

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

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**INTERNATIONAL CO-PROSECUTOR'S APPEAL AGAINST THE  
"DECISION ON INTERNATIONAL CO-PROSECUTOR'S RE-FILING OF THREE  
INVESTIGATIVE REQUESTS IN CASE 003"**

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**TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION</b> .....	<b>1</b>
<b>II.</b>	<b>PROCEDURAL HISTORY</b> .....	<b>2</b>
<b>III.</b>	<b>APPLICABLE LAW</b> .....	<b>6</b>
<b>IV.</b>	<b>ARGUMENT</b> .....	<b>7</b>
A.	The applicable standard of review is settled in PTC jurisprudence.....	7
B.	Rejection of the Requests on the basis of a pending appeal meets the standard for appellate review .....	8
i.	The Order incorrectly interprets the governing law .....	8
ii.	The Order is unreasonable and amounts to an abuse of judicial discretion.....	9
C.	Rejection of the Requests on the basis of untimeliness meets the standard for appellate review.....	10
i.	The Order is based upon patently incorrect factual conclusions .....	10
ii.	The Order is unfair and amounts to an abuse of judicial discretion .....	11
iii.	The Order is unreasonable and amounts to an abuse of judicial discretion.....	12
D.	Rejection of the Requests for lack of personal jurisdiction meets the standard for appellate review .....	12
i.	The Order is both unfair and unreasonable and amounts to an abuse of judicial discretion.....	13
ii.	The Order appears to be based on incorrect interpretations of the governing law .....	14
iii.	The Order is based on patently incorrect factual conclusions concerning the hierarchical position and status of the Suspects and the notoriety or seriousness of their alleged criminal conduct .....	23
<b>V.</b>	<b>RELIEF REQUESTED</b> .....	<b>29</b>

## I. INTRODUCTION

1. Pursuant to ECCC Internal Rules (“Rules”) 66(2) and (3), 74(2), 75(3) and 21, the International Co-Prosecutor (the “ICP”) hereby submits this appeal against the Co-Investigating Judges’ (the “CIJs” or “OCIJ”) order<sup>1</sup> entitled “Decision International Co-Prosecutor’s re-filing of three investigative requests in Case 003” (the “Order”).<sup>2</sup>
2. This appeal is admissible. The Notice of Appeal was registered by the Greffiers of the OCIJ on 4 August 2011.<sup>3</sup> This appeal was submitted on 26 August 2011, thereby complying with the deadlines set out in Rules 75(1) and (3). The ICP submits that he was entitled to file this appeal individually, without either receiving a delegation of power pursuant to Rule 13(3) or recording a disagreement pursuant to Rule 71(1). This issue is currently pending before the Pre-Trial Chamber (“PTC”), on appeal from an impugned order of the OCIJ (“First Appeal”).<sup>4</sup> Without prejudice to the First Appeal, and out of an abundance of caution, a disagreement concerning the submission of the instant appeal was formally recorded at the ICP’s initiative in a signed, dated document placed in a register of disagreements kept by the Greffier of the Co-Prosecutors.
3. This appeal sets out the relevant procedural history (Section II), the applicable law (Section III) and the substantive argument (Section IV). The ICP requests that the PTC set aside the Order rejecting the three investigative requests and direct the OCIJ to address these requests on the merits. The Order should be set aside because it incorrectly interprets the law governing the personal jurisdiction of the ECCC, relies on patently erroneous factual conclusions regarding the hierarchical position and gravity of the alleged criminal conduct of Suspects Sou Met and Meas Mut and amounts to an abuse of judicial discretion in its bases for rejection of the Requests, both on grounds of unfairness and unreasonableness.

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<sup>1</sup> Although the Order is titled “Decision”, there is no doubt in the Internal Rules that the terms “decisions” and “orders” used by the Co-Investigating Judges are interchangeable: compare Rules 66(2) and (3); 74(1), (2) and (4); and 75.

<sup>2</sup> **D26** Decision International Co-Prosecutor’s re-filing of three investigative requests in Case 003, 27 July 2011, ERN 00721129-32.

<sup>3</sup> **D26/1** Appeal register of International Co-Prosecutor’s appeal against the “Decision on International Co-Prosecutor’s re-filing of three investigative requests in Case 003”, 4 August 2011, ERN 00722372-74.

<sup>4</sup> **D20/4/1** International Co-Prosecutor’s appeal against the “Decision on time extension request and investigative requests by the International Co-Prosecutor regarding Case 003”, 7 July 2011, ERN 00712851-75.

## II. PROCEDURAL HISTORY

4. On 9 June 2010, acting on the Second Introductory Submission,<sup>5</sup> the International Co-Investigating Judge (Judge Marcel Lemonde) issued a Rogatory Letter commissioning OCIJ investigators to undertake field investigations.<sup>6</sup> Pursuant to that Rogatory Letter, seventeen (17) witness statements were taken by OCIJ investigators between 13 July 2010 and 2 December 2010.<sup>7</sup> Those 17 witness statements, however, were not placed on the Case File and notified to the ICP until 10 March 2011. The Rogatory Letter was not reclassified from Strictly Confidential and notified to the ICP until 10 May 2011.
5. On 1 December 2010, Judge Siegfried Blunk replaced Judge Marcel Lemonde as International Co-Investigating Judge.<sup>8</sup> On 2 February 2011, Co-Investigating Judges You Bunleng and Siegfried Blunk issued a press release stating that they had established joint working groups “focused on examining and analyzing the documents available on the Case Files, particularly the existing documents in the previous Cases Files 001 and 002.” The CIJs’ press release also indicated that, “at this stage, no field investigation is being conducted.”<sup>9</sup>
6. The Co-Prosecutors received no notice of the substantive investigation being conducted by the CIJs in Case 003 until 10 March 2011. On that date, the CIJs placed onto the Case File

<sup>5</sup> **D1** Second Introductory Submission regarding the Revolutionary Army of Kampuchea, 20 November 2008, ERN 00292056-173.

<sup>6</sup> **D2** Rogatory Letter, 9 June 2010, ERN 00529726-28 (“Rogatory Letter”); this document was signed by the International Co-Investigating Judge alone, presumably pursuant to a disagreement recorded between the Co-Investigating Judges; see Statement from the Co-Investigating Judges, 9 June 2010, online: [http://www.eccc.gov.kh/sites/default/files/media/PROCIJ\(June2010\).pdf](http://www.eccc.gov.kh/sites/default/files/media/PROCIJ(June2010).pdf). The existence of such a disagreement is acknowledged in **D20/3** Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 7 June 2011, ERN 00702797-802 at para. 6(ii).

<sup>7</sup> Written Records of Interview: **D2/2** OU Leang, 13 July 2010, ERN 00590271-77 **D2/3** NOP Hat alias KY Hat alias NOP Hon, 20 July 2010, ERN 00590265-70 **D2/4** PAUCH Koy, 28 July 2010, ERN 00597436-43 **D2/5** HEAN Rum, 24 August 2010, ERN 00623556-64, **D2/11** OUM Keo, 28 September 2010, ERN 00616937-43, **D2/12** MAO Phat, 29 September 2010, ERN 00615442-47, **D2/13** SAY Tay, 25 September 2010, ERN 00616931-36, **D2/14** MEANG Buolin, 26 September 2010, ERN 00623859-69, **D2/4** PAUCH Koy, 28 July 2010, ERN 00597436-43, **D2/6** NHOUNG Chrong, 24 August 2010, ERN 00607253-62, **D2/7** PEN Sarin, 26 August 2010, ERN 00607253-58, **D2/8** **D2/9** **D2/10** SAY Born, 6, 7 and 9 September 2010, ERN 00613007-15, 00613016-26, 00615360-70, **D2/15** **D2/16** TOUCH Soeuli, 10 and 11 November 2010, ERN 00628182-90, 00629460-65, **D2/17** IN Saroeun, 12 November 2010, 00628142-48, ERN 00590265 and **D2/18** Sreng Thi, 1 December 2010, ERN 00630429-36.

<sup>8</sup> Dr. Siegfried Blunk Appointed as New International Co-Investigating Judge, 1 December 2010, online: [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_1\\_Dec\\_2010\\_\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_1_Dec_2010_(Eng).pdf).

<sup>9</sup> Statement from the Co-Investigating Judges, 2 February 2011, online: [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_OCIJ\\_2\\_Feb\\_2011\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_2_Feb_2011(Eng).pdf).

a Rogatory Letter Completion Report and the 17 field interviews that had been conducted between July and December 2010.<sup>10</sup>

7. On 6 April 2011, the CIJs placed onto the Case File a notice of documents from Case 002 that were to be transferred to Case 003.<sup>11</sup> The process of transferring those documents onto Case File 003 began on 22 April 2011, and still continues today. Also on 22 April 2011, five (5) site identification reports were placed on the Case File describing efforts by OCIJ investigators in 2010 to inspect Case 003 crime sites. Those reports were all dated from November or December 2010.<sup>12</sup> On 27 April 2011, the Co-Prosecutors received notification of two interviews that had been conducted by the International CIJ on 24 and 25 March 2011, and on 28 April 2011 an interview conducted by both CIJs the previous day was placed on the Case File.<sup>13</sup>
8. At 4:49 pm on Friday 29 April 2011, a mere seven weeks after the first results of the Case 003 investigation had been placed onto the Case File, the CIJs notified the Co-Prosecutors that they considered the judicial investigation in Case 003 had concluded.<sup>14</sup>
9. As of 29 April 2011, no information had been made public that would have enabled a prospective civil party to determine whether she or he met the criteria for admission set out in Rule 23(1)(b). Accordingly, on 9 May 2011, the ICP issued a press release outlining the crimes alleged and crime sites relevant to Case 003. On 10 May 2011, the ICP filed a request that the deadline for submission of civil party applications in Case 003 be extended by 6 weeks, from 18 May 2011 to 29 June 2011.<sup>15</sup>
10. On 18 May 2011, the ICP submitted three investigative requests (“Requests”) to the CIJs, pursuant to Rule 66(1), whereby he: requested additional documents be placed on the Case

<sup>10</sup> **D2/1** Rogatory Letter Completion Report, 10 February 2011, ERN 00649195-96.

<sup>11</sup> **D4** Note on Placement of Documents on Case File 003, 5 April 2011, ERN 00658994-95. A further notice of additional documents to be transferred from Case File 002 was notified on 26 April 2010. **D10** Note on Placement of Documents on Case File 003, 25 April 2011, ERN 00679647-48.

