

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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**INTERNATIONAL CO-PROSECUTOR'S REQUEST TO THE CO-
INVESTIGATING JUDGES TO FORWARD CASE FILE 003 TO THE TRIAL
CHAMBER**

Filed by:

Brenda J. HOLLIS
International Co-Prosecutor

Distributed to:

Co-Investigating Judges
Judge YOU Bunleng
Judge Michael BOHLANDER

Co-Lawyers for MEAS Muth

ANG Udom
Michael KARNAVAS

Copied to:

CHEA Leang
National Co-Prosecutor

**All Civil Party Lawyers
in Case 003**

I. INTRODUCTION

1. Following the issuance of the Pre-Trial Chamber's ("PTC") Considerations in Case 003,¹ the International Co Prosecutor ("ICP") respectfully requests the Co-Investigating Judges ("CIJ(s)"), jointly or individually, to take all necessary administrative actions to direct the Court Management Section ("CMS") to forward the Considerations, together with the Indictment,² to the Trial Chamber ("TC") and to allow the TC to access the remaining Case File electronically.
2. The ICP makes this request to effectuate the unanimous agreement of the PTC Judges that the Case 003 Indictment is valid. Pursuant to Internal Rule³ ("Rule(s)" or "IR(s)") 77(14), it is the CIJs' duty to proceed in accordance with this PTC decision by forwarding Case File 003 to the TC immediately. The ICP submits that an expeditious transfer is required pursuant to article 12(2) of the ECCC Agreement,⁴ articles 33 and 35 new of the ECCC Law,⁵ and IR(s) 21(1) and (4),⁶ to safeguard the rights and interests of all Case 003 Parties, and to ensure expeditiousness, legal certainty and the proper administration of justice.

II. RELEVANT PROCEDURAL HISTORY

3. On 28 November 2018, the International Co-Investigating Judge ("ICIJ") issued a closing order ("Indictment") indicting Meas Muth for genocide, crimes against humanity, grave

¹ **D266/27 & D267/35** Considerations on Appeals Against Closing Orders, 7 April 2021 ("Considerations").

² **D267** Closing Order, 28 November 2018 ("Indictment").

³ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 ("Rules" or "IR(s)").

⁴ 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 ("ECCC Agreement"), art. 12(2) ("The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights ["ICCPR"], to which Cambodia is a party"); ICCPR, art. 14(3)(c) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] (c) To be tried *without undue delay*" (emphasis added)).

⁵ Law on the Establishment of Extraordinary Chambers In The Courts of Cambodia For The Prosecution of Crimes Committed During The Period of Democratic Kampuchea, with amendments as promulgated on 27 October 2004 ("ECCC Law"), arts 33 new ("The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims"), 35 new ("In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees [...] c. to be tried without delay").

⁶ IR 21 ("Fundamental Principles. 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to *always safeguard the interests of Suspects, Charged Persons, Accused and Victims* and so as to *ensure legal certainty* and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect: a) ECCC proceedings shall be fair and adversarial and *preserve a balance between the rights of the parties*. [...] c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; [...] 4. Proceedings before the ECCC shall be brought to a conclusion *within a reasonable time*" (Emphasis added)).

breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code, and committing him for trial.⁷ On the same day, the National Co-Investigating Judge (“NCIJ”) issued a closing order (“Dismissal Order”) dismissing all charges against Meas Muth on the basis that he does not fall within the personal jurisdiction of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).⁸

4. On 5 and 8 April 2019, three appeals against these closing orders were filed to the PTC by the National Co-Prosecutor, the ICP, and Meas Muth.⁹
5. On 7 April 2021, the PTC issued its Considerations,¹⁰ in which the validity of the Indictment committing Meas Muth to trial was confirmed by all five PTC judges.¹¹ In addition, the International Judges found that the Dismissal Order was null and void for both substantive¹² and procedural defect.¹³ The unanimous Disposition of the Chamber provided that “[i]n accordance with Internal Rule 77(14), this Decision shall be notified to the [CIJs], the Co-Prosecutors and the Parties by the Greffier of the [PTC].” The PTC unanimously indicated that the subsequent procedural steps upon the issuance of the Considerations are governed by Internal Rules 77(13) and (14).¹⁴

⁷ **D267** Indictment, EN 01596603-11, FR 01621343-52, KH 01600889-98.

