

**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:** 1 November 2021**CLASSIFICATION****Classification of the document  
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**MEAS MUTH'S REPLY TO INTERNATIONAL CO-PROSECUTOR'S RESPONSE  
TO MEAS MUTH'S REQUEST TO TERMINATE CASE 003**

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**Filed by:****Distribution to:****The Co-Lawyers:**

ANG Udom

Michael G. KARNAVAS

**Supreme Court Chamber Judges:**

Judge KONG Srim, President

Judge C. N. JAYASINGHE

Judge SOM Sereyvuth

Judge Florence Ndepele MUMBA

Judge MONG Monichariya

Judge Maureen HARDING CLARK

Judge YA Narin

**Co-Prosecutors:**

CHEA Leang

Brenda J. HOLLIS

**All Civil Parties in Case 003**

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), replies to the International Co-Prosecutor’s (“ICP”) Response to Mr. MEAS Muth’s Request to Terminate Case 003. The ICP regurgitates arguments that were unsuccessful before the Pre-Trial Chamber (“PTC”) and Supreme Court Chamber (“SCC”), misstates the applicable law, misstates the PTC and SCC findings, misrepresents the Defence’s arguments, and raises irrelevant arguments. No cogent reasons are presented for the SCC to depart from its decision in Case 004/2, nor any error in reasoning or any change in circumstance that would justify the SCC to decide Case 003 differently. The ICP’s arguments should be summarily dismissed.

1. The ICP erroneously claims that the principle of equal treatment does not apply in this instance because the SCC’s decision in Case 004/2 was based on an error of law “stemming from the PTC’s erroneous decision that the issuance of two Closing Orders was illegal.”<sup>1</sup> These arguments have been raised and dispensed with.<sup>2</sup> Having the power to “raise questions *ex proprio motu*,” had the SCC disagreed with the PTC’s decision, it would have corrected the error.<sup>3</sup>
2. The ICP erroneously claims that the Defence’s arguments on equal treatment misstate the law because the principle “simply requires ensuring that defendants in similar cases are dealt with in similar for fora, with similar procedural rules.”<sup>4</sup> Nonsense. Rule 21 “clearly requires ECCC judicial bodies to ensure legal certainty and that ‘[p]ersons who find themselves in a similar situation [...] shall be treated according to *the same rules*.’”<sup>5</sup> A “proper construction of Internal Rule 21” requires that, in the interests of legal certainty and equality before the law, ECCC Chambers should only depart from previous decisions for “cogent reasons in the interests of justice.”<sup>6</sup>

<sup>1</sup> International Co-Prosecutor’s Response to MEAS Muth’s Request to Terminate Case 003, 25 October 2021, Doc. 4/1, (“ICP’s Response”), paras. 1, 11-13.

<sup>2</sup> 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, 25 October 2021, Doc. 3/1, paras. 1-5.

<sup>3</sup> *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, paras. 15, 16.

<sup>4</sup> ICP’s Response, paras. 9-10.

<sup>5</sup> 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, para. 16 (emphasis added).

<sup>6</sup> 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.

3. The ICP erroneously claims that there are cogent reasons to depart from the SCC's decision in Case 004/2 because the Closing Orders were not illegally issued, and assuming, arguendo, their simultaneous issuance was illegal, they are not null and void and the case proceeds to trial based on the default position.<sup>7</sup> As explained in MEAS Muth's Response to the ICP's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to trial as required by the ECCC Legal Framework,<sup>8</sup> and argued below in paragraphs 4-7, the ICP presents no cogent reasons to depart from the SCC's decision in Case 004/2, error in reasoning, or change in circumstance that would justify the SCC to decide Case 003 differently.
4. The ICP erroneously claims that the Defence has consistently taken the position that two Closing Orders are permissible.<sup>9</sup> Conveniently, she omits mentioning that during oral arguments before the PTC, the Defence specifically allowed the possibility that both the ICP and the Defence had erred in arguing in their written appeals that the ECCC framework permitted the CIJs to issue separate Closing Orders, and that were the PTC to hold otherwise (as it did), the PTC would either have to remit Case File 003 to the CIJs with instructions to issue a single Closing Order or review Case File 003 itself and issue its own Closing Order.<sup>10</sup> Since the Case 004/2 PTC Considerations, the Defence has consistently accepted that the two Closing Orders are illegal.<sup>11</sup>
5. The ICP erroneously claims that the CIJs' issuance of two Closing Orders was a non-fatal procedural error.<sup>12</sup> Inappositely relying on the standard of appeal for procedural errors in a