<sup>12</sup> Site Identification Reports: **D2/19** 4 November 2010, ERN 00622545–58, **D2/20** 4 November 2010, ERN 00622533-44, **D2/21** OCIJ Site Identification Report for S-22 Security Centre, 9 December 2010, ERN 00630523-36, **D2/22** OCIJ Site Identification Report for Wat Enta Nhien Security Centre, 29 December 2010, ERN 00634138-76, and **D2/23** OCIJ Site Identification Report for Stung Hav Rock Quarry, 30 December 2010, ERN 00644146-84.

<sup>13</sup> Written Records of Interview: **D6** Chhouk Rin, 24 March 2011, ERN 00725149-55; **D8** Sam Bung Leng, 25 March 2011, ERN 00680152-54; and **D12** Kaing Guek Eav alias Duch, 27 April 2011, ERN 00680795-99.

<sup>14</sup> **D13** Notice of Conclusion of Judicial Investigation, 29 April 2011, ERN 00681129-30.

<sup>15</sup> **D15** International Co-Prosecutor’s Request for an Extension of Time for the Filing of Civil Party Applications in Case 3, 10 May 2011, ERN 00698581-85.

File and made observations on the status of the investigation;<sup>16</sup> requested further investigative action regarding Sou Met and related crime sites;<sup>17</sup> and requested further investigative action regarding Meas Mut and related crime sites.<sup>18</sup>

11. On 24 May 2011, the Co-Prosecutors were notified of the OCIJ Order on Time Extension and Investigative Requests by ICP in Case 003 dated 19 May 2011. This order directed the Co-Prosecutors to advise whether the above requests were made under a delegation of power pursuant to Rule 13(3) or whether a disagreement between them had been recorded under Rule 71(1).<sup>19</sup> The National Co-Prosecutor (“NCP”) issued a response to this request on 25 May 2011, in which she stated that she had not delegated her responsibility to the ICP and indicated that no disagreement between the Co-Prosecutors had been recorded.<sup>20</sup> On 26 May 2011, the ICP responded to the CIJs’ request, contending that neither a recording of disagreement nor a delegation was required.<sup>21</sup> The ICP submitted that: (1) there was an accepted practice at the court of parties filing alone; (2) the NCP had elected not to delegate power or record a disagreement; and (3) the initial disagreement between the Co-Prosecutors in respect of the Introductory Submission in Case 003 encompassed all subsequent independent prosecutorial acts taken in the case.
12. The CIJs rejected both the request for an extension of time for filing of civil party applications and the ICP’s further investigative requests in an order dated 7 June 2011.<sup>22</sup> This decision did not address the merits of the ICP’s requests. Instead, the requests were dismissed on the basis of the CIJs’ determination that the ICP had not complied with the procedural requirements set out in Internal Rules 13 and 71.
13. Following receipt of the CIJs’ decision of 7 June 2011, the ICP formally recorded a disagreement with the National Co-Prosecutor in relation to the civil party application extension request and each of the investigative requests. On 10 June 2011, the ICP re-

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<sup>16</sup> **D17** International Co-Prosecutor’s First Case File 003 Investigative Request to admit Additional Documents and Observations on the Status of the Investigation, 10 June 2011, ERN 00698659-69 (“First Investigative Request”).

<sup>17</sup> **D18** International Co-Prosecutor’s Second Request for Further Investigative Action regarding Sou Met and Related Crime Sites, 10 June 2011, ERN 00698601-21 (“Second Investigative Request”).

<sup>18</sup> **D19** International Co-Prosecutor’s third Request for Further Investigative Action regarding Meas Mut and Related Crime Sites, 10 June 2011, ERN 00698637-58 (“Third Investigative Request”).

<sup>19</sup> **D20** Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 19 May 2011, ERN 00698907-09.

<sup>20</sup> **D20/1** National Co-Prosecutor’s Response to the Co-Investigating Judges’ Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 25 May 2011, ERN 00699836-37.

<sup>21</sup> **D20/2** Co-Prosecutor’s Response to the Co-Investigating Judges’ Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, ERN 00699776-83.

<sup>22</sup> **D20/3** Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 7 June 2011, ERN 00702797-802.

filed each of the requests for further investigative action and the extension of time application. The ICP requested, pursuant to Rule 39(4), that the CIJs exercise their discretion to recognise the validity of this “action being executed after the expiration of a time limit...under such terms as they see fit.”<sup>23</sup>

14. On 7 July 2011, the ICP appealed the CIJs’ decision of 7 June 2011 to the PTC.<sup>24</sup> The appeal contended that the Rules confer a right to delegate power or record a disagreement, but the exercise of such a right is not necessary to enable the ICP to act alone. In the alternative, the ICP submitted that: (a) in light of the Rule 21(a) requirement that the proceedings ‘preserve a balance between the parties,’ the CIJs ought to have provided the ICP with an opportunity to remedy the perceived procedural defect; and (b) the CIJs’ failure to consider the substance of the ICP’s requests contravenes the CIJs’ obligation to conduct a complete and impartial investigation. The PTC has not yet ruled on the ICP’s appeal of 7 July 2011.
15. On 27 July 2011, the CIJs rejected the Requests that had been re-filed by the ICP on 10 June 2011, on the following grounds:
  - (a) the pending appeal of the validity of the Requests, “not only on formal grounds but also on substance,” constrains the OCIJ from “circumvent[ing] the PTC’s jurisdiction by deciding on the issue themselves” (“Rejection on the grounds of a concurrent pending appeal”, paras. 23-29, below);
  - (b) the ICP re-filed his requests outside the 15-day period for further investigative requests provided in Rule 66(1) and did not make use of the procedure set out in Rule 55(10) that permits investigative requests to be made at any stage during the investigation (“Rejection on the basis of untimeliness”, paras. 30-37, below); and
  - (c) the ICP’s requests do not give “sufficient consideration” to the “basic jurisdictional requirement” of Article 2 of the ECCC Law, and the CIJs are constrained by Rule 55(1), which they state permits investigations only “within

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<sup>23</sup> **D22** Re-filing of International Co-Prosecutor’s First Case File 003 Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation, 10 June 2011, ERN 00720695-704, para 1; **D23** Re-Filing of International Co-Prosecutor’s Second Request for Further Investigative Action Regarding Sou Met and Related Crime Sites, 10 June 2011, ERN 00720752-74, para. 1; **D24** Re-Filing of International Co-Prosecutor’s Third Request for Further Investigative Action Regarding Meas Mut and Related Crime Sites, 10 June 2011, ERN 00720814-29, para. 1.

<sup>24</sup> **D20/4** International Co-Prosecutor’s Appeal Against the “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003”, 7 July 2011, ERN 00712876-906.

the jurisdiction of the ECCC”<sup>25</sup> (“Rejection on the basis of personal jurisdiction”, paras. 38-80 below).

### III. APPLICABLE LAW

16. The relevant applicable law includes provisions of the Agreement, the ECCC Law, the Internal Rules (“Rules”) and Cambodian procedural law and practice.
17. The Preamble and operative part of the Agreement provides:

*WHEREAS the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979;*

Article 1 (“Purpose”):

*The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.*

Article 2(1) (“Law on the Establishment of Extraordinary Chamber”):

*[...] The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.*

18. Article 2 new, ECCC Law provides:

*Extraordinary Chambers shall be established [...] to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as “Suspects”.*

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<sup>25</sup> **D26** Order, *supra* note 2 at paras. 5, 6(a)-(d).



19. Rule 39(4) (“Time limits and conditions for filing documents”) provides:

*The Co-Investigating Judges or the Chambers may, at the request of the concerned party or on their own motion: (a) extend any time limits set by them; or (b) recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit.*

20. Rule 66(1) (“Notification of conclusion of judicial investigation”) provides:

*Where the Co-Investigating Judges consider that an investigation has been concluded, they shall notify all the parties and their lawyers. This decision shall be made public. The parties shall have 15 (fifteen) days to request further investigative action. They may waive such period.*

21. Rule 55 (“General provisions concerning investigations”) provides:

*1. A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.*

*2. The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.*

*5. In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory. [...]*

#### IV. ARGUMENT

##### A. The applicable standard of review is settled in PTC jurisprudence

22. The settled jurisprudence of the Pre-Trial Chamber, beginning with the SMD Decision in 2009 and reinforced in subsequent decisions,<sup>26</sup> has established that the standard of appellate review applicable to an exercise of judicial discretion by the OCIJ will be met if that order is based on (1) an incorrect interpretation of the governing law (or an “error of law”); or (2) a patently incorrect conclusion of fact (or a “clearly erroneous factual finding”); or (3) if it amounts to an abuse of judicial discretion on grounds of (a) unfairness; or (b) unreasonableness.

<sup>26</sup> **D164/4/13** Decision on the Appeal from the Order on the Request to seek exculpatory evidence in the shared materials drive, 18 November 2009, ERN 00402746-62 at paras. 22-27 (citing *Milošević v. Prosecutor*, IT 02-S4-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Assignment of Defense Counsel, ICTY Appeals Chamber, 1 November 2004 at paras. 9-10; **D140/9/5** Decision on Ieng Sary’s Appeal against the Co-Investigating Judges’ Order denying his Request for appointment of an additional expert to re-examine the subject matter of the expert report submitted by Ms Ewa Tabeau and Mr Theay Kheam, 28 June 2010, ERN 00542271-83 at paras. 15-17; **D356/2/9** Decision on Nuon Chea’s Appeal against the Co-Investigating Judges’ Order rejecting Request for a second expert opinion, 1 July 2010, ERN 00539166-00539175 at paras. 16-18;

**B. Rejection of the Requests on the basis of a pending appeal meets the standard for appellate review**

*i. The Order incorrectly interprets the governing law*

23. The first ground for rejection of the Requests is that the Pre-Trial Chamber is seized “with the issue whether the Requests are valid”, and thus the CIJs cannot “interfere with the PTC’s competency...and to circumvent the PTC’s jurisdiction by deciding on this issue themselves.”<sup>27</sup> In support of this basis for rejection of the Requests, the CIJs refer to the decision of the ICP to base his First Appeal not only on formal grounds but alternatively on substance. The ICP had alleged that the “CIJs’ failure to consider the substance of the Requests contravenes the CIJs’ legal obligation to conduct a complete and impartial investigation.”<sup>28</sup> The CIJs appear to take the view that the submission of this alternative ground of appeal effectively suspends the entire competence of the OCIJ to consider the Requests on the merits pending determination of the appeal. With respect, this reasoning is incorrect in law.
24. Competence over the judicial investigation rests with the OCIJ until the sealing of the case file pursuant to Rule 68(2), and this responsibility remains in place pending any interlocutory appeal. Pre-Trial appeals of OCIJ orders by the Co-Prosecutors under Rule 73(a) and 74(2) are subject to Rule 77(11), which provides that pending the appeal, the CIJs “may continue their investigation, where applicable”. Thus, notwithstanding the notice of conclusion of judicial investigation dated 29 April 2011, the responsibility to consider and act upon additional investigative requests remains within the judicial discretion of the OCIJ.
25. While disagreeing with and appealing one aspect of the CIJs’ Decision, namely the OCIJ interpretation of Rules 13(3) and 71(1), the ICP complied with the CIJs’ decision, swiftly cured the alleged technical deficiency in the Requests and re-filed the Requests for consideration on the merits. The ICP’s appeal was not “on substance” as asserted by the Order,<sup>29</sup> but rather concerned, in part, the CIJs’ *failure to consider the substance* of the Requests. In doing so, the ICP acted in good faith, consistent with the need for expediency in proceedings<sup>30</sup> and the paramount consideration in the Agreement and ECCC Law that in the event of disagreement, the prosecution “shall proceed”.<sup>31</sup>

<sup>27</sup> D26 Order, *supra* note 2 at para. 5.