⁸ **D266** Order Dismissing the Case Against Meas Muth, 28 November 2018 (“Dismissal Order”), paras 427-430.

⁹ **D266/2** International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against Meas Muth (D266), 8 April 2019; **D267/3** National Co-Prosecutor’s Appeal Against the International Co-Investigating Judge’s Closing Order in Case 003, 5 April 2019; **D267/4** Meas Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019.

¹⁰ **D266/27 & D267/35** Considerations.

¹¹ **D266/27 & D267/35** Considerations, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 115 (“In light of aforesaid Internal Rule 77(13), the two Closing Orders are of the same value and *stand valid*” (emphasis added)), Opinion of Judges Olivier Beauvallet and Kang Jin Baik (“International Judges’ Opinion”), paras 284 (“despite the simultaneous issuance of the Closing Orders, the Indictment stands as it is substantively valid and in conformity with the ECCC legal framework”), 339-340 (upholding the ICIJ’s determination that Meas Muth is among those most responsible and thus falls within the ECCC’s personal jurisdiction), 342-343 (finding there was a *de facto* unanimous finding in this case: albeit for distinct reasons, the national and international judges of the Chamber concurrently found the Indictment valid and upheld the Indictment unanimously).

¹² **D266/27 & D267/35** Considerations, International Judges’ Opinion, paras 119, 226-250, 284 (Upholding the ICP’s Appeal Grounds B and C, and finding that Case 003 contains an incomplete Dismissal Order that ignores seven years of evidence placed on the Case File since 29 April 2011 and a range of factual allegations of which the NCIJ was duly seized by the ICP. The International Judges found that the unfinished Dismissal Order is invalid within the meaning of IR 67, and null and void on this account alone.)

¹³ **D266/27 & D267/35** Considerations, International Judges’ Opinion, paras 255-262, 284 (finding that the Dismissal Order is null and void since it was issued in contravention of the principle of continuation of the judicial investigation and prosecution contained in the ECCC legal framework).

¹⁴ **D266/27 & D267/35** Considerations, Disposition, EN 01666984, FR 01667141, KH 01667329.

III. APPLICABLE LAW

6. Rule 1(2) states, in relevant part:

In particular, unless otherwise specified, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually, whether directly or through delegation [...].

7. Rule 69 states:

1. Where an appeal is filed against a Closing Order, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Pre-Trial Chamber as provided in Rule 77.

2. Where no appeal is filed against a Closing Order, the Co-Investigating Judges shall seal the case file, and:

a) If an Indictment is issued, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Trial Chamber to allow a date for trial to be set; or

b) If a Dismissal Order is issued, the case file shall be archived after the expiry of the time limit for appeal.

3. The filing of an appeal against a Closing Order does not prevent access by the Trial Chamber and Civil Party Lead Co-Lawyers to the case file for the purposes of advance preparation for trial.

8. Rule 77(13) provides:

A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the default decision of the Chamber shall be as follows: [...]

(b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

9. Rule 77(14) states:

All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. Such decisions shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the other parties by the Greffier of the Chamber. The Co-Investigating Judges *shall immediately proceed in accordance with the decision of the Chamber.*¹⁵

¹⁵ Emphasis added.

10. Rule 79(1) states:

The Trial Chamber *shall be seised* by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.¹⁶

11. The remaining applicable law is set out in the relevant paragraphs.

IV. SUBMISSIONS

The CIJs must forward Case File 003 to the Trial Chamber immediately

12. In their Considerations, all five PTC Judges concluded that the Indictment is valid,¹⁷ constituting a supermajority decision within the meaning of IR 77(13).¹⁸ Pursuant to Rules 77(13) and 79(1),¹⁹ the TC thus automatically became seised of Case 003 upon issuance of those Considerations.²⁰

¹⁶ Emphasis added.

¹⁷ *See supra*, fn. 11.

¹⁸ The ICP notes that even if the CIJs reach a different interpretation of the Considerations, since the Indictment was not overturned by a supermajority of the PTC, under IRs 77(13)(b) and 79(1), the Indictment has automatically seised the TC, and the CIJs' obligations to forward the Considerations, Indictment and remaining Case File are triggered in the same way.