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<sup>7</sup> ICP's Response, paras. 15-32.

<sup>8</sup> 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, 25 October 2021, Doc. 3/1 ("MEAS Muth's Response"), paras. 1-17.

<sup>9</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, para. 16.

<sup>10</sup> Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 11.59.14-12.03.17. *See also* MEAS Muth's Request for Clarification of the PTC's Considerations Against Closing Orders in Case 004/2, 27 March 2020, D267/24, para. 15; MEAS Muth's Supplement to his Appeal Against the International Co-Investigating Judge's Indictment, 5 May 2020, D267/27, para. 24; *Case of AO An*, 004/2/07-2009-ECCC-TC/SC, MEAS Muth's Request for Leave to Intervene and Respond to the International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 29 May 2020, E004/2/2, paras. 11-12.

<sup>11</sup> MEAS Muth's Request for Clarification of the PTC's Considerations Against Closing Orders in Case 004/2, 27 March 2020, D267/24, paras. 15-39; MEAS Muth's Supplement to his Appeal Against the International Co-Investigating Judge's Indictment, 5 May 2020, D267/27, paras. 26-32; *Case of AO An*, 004/2/07-2009-ECCC-TC/SC, MEAS Muth's Request for Leave to Intervene and Respond to the International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 29 May 2020, E004/2/2, paras. 10-13; MEAS Muth's Response to the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 12 May 2021, D270/4, paras. 19-21, 23-24; MEAS Muth's Request to Terminate, Seal, and Archive Case 003, 17 June 2021, D272, paras. 15(d); MEAS Muth's Request to Terminate Case 003, 4 October 2021, Doc. 4, paras. 57-61.

<sup>12</sup> ICP's Response, paras. 22-26.

trial judgment, she ignores the PTC's unanimous findings that the CIJs' "gross" and "manifest" errors were "[m]ore than a violation of the fundamental principles of the ECCC legal framework" since they "jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations."<sup>13</sup> The PTC's uncharacteristically sharp language and tone in articulating their views on the CIJs' errors in issuing two Closing Orders can lead to no other conclusion. And any notion that the National and International PTC Judges could latch on to arguments of their making to justify their respective preference to either Closing Order was unambiguously dismissed by the SCC.<sup>14</sup>

6. The ICP erroneously claims that the PTC unanimously upheld the Indictment and that the National PTC Judges' separate opinion "simply reflects the refusal of the National PTC Judges to act on their own decisions and within the ECCC framework."<sup>15</sup> If, as claimed by the ICP, the PTC had a "common understanding that the Indictment is valid," it would not have subsequently declared that "[t]here is no text requiring the Pre-Trial Chamber to reach a unanimous decision" and that it was "unable to rule on the points raised by the Requests in the disposition of its Considerations in Case 003."<sup>16</sup> "Any argument that five judges upheld the indictment of the International Co-Investigating Judge ... is therefore moot by the PTC's own words."<sup>17</sup>
7. The ICP erroneously claims that the Indictment must proceed to trial based on the default position because it was not overturned by PTC supermajority.<sup>18</sup> Again, the ICP ignores the SCC's finding 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>19</sup>
8. The ICP erroneously claims that there has been no undue delay in Case 003 by disingenuously asserting that the "relevant time period began to run when [Mr. MEAS

<sup>13</sup> Considerations on Appeals Against Closing Orders, 7 April 2021, D266/27 & D267/35, paras. 88, 105, 108; MEAS Muth's Response, para. 9.