<sup>28</sup> D20/4/1 First Appeal, *supra* note 3 at para. 9(c)(ii); D26 Order, *supra* note 2 at paras. 4-5.

<sup>29</sup> D26 Order, *supra* note 2 at para. 5.

<sup>30</sup> Rule 21(4).

<sup>31</sup> Agreement, *infra* note 70, art. 6(4); ECCC Law, *infra* note 71, art. 20 new.

26. An interlocutory appeal of a technical basis for rejection of the Requests does not suspend the entire competence of the OCIJ over these Requests. The PTC has previously held that interlocutory appeals at the pre-trial stage do not have automatic suspensive effect,<sup>32</sup> and that there is a *lacuna* in the Rules and Cambodian law in this regard.<sup>33</sup> This is in contrast with particular civil law jurisdictions, notably Germany.<sup>34</sup> Accordingly, there is no reason for the OCIJ to suspend its consideration of the Requests. Suspension will only be an appropriate remedy “where the execution of the decision before determination of the appeal would render any right of appeal meaningless.”<sup>35</sup> The ICP submits that no grounds for suspension of consideration of the Requests exist in this case. Suspension has neither been requested, nor ordered *proprio motu* by the PTC.<sup>36</sup>
27. For these reasons, the ICP respectfully submits that the existence of a pending appeal does not disclose a lawful reason to reject the Requests, and that this error of law meets the standard for appellate review by the Pre-Trial Chamber.

*ii. The Order is unreasonable and amounts to an abuse of judicial discretion*

28. The rejection of the Requests on the basis of the pending appeal is plainly inconsistent with previous decisions of the OCIJ and does not disclose any valid reason for such a departure. Thus, the Order is arbitrary and undermines legal certainty.<sup>37</sup> In particular, the Ieng Sary defence submitted a request for investigative action to the OCIJ dated 21 May 2009 concerning investigative strategy.<sup>38</sup> As no response was forthcoming from OCIJ, the Ieng Sary defence filed a notice of appeal on 9 October 2009, triggering the appeal jurisdiction of the PTC.<sup>39</sup> Two months later, pending determination of the appeal, the OCIJ placed a letter on the case file, addressed to the Ieng Sary defence (together with other defence teams supporting the request), concerning both the formalities and the

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<sup>32</sup> **D14/1/2** Order suspending the enforcement of the “Order on International Co-Prosecutor’s public statement regarding Case File 003”, 13 June 2011, ERN 00704894-97 (“Suspension Order”) at para. 3.

<sup>33</sup> *Ibid.* at para. 4.

<sup>34</sup> See e.g. *Verwaltungsgerichtsordnung* (VwGO), ss. 80, 80(b).

<sup>35</sup> **D14/1/2** Suspension Order, *supra* note 32 at para. 3.

<sup>36</sup> *Ibid.* at para. 4.

<sup>37</sup> **E50** Decision on the urgent applications for immediate release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, ERN 00644864-78 at paras. 23-27. See also *Khudoyorov v. Russia*, Application No. 6847/02, Judgment (European Court of Human Rights) 8 November 2005 at paras. 125, 131, 135-136, 146; *Stasaitis v. Lithuania*, Application No. 47679/99 (European Court of Human Rights) Judgment, 21 March 2002 at para. 67.

<sup>38</sup> **D171** Ieng Sary’s lawyers’ third request for investigative actions, 21 May 2009, ERN 00330795-818.

<sup>39</sup> **D171/4** Record of appeals, 19 October 2009, ERN 00390105.

substance of the request.<sup>40</sup> This OCIJ action plainly demonstrates that even a broad interlocutory appeal on the “constructive refusal” of a request from a party does not suspend the competence of the OCIJ to address that request on form as well as substance.

29. For this reason, the ICP respectfully submits that the rejection of the Requests on the basis of a pending appeal is unreasonable, amounts to an abuse of judicial discretion and meets the standard for appellate review by the Pre-Trial Chamber.

**C. Rejection of the Requests on the basis of untimeliness meets the standard for appellate review**

*i. The Order is based upon patently incorrect factual conclusions*

30. The re-filed Requests were submitted for the consideration of the CIJs on 10 June 2011, three calendar days after the First Rejection. The Order states that the CIJs cannot exercise their discretion under Rule 39(4) to recognise the validity of the re-filed Requests because the ICP “had almost a full year to make investigative requests, but *chose not to do so* until after the closure of investigations by the CIJs pursuant to Rule 66(1).”<sup>41</sup> The CIJs suggest that the ICP exercised a choice not to submit investigative requests, as “the investigations in Case 003 had been ongoing at least since the issuance of the Rogatory Letter dated 9 June 2010.”<sup>42</sup> This finding is based on patently incorrect factual conclusions.
31. As set out under “II. Procedural History” above, the ICP received no notice of the investigative acts that were being performed by CIJs prior to 10 March 2011. The CIJs posted some of their evidence on the Case File on that date, provided one further notification on 6 April 2011, and then made numerous postings between 22 and 28 April 2011. The latter round of notifications that began on 22 April 2011 included site investigation reports in which OCIJ field investigators stated that their investigations were “not completed yet” and identified material witnesses whom they had not been permitted to interview.<sup>43</sup> The one and only Rogatory Letter issued by the CIJs in Case 003 was not notified to the Co-Prosecutors until 10 May 2011, 335 calendar days after its issuance. The release of that Rogatory Letter confirmed that OCIJ investigators had not even completed

<sup>40</sup> **D171/5** Letter to Defence teams for Ieng Sary, Nuon Chea and Khieu Samphan, 11 December 2009, ERN 00414038-49.

<sup>41</sup> **D26** Order, *supra* note 2, at para. 6(b) (emphasis added).

<sup>42</sup> *Ibid.* at para. 6(b).

<sup>43</sup> **D2/22** OCIJ Site Identification Report for Wat Enta Nhien Security Centre, 29 December 2010, ERN 00634138-76 at ERN 00634139, and **D2/23** OCIJ Site Identification Report for Stung Hav Rock Quarry, 30 December 2010, ERN 00644146-84 at ERN 00644148, 154.

the initial investigation they had been charged to conduct by Judge Lemonde.<sup>44</sup> An analytical table of delays in notification by the OCIJ of key submissions and decisions relevant to Case 003 is provided in Annex 1.

32. As a result of the failure of the CIJs to notify the Co-Prosecutors of the investigation they had conducted until shortly before their Rule 66(1) notice, the ICP was unable to monitor the judicial investigation as it proceeded and to make a reasoned decision as to the need for further investigative requests prior to the CIJs' 29 April 2011 notice that they considered the investigation concluded. At that time, the ICP took urgent action to assess the status of the investigation in accordance with his fundamental responsibilities under Rules 55(10) and 66(1) and directed that the Requests be prepared and submitted. Those Requests were filed within time with the OCIJ on 18 May 2011, only eight calendar days after the CIJs' disclosure to the ICP of the only Rogatory Letter issued in Case 003. The Order is thus patently incorrect to assert that the ICP "had almost a full year to make investigative requests."<sup>45</sup>
33. For this reason, the ICP respectfully submits that the rejection of the Requests on the basis of their timing is a patently incorrect conclusion of fact that meets the standard for appellate review by the Pre-Trial Chamber.

*ii. The Order is unfair and amounts to an abuse of judicial discretion*

34. The rejection of the Requests on the basis that they were submitted outside the 15 day period provided in Rule 66(1)<sup>46</sup> is procedurally unfair. The PTC has recognised that the parties have the right to certainty in the "expectation that a matter will be dealt with in a predictable, proper and defined manner".<sup>47</sup> The ICP has a legitimate expectation that, having acted with dispatch to correct a highly-contestable technical deficiency in the Requests following the First Rejection, the CIJs would exercise their judicial discretion to extend the applicable time limits beyond the 15 days provided in Rule 66(1). This expectation was reinforced by the ICP's notification of the CIJs of his intention to appeal the very interpretation of the law that resulted in his inability to comply with the 15 day period.

<sup>44</sup> **D2** Rogatory Letter, *supra* note 6 (Requesting OCIJ investigators to interview "any witnesses that could provide information relevant to the crimes under investigation").

<sup>45</sup> **D26** Order, *supra* note 2 at para. 6(b).

<sup>46</sup> *Ibid.* at para. 6(a).

<sup>47</sup> **D250/3/2/1/5** Decision on appeals against Co-Investigating Judges' combined Order D250/3/3, 13 January 2010 and Order D250/3/2, 13 January 2010 on admissibility of civil party applications, ERN 00507519-67 at para. 13.

35. The ICP submits that the Order's failure to satisfy legitimate expectations is procedurally unfair and amounts to an abuse of judicial discretion meeting the standard of appellate review by the Pre-Trial Chamber.

*iii. The Order is unreasonable and amounts to an abuse of judicial discretion*

36. The rejection of the Requests on the basis of favouring the expeditiousness of proceedings<sup>48</sup> is unreasonable. The Order indicates that allowing for flexibility in the 15 day period in Rule 66(1) would "violate a fundamental principle of proceedings"<sup>49</sup> concerning the need for expeditiousness, as provided in Rule 21(4). With respect, this reasoning purports to advance one fundamental principle of proceedings while the impugned Order as a whole has a detrimental impact on each of the principles enshrined in the chapeau of Rule 21, and Sub-rules 21(1)(a)-(d). The interests of the Suspects themselves, victims, prospective Civil Parties and the Prosecution are gravely harmed by an investigation that is patently incomplete. Viewed in the context of an investigation of over 14 months into a complex crime base, strict conformity with a 15 day period cannot reasonably be seen as significantly impinging the expeditiousness of proceedings. The ICP incorporates by reference his previous submissions in this regard.<sup>50</sup> The Order does not consider or attempt to balance these principles in rejecting the Requests on grounds of untimeliness.