¹⁹ IR 1(2) stipulates that "a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually". IR 79(1) therefore applies to an indictment issued by a single CIJ, as in the case at hand. *See also* para. 16, *infra*.

²⁰ The ICP is cognisant of the Supreme Court Chamber's ("SCC") holding that the TC has no jurisdiction absent the Case File being transferred to it (Case 004/2-E004/2/1/1/2 Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, paras 49-50, 52, 57, 71) but concurs with the International PTC Judges in their finding that this conclusion is based on a serious legal flaw of equating and conflating the administrative act of transferring the Case File with a jurisdictional bar precluding the TC from action (**D266/27 & D267/35** Considerations, International Judges' Opinion, fn. 594). The SCC's conclusion was not based on any authority and contradicts the Internal Rules, including IR 79(1), which states that "[t]he Trial Chamber *shall be seised* by an Indictment". As the International Judges pointed out, an absolute administrative precondition of such magnitude cannot simply be inferred contrary to the principle of *la compétence de la compétence* (*see, e.g. Tadić*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 18-19) and it was within the TC's power to request the Case 004/2 Case File if it considered it necessary to determine its own *saisine*. Issues as important as the progression of a case to trial should not be determined by judicial inaction. Moreover, the SCC's position contradicts past ECCC practice in Cases 001 and 002. *See* Case 002-E9 Order to File Material in Preparation for Trial, 17 January 2011, Introduction at EN 00635755, FR 00635761, KH 00635748 (noting that the TC was seised pursuant to the Decisions rendered by the PTC on 13 January 2011) and para. 2 (noting that the PTC formally forwarded the Case File to the TC greffiers on 14 January 2011). This Order makes clear that *saisine* and the forwarding of the Case File are separate acts, and that it is the former, not the latter, that bestows jurisdiction on the TC. This position was confirmed in the two Case 002 Trial Judgments that found that the TC was seised with the Case File "following resolution of all appeals against the Closing Order on 13 January 2011" (Case 002-E313 Case 002/01 Judgement, 7 August 2014, para. 23; Case 002-E465 Case 002/02 Judgement, 16 November 2018, para. 33). *See also* IR 69(3); Case 001-E5 Notification of a Trial Management Meeting and Order to the Parties to File Additional Materials, 11 December 2008, Introduction at EN 00250117, FR 00250626, KH 00250110 (noting that the TC was seised pursuant to the Decision on Appeal against the Closing Order rendered by the PTC on 5 December 2008); Case 001-D99/3/5 Decision on Trial Chamber Request to Access the Case File, 11 September 2008, para. 7 (Upon requesting early access to the Case File, the TC acknowledged that "it will not be formally seised of the case until the decision of the Pre-Trial Chamber on the appeal against the Closing Order").

13. The administrative consequence of the TC being seised is that the Considerations, Indictment and remaining Case File must be forwarded to the TC for the commencement of trial. Under the ECCC's procedural framework, the primary responsibility for this transfer falls to the CIJs. As recorded in the unanimous Disposition,²¹ the CIJs have been notified of the Considerations²² and must, pursuant to IR 77(14), "immediately proceed in accordance with the decision of the Chamber". The CIJs can²³ and must therefore apply IR 69(2)(a) *mutatis mutandis* to direct CMS to forward the (publicly available) Considerations and the upheld Indictment to the Greffier of the TC, and to allow the TC to access the remaining Case File electronically.
14. Indeed, the PTC has consistently confirmed that it performs the functions of the Cambodian Investigation Chamber²⁴ and the procedure outlined here comports entirely with the procedure articulated in the Cambodian Code of Criminal Procedure ("CCCP")²⁵ in that regard. Article 282 of the CCCP²⁶ provides that, following the conclusion of the investigation by the Investigation Chamber, the provisions of CCCP articles 247 to 250²⁷ - concerning the conclusion of a judicial investigation by an investigating judge - then apply. Specifically, article 250 dictates that when an investigating judge issues an indictment, he or she shall send the case file immediately to the court president to set the schedule for trial.²⁸
15. The ICP respectfully submits that Case File 003 must be forwarded to the TC immediately in keeping with the IRs and CCCP provisions, and to ensure compliance with the "overriding

²¹ **D266/27 & D267/35** Considerations, Disposition, EN 01666984, FR 01667141, KH 01667329.