<sup>14</sup> SCC Decision in Case 004/2, paras. 52-53, 61.

<sup>15</sup> ICP's Response, paras. 27-29.

<sup>16</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, D271/5 & D272/3, paras. 68, 77.

<sup>17</sup> Order to File Submissions on Residual Jurisdiction to Terminate Case 003, 16 September 2021, D273, para. 2.

<sup>18</sup> ICP's Response, paras. 30-32.

<sup>19</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, 10 August 2020, E004/2/1/1/2, para. 67 (italics in original).

Muth] was ‘officially notified he would be prosecuted’” on “28 November 2018, some three years ago”<sup>20</sup> – a notable *volte face* from her argument before the PTC that “the relevant time period is just over (9) years....”<sup>21</sup> Yet the precise calculation of the time period is neither here nor there. Considering that “after thirteen years there was no agreement that AO An was within the jurisdiction of the ECCC,” the SCC found that “in the absence of a definitive and enforceable indictment against AO An, Case 004/2 against him should be terminated before the ECCC.”<sup>22</sup> The ICP presents no cogent reasons for departing from the SCC’s reasoning in Case 004/2.<sup>23</sup>

9. The ICP erroneously claims that the CIJs’ position that Case 003 is ripe for determination is “irrelevant, erroneous, and contradictory.”<sup>24</sup> The CIJs’ opinion is relevant because they have explained: (a) the events leading to the issuance of separate and opposing Closing Orders; (b) their understanding of the soundness and impact of the SCC’s decision in Case 004/2; (c) the remedies that were available to the PTC in resolving the deadlock *based on* the SCC’s decision in Case 004/2 (which the PTC ignored); and (d) how the PTC’s abdication of its responsibility for the proper resolution of the case has “grave consequences” for Mr. MEAS Muth’s fair trial right to a final, speedy determination of his case.<sup>25</sup>
10. The ICP erroneously claims that the Defence’s “additional arguments are irrelevant and/or erroneous” by referencing disagreements between the Co-Prosecutors, CIJs, and PTC, “argu[ing] that Reserve Judge Kasper-Ansermet was never sworn in as the International CIJ,” and making an “unfounded assertion that a funding crisis ‘threaten[ed] the integrity of the ECCC proceedings.’”<sup>26</sup> The references made by the Defence in the background to its Request to Terminate Case 003 are for context: after 13 years, there is no agreement on

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<sup>20</sup> ICP’s Response, para. 36.

<sup>21</sup> International Co-Prosecutor’s Response to MEAS Muth’s Request to Terminate, Seal and Archive Case File 003, 8 July 2021, D272/1, para. 6.

<sup>22</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, 10 August 2020, E004/2/1/1/2, para. 69.

<sup>23</sup> *See supra*, fn. 6.

<sup>24</sup> ICP’s Response, paras. 47-50.

<sup>25</sup> Decision on International Co-Prosecutor’s Request to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7, paras. 15-37, 40-43.

<sup>26</sup> ICP’s Response, paras. 52-54.

whether Mr. MEAS Muth falls within the personal jurisdiction of the ECCC. The SCC should summarily dismiss the ICP's arguments, which "are clearly irrelevant."<sup>27</sup>

**WHEREFORE**, for all the reasons stated herein, the Supreme Court Chamber should **IGNORE** the ICP's Response, **GRANT** Mr. MEAS Muth's requested relief to Terminate Case 003, and **ORDER** the CIJs to seal and archive Case File 003.

Respectfully submitted,

 <hr style="width: 100%; border: 0.5px solid black;"/> ANG Udom		 <hr style="width: 100%; border: 0.5px solid black;"/> Michael G. KARNAVAS
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Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **1st** day of **November, 2021**

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<sup>27</sup> Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and need not be considered on the merits. Such arguments include those "that are clearly irrelevant." *Case of KAING 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.