37. For this reason, the ICP respectfully submits that the rejection of the Requests on the basis of the timing is unreasonable and amounts to an abuse of judicial discretion that meets the standard for appellate review by the Pre-Trial Chamber.

#### **D. Rejection of the Requests for lack of personal jurisdiction meets the standard for appellate review**

38. The fourth and fifth grounds for rejection of the Requests concern the personal jurisdiction of the ECCC. The Order states that:

*"[i]t is still not apparent that the ICP is giving sufficient consideration to the basic jurisdictional requirement of Article 2 ECCC Law, namely that the suspects in Case 003 must be "senior leaders" of DK or "most responsible" for crimes committed during that period."<sup>51</sup>*

<sup>48</sup> D26 Order, *supra* note 2 at para. 6(a).

<sup>49</sup> *Ibid.*

<sup>50</sup> D20/4/1 First Appeal, *supra* note 3 at paras. 39-74.

<sup>51</sup> D26 Order, *supra* note 2 at para. 6(c).

39. As justification for the rejection of the Requests on grounds of personal jurisdiction, the CIJs state that the characterisation of the Suspects Meas Mut and Sou Met as senior leaders is “obviously nonsensical”.<sup>52</sup> The CIJs appear to have reached a legal finding on the scope of personal jurisdiction in this case, “having analysed in depth the existing evidence”<sup>53</sup> but provide merely two lines of substantiation for this sweeping conclusion, based on the fact that the Suspects were commanders of divisions, of which there were “no less than 9 (plus 3 independent regiments).”<sup>54</sup>
40. Given the scant investigative material available on the case file and considering the stage of the proceedings, the ICP takes the view that it would be premature to make full submissions on the issue of whether the Suspects qualify as senior leaders or persons most responsible for “crimes within the jurisdiction of the ECCC.”<sup>55</sup> Rather, the ICP will demonstrate that the rejection of the Requests for lack of personal jurisdiction is unreasonable, and to the extent ascertainable, appears to be based both upon errors of law and clearly erroneous factual findings. These are considered in turn.

*i. The Order is both unfair and unreasonable and amounts to an abuse of judicial discretion*

41. The Order leaves obscure the methodology adopted by the OCIJ to define the terms “senior leader” and “those most responsible”, while basing fundamental decisions on the direction of the investigation and appropriate allocation of investigative resources on unstated reasons.<sup>56</sup> In particular, the Order suggests that the further investigation along the lines of the Requests “would not change the CIJs’ analysis on the basic jurisdictional issues but would instead commit the Court’s resources unnecessarily and irresponsibly.”<sup>57</sup> This statement suggests that the OCIJ has reached a conclusion on the “basic jurisdictional issues” in Case 003, without (a) conducting a diligent investigation into the hierarchical position or status of the Suspects or the notoriety or seriousness of the criminal conduct they are alleged to have committed<sup>58</sup> (see below, paras. 69-80); or (b) issuing a reasoned decision concerning jurisdiction against which any Charged Person could exercise his or

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<sup>52</sup>

*Ibid.*

<sup>53</sup>

*Ibid.* at para. 6(d).

<sup>54</sup>

**D26** Order, *supra* note 2 at para. 6(c).

<sup>55</sup>

Rule 55(1).

<sup>56</sup>

**D26** Order, *supra* note 2 at para. 6(d).

<sup>57</sup>

*Ibid.* 6(d).

<sup>58</sup>

The ICP has previously raised this concern in detail with the OCIJ: see **D17** First Investigative Request, *supra* note 16 at paras. 4-5.

her right of appeal in accordance with Rule 74(3)(a), or which the Co-Prosecutors might appeal under Rule 74(2).

42. The PTC has previously ruled that jurisdictional issues are fundamental.<sup>59</sup> The ICP has previously notified the OCIJ that any decision dismissing investigative requests or concluding their investigation on the basis of a jurisdictional finding must be notified and afford the ICP an opportunity to file detailed submissions.<sup>60</sup> In a written press interview published in the press on 18 August 2011, Judge Siegfried Blunk stated that his office has “conducted an in-depth analysis of the origin and meaning of the term “most responsible” and developed a set of criteria on the basis of the ECCC Law and jurisprudence of international tribunals...”<sup>61</sup> Judge Blunk adds that these criteria would not be made public prior to the Closing Order.<sup>62</sup> This statement confirms that a putative decision on personal jurisdiction has been taken by the CIJs, without providing any reasons for that decision to the ICP, even on a confidential basis, or affording the ICP the opportunity to make written submissions.
43. On this basis, the ICP submits that the Order cannot be considered to have provided sufficient reasons as required by Rule 55(10), nor to have afforded the ICP a right to be heard. The PTC has in the past held that a failure by the CIJs to provide *any reasons* is a reviewable error of law;<sup>63</sup> The ICP submits that the failure of the CIJs to provide *sufficient reasons* for their putative decision on personal jurisdiction in the present Order is properly characterised as unreasonableness amounting to an abuse of discretion. The failure to afford the ICP the right to be heard is procedurally unfair and also amounts to an abuse of judicial discretion. As such, the Order meets the standard for appellate review by the Pre-Trial Chamber.

*ii. The Order appears to be based on incorrect interpretations of the governing law*

44. The putative decision of the OCIJ on personal jurisdiction, to the extent ascertainable, appears to be based on incorrect interpretations of the governing law, particularly the Agreement (being an international treaty) and an instrument adopted by one of the parties

<sup>59</sup> **D427/3/15** Case 002: Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, ERN 00644462-571 at p. 32.

<sup>60</sup> **D17** First Investigative Request, *supra* note 16 at para. 9.

<sup>61</sup> “KRT judge talks court controversies”, Phnom Penh Post, 18 August 2011 at p. 6.

<sup>62</sup> *Ibid.*

<sup>63</sup> **D365/2/10** Decision on the Co-Prosecutors Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 15 June 2011, ERN 00526872–82 at para. 26.



to that treaty, namely the ECCC Law. The ICP submits that these errors of law are evident in that the Order (a) incorrectly impugns the Introductory Submission for failing to specify which of the two alternatives (“senior leaders” or “those most responsible”) should apply to the Suspects;<sup>64</sup> (b) incorrectly applies Rule 55(1) to reject the Requests;<sup>65</sup> and (c) does not accurately consider hierarchy and status, or notoriety or seriousness of alleged criminal conduct, in violation of the applicable law and relevant international standards.<sup>66</sup>

The Introductory Submission cannot be impugned on the grounds that it fails to specify whether the Suspects are “senior leaders” or “those most responsible”.

45. Rule 53(1) does not require the Co-Prosecutors to “make up his mind”<sup>67</sup> as part of the Introductory Submission. This is consistent with the statement of personal jurisdiction in the applicable law, which adopts disjunctive language (“senior leaders” *or* “those most responsible”). The determination of how precisely a named individual may fall within the jurisdiction of the ECCC is properly a matter for the structured judicial discretion of the CIJs, exercised under the applicable law on the basis of a thorough and impartial investigation, and set down for definitive determination by the Trial Chamber under the Rule governing preliminary objections.<sup>68</sup>

Rule 55(1) imposes an obligation on the OCIJ to investigate crimes within the jurisdiction of the ECCC. It does not limit the scope of investigations over particular persons.

46. The Order cites Rule 55(1) as *permitting* investigations only “within the jurisdiction of the ECCC”.<sup>69</sup> The ICP submits that this is a misapplication of Rule 55(1), which does not permit but *compulsorily mandates* the OCIJ to carry out judicial investigations over “*crimes* within the jurisdiction of the ECCC”. They may, on the basis of this investigation into crimes, proceed to charge either Suspects named in the Introductory Submission or others “against whom there is clear and consistent evidence” indicating that such persons may be criminally responsible for crimes referred to in the Introductory or Supplementary Submissions. Clearly, the purpose of Rule 55(1) is to mandate judicial investigation of the crime base set out by the Co-Prosecutors, not to sanction insufficiently reasoned limitations of the scope of investigations into the conduct of particular individuals.

<sup>64</sup> D26 Order, *supra* note 2 at para. 6(c).

<sup>65</sup> *Ibid.* at para. 6(d).

<sup>66</sup> *Ibid.* at para. 6(c).

<sup>67</sup> *Ibid.* at para. 6(c).

<sup>68</sup> Rule 89(1).

<sup>69</sup> D26 Order, *supra* note 2 at para. 6(c).

The meaning of “senior leader” and “those most responsible” must be interpreted in accordance with applicable principles of treaty interpretation.

47. Articles 1 of the Agreement and the ECCC Law<sup>70</sup> provide, in identical terms, that their purpose is to bring
- to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.*<sup>71</sup>
48. Article 2(2) of the Agreement provides that “[t]he present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers”.<sup>72</sup> Accordingly, article 2 of the ECCC Law gives the Court jurisdiction over the “senior leaders” and those “most responsible” for the crimes committed during the same period.<sup>73</sup>
49. The Agreement and ECCC Law do not define the terms “senior leaders” and “those most responsible” Accordingly, the ICP submits that the PTC should first have recourse to the interpretative methodology set out in articles 31-33 of the *Vienna Convention on the Law of Treaties* (“VCLT”).<sup>74</sup> Article 2(2) of the Agreement explicitly states that the *Vienna Convention on the Law of Treaties* (“VCLT”) applies to the Agreement.<sup>75</sup> The International Court of Justice has stated explicitly that the rules of interpretation in articles 31-33 of the VCLT reflect customary international law.<sup>76</sup>
50. Applying the VCLT rules, the Agreement should be interpreted in “good faith”, and according to its “ordinary meaning ...in their context and in light of its object and purpose”.<sup>77</sup> In this case the context of the Agreement includes, in particular, the third recital in its Preamble and the ECCC Law, which is clearly an “instrument which was

<sup>70</sup> Agreement Between The United Nations And The Royal Government Of Cambodia Concerning The Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea, 6 June 2003 (“Agreement”).

<sup>71</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, art 1 (“ECCC Law”); Agreement, *Ibid.* art 1.

<sup>72</sup> Agreement, *supra* note 70, art 2(2).

<sup>73</sup> ECCC Law, *supra* note 71, art 2.

<sup>74</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 115 UNTS 331 (“VCLT”).

<sup>75</sup> Agreement, *supra* note 70, at art 2(2).

