

**BEFORE THE SUPREME COURT CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/08-10-2021-ECCC/SC(05)**Party Filing:** The Defence for MEAS Muth**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 25 October 2021**CLASSIFICATION****Classification of the document  
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**MEAS MUTH'S RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S  
APPEAL OF THE PRE-TRIAL CHAMBER'S FAILURE TO SEND CASE 003 TO  
TRIAL AS REQUIRED BY THE ECCC LEGAL FRAMEWORK**

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**All Civil Parties in Case 003**

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), hereby responds to the International Co-Prosecutor’s (“ICP”) Appeal of the Pre-Trial Chamber’s (“PTC”) Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework.<sup>1</sup> The ICP’s appeal is inadmissible. She imprudently invites the Supreme Court Chamber (“SCC”) to depart from its previous decision in Case 004/2 without presenting any cogent reasons,<sup>2</sup> any error in reasoning, or any change in circumstances that would cause the SCC to decide the same legal issues in Case 003 differently.<sup>3</sup> All arguments should be summarily dismissed.<sup>4</sup>

## I. RESPONSE

### A. The Closing Orders are illegal

1. In Ground A (paragraphs 53-61), the ICP erroneously claims the Co-Investigating Judges (“CIJs”) were permitted to issue two Closing Orders because: (a) the CIJs are equal and independent;<sup>5</sup> (b) Rule 72 is discretionary in nature;<sup>6</sup> (c) two Closing Orders were anticipated by the drafters of the ECCC framework, and where there are irreconcilable differences, the Indictment would proceed under the default position;<sup>7</sup> (d) Rule 67(1) requiring a Closing Order must be interpreted with Rule 1(2), which provides that a reference to the CIJs includes both acting jointly and each acting individually;<sup>8</sup> and (e) a comparison with civil law systems where two Closing Orders are not permitted highlight the unique nature of the ECCC legal framework in permitting two Closing Orders.<sup>9</sup>

<sup>1</sup> International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 8 October 2021, Doc. No. 3 (“ICP Appeal”), paras. 42-52.

<sup>2</sup> The SCC should follow its previous decisions and should only be free to depart from them for “cogent reasons in the interests of justice.” See *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2021, E100/6, para. 26. See also Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Chum Neou, 13 February 2013, D11/3/4/2, Opinion of Judges Chung and Downing, paras. 16-17; *Prosecutor v. Semanza*, ICTR-97-20-A, Decision, 31 May 2000, para. 92.

<sup>3</sup> Inasmuch as the ICP is requesting the SCC to reconsider legal issues it decided on in Case 004/2, the ICP must demonstrate a clear error in the SCC’s reasoning or a change in circumstances warranting the SCC’s reconsideration. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Decision on Khieu Samphân’s Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 7 June 2019, F44/1, p. 2; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/S, Decision on Co-Prosecutors’ Submissions on Proceeding with Appeal Hearing, 3 December 2015, F30/16/1, p. 3. See also *Prosecutor v. Šešelj*, IT-03-67-AR72.1, Decision on Motion for Reconsideration of the “Decision on the Interlocutory Appeal Concerning Jurisdiction” Dated 31 August 2004, 15 June 2006, para. 9.

<sup>4</sup> See *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 20. *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22.

<sup>5</sup> ICP Appeal, para. 54.

<sup>6</sup> ICP Appeal, para. 55.

<sup>7</sup> ICP Appeal, paras. 56-57.

<sup>8</sup> ICP Appeal, para. 58.

<sup>9</sup> ICP Appeal, paras. 59-61.

2. The ICP presents no cogent reasons, error in reasoning, or change in circumstances for the SCC to depart from its decision in Case 004/2.<sup>10</sup> The ICP merely repeats arguments that were unsuccessful before the SCC without any demonstration of why their rejection by the SCC constituted an error.<sup>11</sup>
3. When appealing before the SCC in Case 004/2, the ICP claimed that Rules 77(13)(b), 79(1), and 1(2) mandate that the indictment proceeds to trial since it was not overturned by PTC supermajority and “remains live.”<sup>12</sup> The SCC did not find an error in the PTC’s reasoning that the issuance of two Closing Orders was illegal and that Rule 1(2) did not provide a legal basis to deviate from the requirement in Rule 67(1) to issue a single Closing Order.<sup>13</sup> It explicitly found that “whether Rule 1(2) permits an Investigating Judge to act individually remains to be resolved by the Pre-Trial Chamber.”<sup>14</sup> Had the SCC determined that the PTC erred in finding that two Closing Orders are illegal, it would have raised and corrected the error *proprio motu*, since determining this issue was “of fundamental significance to the ECCC’s jurisprudence.”<sup>15</sup>
4. Subsequently in Cases 003 and 004, the PTC again unanimously held that Rule 1(2) does not offer a legal basis for the CIJs to issue two Closing Orders.<sup>16</sup> It did not unanimously find that Rule 1(2) permits the CIJs to act individually to forward the Indictment.
5. For these reasons, Ground A should be summarily dismissed.

