most responsible" for crimes during the DK regime, and send Case 003 for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

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

112 **D269.3** Annex C – List of Civil Party Applicationsand Related Documents Considered as Complaints (18 deceased applicants: Than Nan, Chhay Ly, Om Mon, Tit Saphal, Khut Hen, Sim To, Lok Man, Bou Him, Chhie Sun, Suon Lov, Van (Thach) Saret, Khen Hay, Kieng Ka, Nil Kaut, Kim Huoy, Sev Yaenh, Chom Sao, Sum Pat; Two withdrew their applications: Dy Dany and Seng Chantheary).

113 **D269.2** Annex B – List of Civil Party Applications Inadmissible (604 names).

114 **D269/3** Appeal Against Order on the Admissibility of Civil Party Applicants, 7 March 2019 [The lawyers of the Civil Party Applicants filed to the PTC an appeal requesting to declare the admissibility of all applicants that were declared inadmissible or, if not, consider them as complainants].

115 **D267/3** NCP Appeal, para. 73.