<sup>76</sup> Territorial Dispute (Libyan Arab Jamahariyya/Chad), Judgment, (1994) ICJ Reports 6, at para.41; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (1995) ICJ Reports 6 at para. 33.

<sup>77</sup> VCLT, *supra* note 74, art 31(1); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, art 31(1) (“VCLTIO”).

made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”.<sup>78</sup> The VCLT rules also permit recourse to preparatory work and the circumstances of the conclusion of the treaty to clarify terms whose ordinary meaning is ambiguous or obscure, such as in the present case.<sup>79</sup>

51. The ICP submits that the circumstances of the conclusion of the Agreement demonstrate with clarity that the putative decision of the CIJs on personal jurisdiction discloses errors of law in its interpretation of the terms “senior leaders” and “those who were most responsible” in Articles 1 and 2(1) of the Agreement, and mirrored in Article 2 new of the ECCC Law.
52. The initial 1997 request from Cambodia to the United Nations for assistance, which formed the basis for subsequent negotiations towards the establishment of the ECCC, referred only to “bringing those responsible to justice”, omitting any qualifiers that would limit the scope of responsibility.<sup>80</sup>
53. Following this request, the General Assembly called upon the Secretary-General to establish a “Group of Experts” to address the government’s request for assistance.<sup>81</sup> This report was a crucial part of the negotiations between the UN and the Royal Government of Cambodia (“RGC”) that provided a foundation for legislative debates that eventually resulted in the adoption of the ECCC Law.
54. The Group of Experts Report emphasises that the personal jurisdiction of the Court should not be unduly limited. First, it states that prosecutions should not be limited to exclude those “who have surrendered to the Government or returned to civilian life”.<sup>82</sup> Further, it notes that the personal jurisdiction of the Court need not directly correlate to the top governmental leaders, which “may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and *others not in the chart*

<sup>78</sup> VCLT, *supra* note 74, art 31(2)(b); VCLTIO *supra* note 77, art 32(a).

<sup>79</sup> VCLT, *supra* note 74, art 31(2)(b); VCLTIO *supra* note 77, art 32(a).

<sup>80</sup> United Nations document entitled Identical Letters 23 June 1997 from the Secretary-General to the President of the General Assembly and the President of the Security Council, U.N. Doc. No. A/51/930 and S/1997/488, 24 June 1997 (attaching a letter from the Prime Ministers of Cambodia, Prince Norodom Ranariddh and Hun Sen, to the Secretary General).

<sup>81</sup> United Nations General Assembly Resolution 52/135 entitled *Situation of human rights in Cambodia*, U.N. Doc. No. A/RES/52/135, 27 February 1998 at para. 16.

<sup>82</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. Nos. A/53/850 and S/1999/231, 16 Mar 1999 at para. 107 (“Group of Experts Report”).

*of senior leaders may have played a significant role in the atrocities*".<sup>83</sup> "Certain leaders at the zonal level" were specifically considered as having played a significant role in the atrocities.<sup>84</sup>

55. The Group went on to state that "those persons *most responsible*...would include senior leaders with responsibility over the abuses *as well as those at lower levels who are directly implicated in the most serious atrocities*".<sup>85</sup> As a further indication of the scope of responsibility, the Report indicated that "the number of persons to be tried might well be in the range of some 20 to 30".<sup>86</sup>
56. In 2001, the RGC passed the first version of the ECCC Law, which included the formulation "senior leaders of Democratic Kampuchea and those who were most responsible."<sup>87</sup> The 2001 Law generally follows the proposals in the Group of Experts Report in that the Law encompasses both a person's rank (senior leader) and his or her actual role in the crimes (most responsible). This formulation was later endorsed by the General Assembly.<sup>88</sup>
57. During the October 2004 National Assembly debates on the ECCC Law,<sup>89</sup> in response to a question seeking clarification on the scope of persons to be prosecuted it was stated on behalf of the RGC that Article 2 of the proposed law was intended to allow the prosecution of "two types of targets": (i) "senior leaders," as opposed to persons who held "ordinary positions" and (ii) "those who were not the senior leaders, but who committed crimes as serious as the senior ones."<sup>90</sup> In response to a request to clarify the government's understanding of the levels ("regional, district, sub-district and cooperative") encompassed by the phrase "those most responsible", the RGC states unequivocally that "neither the UN nor the RGC Taskforce can give a response" to the question of "who shall be indicted", because "this is a task of...the Extraordinary Chambers." The RGC also confirmed during the National Assembly Debate that the following points of consensus had been reached between the UN and the RGC :

<sup>83</sup> *Ibid.*, para. 109 (emphasis added).

<sup>84</sup> *Ibid.*, para. 109 (emphasis added).

<sup>85</sup> *Ibid.*, para. 110.

<sup>86</sup> Group of Experts Report, *supra* note 82 at para 110.

<sup>87</sup> Reach Kram NS/RKM/0801/12, 10 August 2001 (promulgating the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Democratic Kampuchea Period). The 2001 law was subsequently amended on 27 October 2004 to produce the current ECCC Law. See Reach Kram NS/RKM/1004/006.

<sup>88</sup> United Nations General Assembly Resolution 57/228 entitled *Khmer Rouge trials*, U.N. Doc. No. A/RES/57/228, 27 February 2003, at para. 3.

<sup>89</sup> 4-5 October 2004, ERN 00315486-515 ("National Assembly Debate"). [Document numbers

<sup>90</sup> National Assembly Debate, at ERN 00336417.

- (a) There were two sets of targets – those who were senior leaders and those who were most responsible;
  - (b) Senior leaders would be no more than ten persons; and
  - (c) The second target of those most responsible were those who were not senior leaders but who did commit atrocious crimes and there was no specific number identified as falling into this category.<sup>91</sup>
58. Writing in 2004, an advisor to the Trial Taskforce, Helen Jarvis, goes so far as to list Suspects Sou Met and Meas Mut as “Key Khmer Rouge Personnel – Those Most Responsible for Serious Crimes”.<sup>92</sup> While such categorisations had no bearing on the ICP’s independent assessment leading to the formulation of the Introductory Submission, the records of debates and statements above shed light on the understanding of the Cambodian government and persons closely involved in the negotiation, conclusion and subsequent implementation of the Agreement through the ECCC Law.
59. David Scheffer, another close participant in the negotiations leading to the establishment of the ECCC, having compiled his personal recollections, makes the following relevant observation:
- To suggest now that somehow the Cambodian authorities interpreted the final personal jurisdiction language to limit the suspect pool to only five individuals lacks credibility, particularly in light of years of negotiations and the much broader grab at personal jurisdiction that the Cambodians supported through much of 2000.*<sup>93</sup>
60. Following a detailed analysis of the drafting history of the Agreement, Steven Heder reaches the following conclusion as to the interpretation of these terms:
- [...] “senior leaders” referred to members of the CPK Standing Committee and its subordinate Central Committee and possibly of the DK Government, while others “most responsible” either referred to intermediate-level political and military leaders, with DK Government ministers perhaps instead in this category, or to such intermediate-level leaders plus Duch, on the proviso that there was sufficient evidence against such persons. On the other hand, others “most responsible” did not cover the lowest echelons of the Khmer Rouge, that is, it did

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<sup>91</sup> National Assembly Debate, *supra* note 89 at ERN 00315508.

<sup>92</sup> Tim Fawthrop and Helen Jarvis, Getting away with genocide? Elusive justice and the Khmer Rouge Tribunal (2004) at p. 269.

<sup>93</sup> David Scheffer, *The Negotiating History of the ECCC’s Personal Jurisdiction*, (“Scheffer”) at p. 10, online: <http://www.cambodiatribunal.org/blog/2011/05/negotiating-history-eccc%E2%80%99s-personal-jurisdiction>.

*not refer to the rank-and-file, hands-on perpetrators, even if they were CPK cadre exercising some authority over other CPK members.*<sup>94</sup>

The meaning of “senior leader” and “most responsible” can be clarified further by reference to the statutes, decisions and policies of other international and internationalised criminal tribunals

61. The jurisprudence of the International Criminal Tribunal for Yugoslavia (“ICTY”) and the Special Court for Sierra Leone (“SCSL”) and the investigation policy of the International Criminal Court (“ICC”) suggest that the terms “senior leader” and “most responsible” should be interpreted broadly, especially at the judicial investigation stage.
62. Although the scope of personal jurisdiction of the ICTY is formulated more broadly than that of the ECCC,<sup>95</sup> the ICTY was subsequently mandated to concentrate on the prosecution of “the most senior leaders suspected of being most responsible” for crimes within its jurisdiction<sup>96</sup> and transfer cases that do not meet this criteria to national jurisdictions.<sup>97</sup> In evaluating whether an individual is a most senior leader who is most responsible, the ICTY Referral Bench considers (1) the gravity of the crimes charged, and (2) the level of responsibility of the accused.<sup>98</sup> These two factors roughly correspond to an evaluation of whether the accused is a “most senior leader” (level of responsibility) and “most responsible” (seriousness of the criminal conduct).
63. In assessing the level of responsibility of the accused, the ICTY Referral Bench has noted that “most senior leaders” is not restricted to individuals who are “architects” of an “overall policy” which forms the basis of alleged crimes.<sup>99</sup> Instead, the Bench considers individuals who, by virtue of their *de jure* and *de facto* position and function in the

<sup>94</sup> Steven Heder, “A Review of the Negotiations among Cambodia, the UN and the US on the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia”, 1 August 2011, available at <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf> (“Heder”) at p. 38.

<sup>95</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, amended 7 July 2009, Art. 1.

<sup>96</sup> United Nations Security Council Resolution 1534, 26 March 2004, at paras. 5-6, UN Doc. No. S/Res/1534 (2004); United Nations Security Council Resolution 1503, 28 August 2003, UN Doc. No. S/Res/1503 (2003).

<sup>97</sup> International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 11*bis* (describing the process for transferring cases to competent national courts). Rule 11*bis* references Security Council Resolution 1534 and states that the ICTY will consider the “gravity of the crimes charged” and the “level of responsibility of the accused” in deciding whether to transfer cases. *See also Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Referral Bench, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005, at paras. 1-3 (describing the transfer process) (“*Milošević* Referral Decision”).

<sup>98</sup> *Prosecutor v. Lukić*, Case No. IT-98-32/1-PT, ICTY, 5 April 2007, at para. 26 (“*Lukić* Referral Decision”).