### **B. The Closing Orders are null and void**

6. In Ground B (paragraphs 62-68), the ICP erroneously claims that the Closing Orders are not null and void and that the PTC had a duty to examine the merits of the Closing Orders,

<sup>10</sup> See *supra* fns. 1-2.

<sup>11</sup> See *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 20. *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22.

<sup>12</sup> *Case of AO An*, 004/2/07-09-2009-ECCC-TC/SC, International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020, E004/2/1, para. 55; *Case of AO An*, 004/2/07-09-2009-ECCC-TC/SC, International Co-Prosecutor’s Reply to AO An’s Letter Regarding Her Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 26 May 2020, E004/2/1/1/1, para. 4.

<sup>13</sup> *Case of AO An*, 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, E004/2/1/1/2 (“SCC Decision in Case 004/2”), paras. 52-53; *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), Considerations on Appeals Against Closing Orders, 19 December 2019, D359/24 & D360/33, para. 121.

<sup>14</sup> SCC Decision in Case 004/2, para. 68.

<sup>15</sup> See *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 15.

<sup>16</sup> Considerations on Appeals Against Closing Orders, 7 April 2021, D266/27 & D267/35 (“Case 003 PTC Considerations”), paras. 103-104. *Case of YIM Tith*, 004/07-09-2009-ECCC/OCIJ (PTC61), Considerations on Appeals Against Closing Orders, 17 September 2021, D381/45 & D382/43, paras. 109-110.

which she claims, “for differing reasons, confirmed the Indictment.”<sup>17</sup> She further erroneously claims that if the SCC disagrees and move to consider its own remedy, it must consider whether the two Closing Orders occasioned a miscarriage of justice and grossly unfair outcome in the proceedings, “the gravity of the crimes charged, the social costs of preventing the case from proceeding, the interests and rights of all the parties, and the proportionality of any remedy to the alleged harm.”<sup>18</sup>

7. The ICP presents no cogent reasons, error in reasoning, or change in circumstances for the SCC to depart from its decision in Case 004/2.<sup>19</sup> “Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and do not need to be considered on the merits.”<sup>20</sup>
8. The SCC held in Case 004/2 that the consequence of the PTC’s declaration that the Closing Orders were the results of *unlawful and illegal actions* is that they are null and void, and the separate opinions on the validity of each Closing Order are “irrelevant,” “superfluous,” and “redundant.”<sup>21</sup> The SCC considered that “[a] void act cannot create a lawful consequence or result” and “therefore it logically follows that the source action – each Closing Order – was of no legal effect.”<sup>22</sup> In the absence of a valid Indictment, and considering that there was “no agreement after thirteen years of investigation that AO An was within the jurisdiction of the Court,” the SCC held that “Case 004/2 against him should be terminated before the ECCC.”<sup>23</sup>
9. The ICP in injecting irrelevant factors for the SCC’s consideration in Case 003:
  - a. erroneously cites the standard of review for procedural errors in a trial judgment,<sup>24</sup> ignoring the PTC’s findings that the CIJs’ “manifest” and “gross” errors in issuing two

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<sup>17</sup> ICP Appeal, para. 62.

<sup>18</sup> ICP Appeal, para. 63.

<sup>19</sup> *See supra* fn. 1-2.

<sup>20</sup> *See Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 20.

<sup>21</sup> SCC Decision in Case 004/2, paras. 53, 67.

<sup>22</sup> SCC Decision in Case 004/2, para. 67.

<sup>23</sup> SCC Decision in Case 004/2, para. 69.

<sup>24</sup> ICP Appeal, paras. 32-33, citing the SCC’s standard of appellate review in *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, F36, para. 100.

Closing Orders “jeopardised the whole system upheld by the Royal Government of Cambodia and United Nations”;<sup>25</sup>

- b. misrepresents inapposite case law from the European Court of Human Rights concerning the “fairness of the proceedings” and US case law concerning the suppression of illegal evidence as jurisprudence that is applicable at the ECCC;<sup>26</sup>
- c. misleads in suggesting that termination is only appropriate in cases of inhuman, cruel or degrading treatment, or torture;<sup>27</sup> and
- d. misleads in claiming that a survey of cases from other international criminal tribunals – where *trial and appeal proceedings* were completed within eight to 13 years of the accused’s transfer to the tribunal – shows that Case 003, which has been in the pre-trial phase for 13 years, is not unduly delayed.<sup>28</sup>