<sup>99</sup> *Milošević* Referral Decision, *supra* note 97 at para. 22; *Lukić* Referral Decision, *ibid.* at para. 28.

relevant hierarchy are alleged to have exercised such a degree of authority that it is appropriate to describe them as “most senior” rather than “intermediate.”<sup>100</sup> Factors considered in determining this degree of authority include: permanent versus *ad hoc* position,<sup>101</sup> temporal scope,<sup>102</sup> rank of the accused within the hierarchical structure,<sup>103</sup> authority to negotiate, sign, or implement agreements,<sup>104</sup> control of access to territory,<sup>105</sup> number of subordinates,<sup>106</sup> actual role of the accused in the commission of the crimes,<sup>107</sup> and whether those more senior in rank than the accused have already been convicted for their role.<sup>108</sup>

64. Applying these factors, the ICTY Referral Bench concluded that a military commander in charge of ten brigades and 18,000 personnel who reported to the highest echelon of the military and who was accused of shelling and sniping the city of Sarajevo for a fifteen-month period and killing and wounding thousands of civilians, qualified as one of “the most senior leaders suspected of being most responsible.”<sup>109</sup> The ICTY Appeals Chamber has held that a top paramilitary leader accused of orchestrating multiple incidents of mass murder that resulted in the deaths of over 150 people must be considered a “most senior leader” and tried by the Tribunal.<sup>110</sup>
65. Persons whose level of seniority and responsibility were determined to be lower and thus appropriate for referral by the ICTY to national jurisdictions have included: a paramilitary leader and sub-commander of military police whose authority was limited to the “local level” (town of Foča);<sup>111</sup> the Assistant Warden of a prison, whose alleged crimes were limited to a specific region;<sup>112</sup> a brigade commander and the acting commander of a

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*Ibid.*

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*Milošević* Referral Decision, *supra* note 97 at para. 23.

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*Ibid.* at para. 23.

103

*Prosecutor v. Ademi*, Case No. IT-04-78-PT, ICTY, 14 September 2005, at para. 29 (“Ademi Referral Decision”); *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, ICTY, 17 November 2006, at para. 20 (hereafter “Kovačević Referral Decision”); *Milošević* Referral Decision at para. 23; *Lukić* Referral Decision, *supra* note 98 at para. 28.

104

*Milošević* Referral Decision, *supra* note 97 at para 23; *Ademi* Referral Decision *Ibid.* at para. 29.

105

*Milošević* Referral Decision, *supra* note 97 at para 23.

106

*Ibid.*

107

*Ademi* Referral Decision, *supra* note 107 at para.29; *Lukić* Referral Decision, *supra* note 107 at para. 28.

108

*Kovačević* Referral Decision, *supra* note 107 at para. 20.

109

*Milošević* Referral Decision, *supra* note 97 at para. 8-10, 19, 21-24.

110

ICTY, *Prosecutor v. Lukić*, Case No. IT-98-32/1-AR11bis.1, 11 July 2007, para.21-22, 25 (reversing a decision of the Referral Bench).

111

*Prosecutor v Janković*, Case No. IT-96-23-2-AR11bis2, Decision on Rule 11 bis Referral, (Appeals Chamber), 15 November 2005 at paras. 4, 19-22.

112

*Prosecutor v Rasević*, Case No. IT-97-25/1-PT, Decision on Referral of Case under Rule 11 bis, (Referral Bench), 8 July 2005 at paras. 13, 16, 21-22, 25.

military district charged with the deaths of 34 people during a single military operation;<sup>113</sup> and a battalion commander accused of participating in a one-month military campaign to shell the town of Dubrovnik that injured or killed five people.<sup>114</sup>

66. The equivalent language in the SCSL Statute covers only those who bear the “greatest” responsibility and is therefore narrower than the terms used in the Agreement and ECCC Law.<sup>115</sup> The SCSL has interpreted the term “greatest responsibility” to include an “array of individuals from military and political leaders down to individuals as young as 15”<sup>116</sup> and those who had been “implicated in serious crimes” within the jurisdiction of the court.<sup>117</sup>
67. The stated policy of the ICC is to focus its “investigations” on those who bear “the greatest responsibility” for core international crimes.<sup>118</sup> The relevant policy paper of the Office of the Prosecutor provides that in assessing the degree of responsibility, factors to be taken into account include “the alleged status or hierarchical level of the accused *or* implication in particularly serious or notorious crimes.”<sup>119</sup> It is clear from the disjunctive language (“*or*”) that the ICC legal framework would include both senior leaders and those implicated in particularly serious or notorious crimes as bearing the “greatest responsibility”.
68. For these reasons, the ICP respectfully submits that the Order rests on a putative decision on personal jurisdiction which is based on an incorrect interpretation of the governing law and meets the standard of appellate review of the PTC.

<sup>113</sup> *Ademi* Referral Decision, *supra* note 107 at paras. 15-18, 28-31.

<sup>114</sup> *Kovačević* Referral Decision, *supra* note 108 at paras. 12-13, 20.

<sup>115</sup> Statute of the Special Court for Sierra Leone, 16 January 2002, at art. 1.

<sup>116</sup> See *Prosecutor v Brima et al*, Case No. SCSL-04-16-T, Judgment, (Trial Chamber), 20 June 2007 at paras. 658-59 (noting that the phrase “greatest responsibility” must be interpreted broadly enough to include children and that the phrase covers an “array of individuals from military and political leaders down to individuals as young as 15”). See also *Prosecutor v Brima et al*, Case No. SCSL-04-16-T Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, (Trial Chamber II), 31 March 2006, at para. 34, 36-37, 39. The Special Court has even indicated that children between the ages of 15 and 18 could be “persons who bear the greatest responsibility” for the crimes that occurred in Sierra Leone. (“Thus, although children accused of serious crimes may fall within the category of persons who bear “the greatest responsibility”, it would perhaps be at the lower end of the spectrum.”). Trial Chamber II also suggested that the court’s jurisdiction over the accused is unaffected even if there is evidence of additional individuals who also bear the greatest responsibility.

<sup>117</sup> *Ibid.* at para. 38.

<sup>118</sup> Policy Paper on the Interests of Justice, September 2007, online: [www.icc-cpi.int](http://www.icc-cpi.int), (“Policy Paper”) at p. 7

<sup>119</sup> Policy Paper, *supra* note 118 at p. 7 (emphasis added).



iii. *The Order is based on patently incorrect factual conclusions concerning the hierarchical position and status of the Suspects and the notoriety or seriousness of their alleged criminal conduct*

69. The Order specifies that the Suspects were commanders of divisions, of which there were “no less than 9 (plus three independent regiments).”<sup>120</sup> On this basis, the CIJs conclude that it is “obviously nonsensical” for the ICP to consider the Suspects as senior leaders.<sup>121</sup> The Order also appears to dismiss the possibility that the Suspects are among “those most responsible” for crimes.
70. The Order first errs by focusing exclusively on the Suspects’ positions as military commanders and ignoring their other roles and responsibilities in the DK regime, such as their positions on the CPK Central Committee. As established by Articles 7.1 and 23 of the CPK Statute, the Central Committee was the “highest operational unit throughout the country” responsible for “implement[ing] the Party political line,” instructing zones and sectors and governing “cadres and Party members.”<sup>122</sup> It is clear from the drafting history of the ECCC Agreement, as discussed above, that the term “senior leaders” was not intended to be limited to members of the CPK Standing Committee, but also intended to encompass members of the Central Committee such as Khieu Samphan, Ke Pauk and the Case 003 Suspects.<sup>123</sup>
71. The CIJs are thus obligated to conduct a reasonable investigation to determine the members of the Central Committee who were appointed at the 4<sup>th</sup> Party Congress in January 1976 and 5<sup>th</sup> Party Congress in October 1978.<sup>124</sup> Khieu Samphan, the only member of the CPK Central Committee who has provided testimony to the ECCC identifying other members, has stated that Meas Mut was one of the 30 full-rights

<sup>120</sup> **D26** Order, *supra* note 2 at para. 6(c).

<sup>121</sup> *Ibid.*

<sup>122</sup> **D1.3.22.1** CPK Legal Document entitled “Communist Party of Kampuchea Statute”, January 1976, at ERN 00184038, 00184045; **D427** Closing Order, 15 September 2010, ERN 00604508-5246, para. 37 (“Case 002 Closing Order”).

<sup>123</sup> National Assembly Debate, *supra* note 89 at ERN 00315508 (referencing understanding that “senior leaders” would encompass as many as 10 people and would not be limited to “members of the Standing Committee”); Heder, *supra* note 94 at pp. 23-24, 27, 37-38.

<sup>124</sup> **D1.3.22.1** CPK Legal Document entitled “Communist Party of Kampuchea Statute”, January 1976, ERN 00184022-47 at ERN 00184044-45 [providing that a “General Conference” or Party Congress was to be held at least every 4 years to appoint the members of the Central Committee]; **D4.1.871** CPK Publication Revolutionary Flag, September 1978, ERN 00488614-40 at ERN 00488633 [referencing January 1976 Party Congress]; **D1.3.33.15** Written Record of Interview of Khieu Samphan, 13 December 2007, at 00156741-51 at ERN 00156750-51; **D1.3.30.29** Interviews with Kampuchean Refugees at Thai-Cambodia Border, February-March 1980, ERN 00170692-773 at ERN 00170749-50 (interview of Chap Lonh, one of the 60 attendees at the 5<sup>th</sup> Party Congress in 1978).

members of that Committee.<sup>125</sup> He has also stated that the Central Committee consisted primarily of secretaries of zones, sectors and military units.<sup>126</sup> The CIJs rejected the ICP's request that Khieu Samphan be interviewed in Case 003,<sup>127</sup> thus he has yet to be asked whether Sou Met was also a member of the Central Committee.

72. Nonetheless, Sou Met's position can be inferred from the statement of Kaing Guek Eav alias Duch, who was told in 1975 that Sou Met and Meas Mut had been named "Assistants" to the Central Committee.<sup>128</sup> Given that over half of the members of the Central Committee were arrested and executed between 1976 and 1978,<sup>129</sup> it is highly likely that Sou Met (like Meas Mut) was promoted to a full-rights member at either the 1976 or 1978 Party Congress.<sup>130</sup> Sou Met's position in the Party Centre is also evidenced by his participation in a series of meetings with the President of Burma in November 1977 as part of a group of senior DK leaders that also included Nuon Chea, Ieng Sary, Khieu Samphan, Von Vet, Son Sen and Ieng Thirith.<sup>131</sup>
73. In addition to his positions as Commander of Division 164 and a member of the Central Committee, Meas Mut was also Secretary of the Kampong Som Committee.<sup>132</sup> In 1977 or 1978, Meas Mut relocated to Phnom Penh and took on direct responsibilities with the Party Centre.<sup>133</sup> In late 1978, presumably as part of his Central Committee responsibility

<sup>125</sup> **D1.3.33.15** Written Record of Interview of Khieu Samphan, 13 December 2007, ERN 00156741-51 at ERN 00156751.