10. For these reasons, Ground B should be summarily dismissed.

### **C. The PTC did not unanimously uphold the Indictment**

- 11. In Ground C (paragraphs 69-75), the ICP disingenuously claims that the PTC unanimously upheld the Indictment.<sup>29</sup>
- 12. The ICP misrepresents the PTC Considerations and the PTC’s Consolidated Decision on the parties’ requests to conclude the pre-trial proceedings in Case 003. When the ICP requested the CIJs to forward Case File 003, they found that the ICP’s argument “based on the PTC’s IJs’ opinion about the existence of an allegedly unanimous finding by all five judges that the indictment is valid, is taking the NJs’ words out of context...”<sup>30</sup> Subsequently, the PTC did *not* order the CIJs to forward the Indictment, unanimously declaring that it had been unable to reach a supermajority in its Considerations on the questions raised again by the parties’ requests (whether to forward or archive).<sup>31</sup> As the

<sup>25</sup> Case 003 PTC Considerations, paras. 88, 105, 108.

<sup>26</sup> ICP Appeal, para. 34, fn. 58, citing *Ibrahim and others v. the United Kingdom*, Nos. 50541/08, 50571/08, 505373/08, 40351/09, Judgment, 13 September 2016, para. 252 and *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

<sup>27</sup> ICP Appeal, para. 35.

<sup>28</sup> ICP Appeal, para. 66, citing International Co-Prosecutor’s Response to MEAS Muth’s Request to Terminate, Seal and Archive Case 003, 8 July 2021, D272/1, para. 16.

<sup>29</sup> ICP Appeal, para. 62.

<sup>30</sup> Decision on International Co-Prosecutor’s Request to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7, para. 30.

<sup>31</sup> Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for MEAS Muth Concerning the Proceedings in Case 003, 8 September 2021, D275/1 & D272/3, para. 77.



CIJs have found, “any argument that five judges upheld the indictment of the International Co-Investigating Judge ... is therefore moot by the PTC’s own words.”<sup>32</sup>

13. For these reasons, Ground C should be summarily dismissed.<sup>33</sup>

**D. Case 003 cannot proceed to trial because there is no valid Indictment**

14. In Ground D (paragraphs 76-82), the ICP erroneously claims that even if the PTC did not unanimously uphold the Indictment, it was obliged to send Case 003 to trial pursuant to the default position because the Indictment was not overturned by PTC supermajority.<sup>34</sup>

15. The ICP presents no cogent reasons, error in reasoning, or change in circumstances for the SCC to depart from its decision in Case 004/2.<sup>35</sup> The ICP merely repeats arguments that were unsuccessful before the SCC without any demonstration of why their rejection by the SCC constituted an error.<sup>36</sup>

16. The SCC “unequivocal[ly]” held that a case cannot go to trial “in the absence of a valid Closing Order,” despite finding that the objective of the dispute resolution mechanism is to “prevent a deadlock from derailing the proceedings from moving to trial.”<sup>37</sup> It has already found that “[t]he argument proposed by the International Co-Prosecutor ... that in the absence of agreement and supermajority in favour of dismissal the default position operates.... sidesteps or ignores the consequences of the *unanimous* finding of the Pre-Trial Chamber that the Closing Orders were the results of *unlawful and illegal* actions.”<sup>38</sup>

17. For these reasons, Ground D should be summarily dismissed.

<sup>32</sup> Order to File Submissions on Residual Jurisdiction to Terminate Case 003, 16 September 2021, D273, para. 2.

<sup>33</sup> *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 20. *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22.

<sup>34</sup> ICP Appeal, para. 76.

<sup>35</sup> *See supra* fns. 1-2.

<sup>36</sup> *See Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 20. *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 22.

<sup>37</sup> SCC Decision in Case 004/2, para. 68.

<sup>38</sup> SCC Decision in Case 004/2, para. 67 (emphasis added).

## II. CONCLUSION AND RELIEF SOUGHT

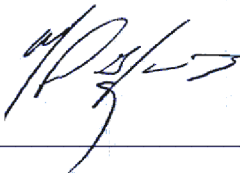
18. The Indictment in Case 003 is as null and void as the PTC Judges' separate opinions are irrelevant and superfluous. The only remedy to the illegal Closing Orders that guarantees Mr. MEAS Muth's rights to equal treatment, legal certainty, and to a speedy, final determination of his case under the ECCC framework is to terminate Case 003 in accordance with the SCC's decision in Case 004/2.

**WHEREFORE**, for all the reasons stated herein, the SCC should **SUMMARILY DISMISS** the ICP's Appeal:

Respectfully submitted,

  
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\_\_\_\_\_  
Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth  
Signed in Phnom Penh, Kingdom of Cambodia on this **25<sup>th</sup>** day of **October, 2021**