<sup>126</sup> **IS 4.23** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, ERN0010371-801 at ERN 00103785; *Ibid.* at ERN 00156750. See also **D427** Case 002 Closing Order, *supra* note 122 at para. 38 ("other zone secretaries and at least some sector secretaries were also members of the Central Committee, along with some additional military cadres").

<sup>127</sup> **D18** Second Investigative Request, *supra* note 17, at para. 15.

<sup>128</sup> **D1.3.33.10** Written Record of Interview of Kaing Guek Eav alias Duch, 2 June 2008, ERN 00195571-00195579 at ERN 00195577 (stating that Duch received this information from In Lorn *alias* Nat in late 1975); **D12** Written Record of Interview of Kaing Guek Eav *alias* Duch, 27 April 2011, ERN 00680795-99 at ERN 00680796.

<sup>129</sup> **D427** Case 002 Closing Order, *supra* note 122, at para. 38; **D4.1.950** OCP Revised S-21 Prisoner List, 19 May 2009, ERN 00329596-00330129 at ERN 00329602 (Baun Nan *alias* Yi), ERN 00329605 (Bou Phat *alias* Hâng), 00329617 (Chan Sam *alias* Kang Chap *alias* Sè), 00329661 (Chou Chet *alias* Sy), 00329775 (Koy Thuon), 00329819 (Mèn San *alias* Ya), 00329902 (Pa Phâl *alias* Sot), 00329928 (Sok Sophon *alias* Phuong), 00329987 (Seat Chhae *alias* Tum), 00330011 (Seua Vasi *alias* Doeun), 00330039 (Suos Nov *alias* Chhouk); **D10.1.5** S-21 Confession of Muol Sambath *alias* Ros Nhim, 14 June 1978.

<sup>130</sup> **D4.1.4** Timothy Carney, *The Organisation of Power*, in Karl D. Jackson, *Cambodia 1975-1978: Rendezvous with Death*, 1989, ERN 00105126-156 at ERN00105152; *supra* note 93, p 14; **D1.3.17.6** Stephen Heder and Brian Tittlemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, 2004, at ERN 00393603-04.

<sup>131</sup> **D262.36**, DK Media Reports for November 1977 (FBIS), ERN 00168544-610 at ERN 00168599-605.

<sup>132</sup> **D196.12**, DK Media Report entitled "Chinese Delegation Visits Kompong Som Area," 13 December 1977, ERN 00168307-399 at ERN 00168349.

<sup>133</sup> **D2/23** OCIJ Site Identification Report for Stung Hav Rock Quarry, 30 December 2010, ERN 00644146-84 at ERN 00644147-48 (n. 4); **D2/22** OCIJ Site Identification Report for Wat Enta Nhien Security Centre, 29 December 2010, ERN 00634138-76 at ERN 006341-42 [stating that Mut was reassigned to Phnom Penh in

to “govern and arrange cadres,” Meas Mut coordinated the replacement of purged sector and district leaders in Kratie (Sector 505).<sup>134</sup>

74. In any event, whether they were full-rights, candidate or assistant members, Meas Mut and Sou Met were at least as senior in the CPK hierarchy as Ieng Thirith, who held no known position on the Central Committee, was one of no less than nine government ministers and nonetheless was determined to be a “senior leader” by the CIJs in Case 002.<sup>135</sup>
75. The CIJs further erred by failing to consider that while Meas Mut and Sou Met’s authority and responsibilities increased over the course of the DK period, many of the other 9 division commanders were purged and their divisions merged out of existence. The Secretaries of Divisions 170, 310 and 450 were all arrested and executed in 1976 or 1977.<sup>136</sup> As recognized by the CIJs in the Case 002 Closing Order, “Centre Divisions were severely purged, which lead to their subsequent re-designation or merging into other divisions.”<sup>137</sup> The relative responsibility and power of Sou Met, for example, substantially increased when Divisions 605 and 703 were dissolved (after their leaders were arrested) and merged into Division 502.<sup>138</sup> Sou Met was described by one former Division 502 cadre as the “*de facto* Number 2 to Son Sen,” and he was frequently present at the General Staff office in Phnom Penh.<sup>139</sup>
76. At the time the “senior leaders” requirement was negotiated and understood to allow the prosecution of up to 10 persons, Meas Mut and Sou Met were, and remain, the only surviving leaders of the Revolutionary Army of Kampuchea (RAK). The only RAK military leader higher-ranking than these Suspects was their direct superior Son Sen, the Chief of the General Staff.<sup>140</sup> As the Commander of the Air Force and Secretary of

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1978]; **ERF 979** Statement of Meas Mut, 5 December 2001, ERN 00249692-700 at 00249695 (stating that he was “transferred to Phnom Penh” in 1977), submitted as Document No. 181 in **D17.2**, ERN 00698725.

<sup>134</sup> **D4.1.810** Written Record of Interview of Seng Soeun, 11 November 2009, ERN 00412176-87 at ERN 00412180-81.

<sup>135</sup> **D427** Case 002 Closing Order, *supra* note 122 at para. 1327.

<sup>136</sup> **D4.1.950** OCP Revised S-21 Prisoner List, ERN 00329596-00330129 at ERN 00329613, 00329627, 00329986 (Nos. 416, 714 & 8967); **D4.1.22** S-21 Confession of Chan Chakrey *alias* Nov Mean, 1 June 1976 (arrested 19 May 1976), ERN00183019-85; **D4.1.651** S-21 Confession of Chan Chakrey *alias* Nov Mean, 30 August 1976, ERN 00030985-00032842; **IS 5.89** S-21 Confession of Sbauv Him *alias* Euan; **D4.1.32** S-21 Confession of Chea Non *alias* Suong, 23 March 1977, ERN 00096949-93.

<sup>137</sup> **D427** Case 002 Closing Order, *supra* note 122, at para. 131.

<sup>138</sup> **D2/18** Written Record of Interview of Sreng Thi, 1 December 2010, ERN 00630429–36 at ERN 00630434-35.

<sup>139</sup> **D1.3.13.7** SOAS/HRW Interview of Pech Dari *alias* Ri, 27 July 2005, ERN 00207714-15; **D4.1.845** Written Record of Interview of Lonh Dos, 20 November 2009, at ERN 00407792.

<sup>140</sup> **D427** Case 002 Closing Order, *supra* note 122 at para. 386; **D4.1.855** Written Record of Interview of Lonh Dos, at ERN 00364071; **D4.1.845** Written Record of Interview of Lonh Dos, at ERN 00407792.

Division 502,<sup>141</sup> Sou Met was responsible for at least 12 battalions with a total of between 5,000 and 6,000 personnel.<sup>142</sup> As the Commander of the Navy and Secretary of Division 164,<sup>143</sup> Meas Mut was responsible for at least 12 battalions with total personnel between 8,500 and 10,000.<sup>144</sup>

77. The RAK had a major role in the mass crimes committed during the DK period. In their Case 002 Closing Order, the CIJs expressly found that the RAK was a “core institution” in DK because “CPK policy relied heavily on the implementation of its goals by forceful means,”<sup>145</sup> and that the members of the joint criminal enterprise (JCE) included the “heads of the Party Centre military divisions,” as well as the Standing Committee, Central Committee, zone and autonomous sector secretaries.<sup>146</sup> The CIJs also concluded that it was the Accused’s “personal participation in the implementation” of the JCE that made them part of “the category of those most responsible for crimes and serious violations committed between 17 April 1975 and 6 January 1979.”<sup>147</sup>
78. In this case, numerous contemporaneous documents establish the participation of Meas Mut<sup>148</sup> and Sou Met<sup>149</sup> in that JCE, including: a vow by Meas Mut to Office 870 (the Standing Committee) to “[sweep] cleanly away and without half-measures the uncover[ed] elements of the enemy, whether the Yuon or other enemies;”<sup>150</sup> and statements by Sou Met to Son Sen and other division commanders urging that it was “imperative to take further

<sup>141</sup> **D427** Case 002 Closing Order, *supra* note 122 at para. 386; **D4.1.841** Written Record of Interview of Sokh Chhay, at ERN 00404291; **D4.1.837** Written Record of Interview of Hen Sophal, at ERN 00374046; **D4.1.601** Written Record of Interview of Seng Mon, at ERN 00288621.

<sup>142</sup> **D1.3.5.18** DK Report entitled *List of Monthly Military Personnel Strength, May 1976*, 5 June 1976, at ERN 00509700 (total of 5,684 persons); **D1.3.5.21** DK Report entitled *Monthly List of Forces for October 1976*, 25 October 1976, at ERN 00233924 [total of 5,599 persons]; **D1.3.30.5** DK Report entitled *Table of Statistics on Students Studying at the First General Staff Study Session*, 20 October 1976, ERN 00095532-43; **D4.1.396** DK Report entitled *Second General Staff Study Session*, 23 November 1976, at ERN 00195326-27.

<sup>143</sup> **D2/9** Written Record of Interview of Say Born, at ERN 00613021; **D2/16** Written Record of Interview of Touch Soeuli, at ERN 00629463.

<sup>144</sup> **D1.3.5.3** DK Report entitled *Daily List of Forces 27 October 1976*, 27 October 1976, at ERN 00233989 (identifying 4 regiments and 6 battalions with total of 8,611 persons); **D1.3.11.3** *OCP List of Arrestees from Division 164*, 25 January 2008, ERN 00196162-78; **D1.3.33.16** Statement of Meas Mut, 20 July 2001, at ERN 00089661 (stating that there were “probably over 10,000” in his division).

<sup>145</sup> **D427** Case 002 Closing Order, *supra* note 122 at para. 113 and 147 (also finding that the RAK’s responsibility was to defend the country against “internal enemies” and “to continue to smash”).

<sup>146</sup> *Ibid.* paras. 159, 1529.

<sup>147</sup> *Ibid.* para. 1328.

<sup>148</sup> See documents identified in footnote 64 of **D19** Third Investigative Request, *supra* note 18.

<sup>149</sup> See documents identified in footnotes 9-10 and 35-38 of **D18** Second Investigative Request, *supra* note 17.

<sup>150</sup> **D1.3.34.60** DK Telegram from Mut to Mo-870, 31 December 1977, ERN 00184995.

measures” to eliminate enemies of the CPK.<sup>151</sup> Both Suspects regularly participated in General Staff meetings discussing the elimination of enemies,<sup>152</sup> and submitted reports on their efforts to identify and purge enemies within their ranks.<sup>153</sup> S-21 confessions were sent to Sou Met<sup>154</sup> and Meas Mut,<sup>155</sup> who then worked together with Son Sen and Nuon Chea to determine which of the implicated Division 164 and 502 cadres who would be arrested and sent to S-21.<sup>156</sup> As determined by the CIJs in Case 002, RAK cadres were the

- <sup>151</sup> **D1.3.27.20** Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 9 October 1976, at ERN 00183990 (also recording Meas Mut’s “total agreement” with the Party and warning that “no-good elements or enemies are still camouflaged and infiltrated in the rank-and-file”).
- <sup>152</sup> **D1.3.27.8** Minutes of the Meeting of Secretaries and Economics of Divisions, 16 May 1976, at ERN 00184820; **D1.3.27.13** Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 30 August 1976, at ERN 00183966-68 [“imperative to conduct further purges of no-good elements”]; **D1.3.8.4** Minutes of the Meeting of Comrades 164, 9 September 1976, ERN 00657354-56; **D1.3.27.16** Minutes of Divisional and Independent Regiment Secretary and Under-Secretary’s Meeting, 16 September 1976, at ERN 00184339-40; **D1.3.27.18** Minutes of Meeting of Secretaries and Logistics Chiefs of Divisions and Regiments, 19 September 1976, at ERN 00195340-41; **D1.3.27.19** Minutes of the Meeting on Production Work, 30 September 1976, at ERN 00184821; **D1.3.27.23** Minutes of Meeting of Secretaries and Logistics Officers of Divisions and Independent Regiments, 15 December 1976, at ERN 00233711-12; **D1.3.27.26** Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 1 March 1977, at ERN 00183949 (statement by Sou Met that “more than 50 no-goods” had been sent to S-21 and proposing removal of 5 more platoon secretaries, and statement by Meas Mut that one platoon had been purged). *See also* **D1.3.8.3**, Minutes of Meeting of Military Work in Kampong Som, 3 August 1976, ERN 0234012-16 (Meas Mut meeting with Pol Pot, Vorn Vet and Son Sen discussing enemy situation).
- <sup>153</sup> **D366/7.1.476**, DK Report from Mut to Brother 89, 20 February 1976, ERN 00525783; **D1.3.12.6** DK Report from Met (Division 502), 1 August 1976, at ERN 00234035; **D1.3.12.9** DK Report from Met (Division 502 Committee), 1 September 1976, ERN 00233902; **D1.3.34.11** DK Telegram from Dim to Mut, 24 September 1976, ERN 00233660 (copy to Nuon Chea and Son Sen); **D1.3.34.13** DK Telegram from Dim to Mut, 6 October 1976, ERN 00233657 (copy to Nuon Chea and Son Sen).
- <sup>154</sup> **D1.3.1.10** S-21 Confession of Srei Sareuan, 19 October 1977, at ERN 00161882; **D1.3.1.12** S-21 Confession of Uk Van alias Vin, 24 September 1977, at ERN 00233907; **D1.3.1.5** S-21 Confession of Nay Chap, 27 August 1977, ERN 00162395-427; **D1.3.1.11** S-21 Confession of Suon Heuang, 29 August 1977, at ERN 00233937; **D288/6.2.23** S-21 Confession of Deang Phika, 6 October 1976 (submitted by ICP as Document No. 19 in **D17.1**, ERN 00698686).
- <sup>155</sup> **D1.3.18.1** S-21 Confession of Hang Doeun alias Dim, 4 May 1977, at ERN 00187721; **D1.3.18.3** S-21 Confession of Kun Dim, 10 September 1977, at ERN 00242033; **D1.3.1.7** S-21 Confession of PEN Ham, 3 June 1977, at ERN 00233933.
- <sup>156</sup> **D288/4.26.1** Case 001 Trial Transcript, 27 May 2009 (Day 22), ERN 00334496-599 (pp. 3, 9, 17, 29); **D12** Written Record of Interview of Kaing Guek Eav *alias* Duch, 27 April 2011, ERN 00680795-99. at ERN 00680799; **D43/IV Annex 57** S-21 Confession of Hang Doeun alias Dim, at ERN 00224085 (annotation by Son Sen on confession of Division 164 Deputy Secretary stating: “[t]hough some are the right people, some others, whom I have known are not. I will invite comrade Muth to check this together”); **D1.3.23.3** DK Report from Met to Duch, 1 April 1977, ERN 00178065; **D1.3.28.35** DK Report from Met to Duch, 30 May 1977, ERN 00178066; **D4.1.391** DK Report from Met to Duch, 2 June 1977, at ERN 00316309; **D427** Case 002 Closing Order, *supra* note 122 at para. 600, 1074 (describing “working principle” of S-21 by which confessions were sent to the unit head of the interrogated detainee “to allow him or her to contemplate the arrest of anyone else implicated in the confession”).

single largest group of prisoners at S-21, accounting for almost one-half of the known detainees.<sup>157</sup>

79. OCIJ investigators and witnesses have also confirmed the responsibility of Sou Met and Meas Mut for other Case 003 crime sites. As Division 502 Secretary, Sou Met was responsible for the S-22 division prison and Kampong Chhnang airport worksite, which he frequently visited.<sup>158</sup> As Division 164 Secretary, Meas Mut was responsible for the Wat Enta Nhien division security centre, the forced labour site at the Stung Hav rock quarry, the capture of Thai, Vietnamese and foreign vessels that entered Cambodian waters and the arrest and execution of foreigners on those vessels,<sup>159</sup> including US marines captured during the *Mayaguez* incident who were reportedly imprisoned and killed at Wat Enta Nhien.<sup>160</sup>
80. Under these circumstances, if Meas Mut and Sou Met are not prosecuted by the ECCC, no military leader will be held accountable for the serious crimes for which the RAK was responsible during the DK regime. By way of contrast, at the ICTY, 78 out of 161 indictees were military personnel, representing 48% of all completed or pending cases.<sup>161</sup> There should be no question here that the Case 003 Suspects named by the ICP fall within

<sup>157</sup> **D427** Case 002 Closing Order, *supra* note 122 at para. 424 (finding that RAK cadres accounted for 5,609 of the 12,273 total entries on the Revised S-21 Prisoner List); **D1.3.11.3** OCP List of Arrestees from Division 164, ERN 00196162-78 (identifying 396 Division 164 cadres sent to S-21); **D9.3** OCIJ S-21 Prisoners from Division 164, ERN 00679641-44 (listing 55 S-21 prisoners); **D1.3.11.2** OCP List of Arrestees from Division 502, ERN 00196179-216 (identifying 863 Division 502 cadres sent to S-21); **D9.2** OCIJ S-21 Prisoners from Division 502, ERN 00679626-40 (listing 355 S-21 prisoners). The CIJs also found that “Division 502 actively participated in the purge of the RAK members.” **D427** Case 002 Closing Order, *supra* note 122 at para. 387.

<sup>158</sup> **D2/21** OCIJ Site Identification Report for S-22 Security Centre, 9 December 2010, ERN 00630523-36 at ERN 00630524; **D4.1.780** OCIJ Site Identification Report for Kampong Chhnang Airfield, at ERN 00436945-47 (identifying Sou Met as the only surviving supervisor of the site and as one of the “high level Khmer Rouge leaders,” along with Khieu Samphan, Ieng Sary, Ta Mok and Son Sen, who regularly inspected the site); **D2/18** Written Record of Interview of Sreng Thi, at ERN 00630432, 00630434-35; **D4.1.837** Written Record of Interview of Hen Sophal, at ERN 00374048. *See also* **D427** Case 002 Closing Order, *supra* note 122 at para. 386.

<sup>159</sup> **D2/23** OCIJ Site Identification Report for Stung Hav Rock Quarry, 30 December 2010, ERN 00644146-84 at ERN 00644147-48, 00644152; **D2/22** OCIJ Site Identification Report for Wat Enta Nhien Security Centre, 29 December 2010, ERN 00634138-76, at ERN 00634141-42; **D2/9** Written Record of Interview of Say Born, at ERN 00613024; **D2/15** Written Record of Interview of Touch Soeuli, at ERN 00628184-85, 00628187-88; **D2/16** Written Record of Interview of Touch Soeuli, at ERN 00629463; **D1.3.8.4** Minutes of the Meeting of Comrades 164, at ERN 00657355-56; **D1.3.27.18** Minutes of Meeting of Secretaries and Logistics Chiefs of Divisions and Regiments, at ERN 00195340-41; **D1.3.12.20** DK Report from Mut, 12 August 1977, ERN 00233972; **D4.1.635** DK Report from Mut, 1 April 1978, at ERN 00143507.

<sup>160</sup> **D2/22** OCIJ Site Identification Report for Wat Enta Nhien Security Centre, 29 December 2010, at ERN 00634141-43; Ralph Wetterhahn, *The Last Battle* (2002), pp. 281-89.

<sup>161</sup> See Case Information Sheets at <http://www.icty.org/action/cases/4>; other categories of indictees included 28 political or governmental leaders (17%), 12 police officers (7%), 31 prison officers (19%), six paramilitaries (4%), and six civilians (4%).

the personal jurisdiction of the ECCC as senior leaders or persons most responsible, and that paragraphs 6(c) and 6(d) of the CIJs' Order are based on patently incorrect factual conclusions and subject to appellate review by the PTC.

### V. RELIEF REQUESTED

81. For the reasons set out above, the ICP respectfully requests the Pre-Trial Chamber:

- (a) To hold that the Order is reviewable on appeal and invalid on the grounds that it is
  - (i) based on incorrect interpretations of the governing law (paras. 23-27; 44-68),
  - (ii) based on patently incorrect conclusions of fact (paras. 30-33; 69-80) and (iii) so unfair or unreasonable as to constitute an abuse of judicial discretion (paras. 28-29; 34-37; 41-43);
- (b) To direct the CIJs to consider the ICP's Requests on the merits on an urgent basis;
- (c) In light of the significant public interest in this matter, and in order to further promote public confidence in the effective and expeditious functioning of the Court, (i) to allow a public, redacted copy of this Appeal to be issued by the Co-Prosecutor now and (ii) to make its decision on the Appeal public, consistent with the Pre-Trial Chamber's practice to date; and
- (d) To expedite its consideration of, and decision on, the Appeal having regard to the central importance of this issue to the integrity and public reputation of the ECCC and the internal procedures of the OCP.

Respectfully submitted,

Date	Name	Place	Signature
26 August 2011	Andrew CAYLEY International Co-Prosecutor	Phnom Penh 	