²² See Email notification from the Case File Officer, 7 April 2021, 4:14 p.m., entitled "[Filed by PTC] New Documents(s): Case File 003 – Considerations on Appeals Against Closing Orders", listing as recipients CIJs Judge You Bunleng and Judge Michael Bohlander as well as OCIJ Greffier Chanlyda Chhay.

²³ The PTC has confirmed that it has exclusive authority over the case file immediately following issuance of the Closing Orders, *except for* administrative functions such as this that are explicitly set forth in the ECCC legal framework. See **D266/27 & D267/35** Considerations, International Judges' Opinion, para. 132; Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018 ("Considerations on Closing Order Appeal"), para. 33; Case 004/2-**D360/3** Decision on Ao An's Urgent Request for Redaction and Interim Measures, 5 September 2018, paras 6, 12-13 and Disposition, EN 01584812, KH 01585158-9.

²⁴ See *e.g.* Case 001-**D99/3/42** Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, para. 41; Case 004/1-**D308/3/1/20** Considerations on Closing Order Appeal, para. 22; Case 004/2-**D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 ("Considerations"), para. 44; *see also* **D266/27 & D267/35** Considerations, International Judges' Opinion, paras 129-130, 132.

²⁵ Cambodian Code of Criminal Procedure, 2007 ("CCCP").

²⁶ CCCP, art. 282, third paragraph.

²⁷ CCCP, arts 247-250 (Article 247 (Closing Order); Article 248 (Return of Seized Items); Article 249 (Provisions of Closing Orders in relation to Provisional Detention and Judicial Supervision); Article 250 (Forwarding Case File for Trial)).

²⁸ CCCP, art. 250 ("After the judge has issued an indictment, he shall send the case file immediately to the trial court president who shall fix a date for trial").

principle that ECCC proceedings must comply with the legality, fairness and effectiveness requirements under the ECCC legal framework” to achieve “effective criminal justice”.²⁹

One Co-Investigating Judge may act alone to forward Case File 003 to the Trial Chamber

16. The ICP recalls the principle of continuation of the judicial investigation or prosecution encapsulated in the ECCC legal framework³⁰ to avoid procedural stalemates³¹ and ensure effective justice.³² Pursuant to that principle, one CIJ can act alone to forward the Considerations, Indictment and remaining Case File to the TC.³³ “[T]he Internal Rules not only envisage, but allow, a Co-Investigating Judge to make decisions alone, as a validly constituted Court,”³⁴ especially where his colleague has retreated from continuing the investigation.³⁵ The PTC has held that “[t]he Agreement, the ECCC Law and the Internal Rules provide that one [CIJ] can validly act alone if the requirements of the disagreement procedure have been complied with”,³⁶ and where the action remains coherent with the “fundamental and determinative”³⁷ default position intrinsic to the ECCC legal system that “the investigation shall proceed”.³⁸

²⁹ Case 004/2-**D359/24 & D360/33** Considerations, para. 109 (unanimous); ECCC Agreement, art. 12(2); ECCC Law, arts 33 new, 35 new; IR 21(1), (4). *See supra*, para. 2.

³⁰ *See* ECCC Agreement, art. 5(4) and ECCC Law, art. 23new, which both provide that in the event of a disagreement between the investigating judges, “the investigation shall proceed” unless the CIJs or one of them refers their disagreement to the PTC.

³¹ **D266/27 & D267/35** Considerations, paras 90, 97 (unanimous); Case 004/2-**D359/24 & D360/33** Considerations, paras 101, 111 (unanimous).

³² **D266/27 & D267/35** Considerations, para. 97 (unanimous); Case 004/2-**D359/24 & D360/33** Considerations, para. 111 (unanimous). *See also* **D266/27 & D267/35** Considerations, International Judges’ Opinion, para. 258 (“the key object of the disagreement settlement mechanism is to prevent a deadlock from derailing the proceedings from moving to trial”).

³³ IRs 1(2), 72 and following citations.

³⁴ **D128/1/9** Considerations on Meas Muth’s Appeal Against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *In Absentia*, 30 March 2016 (“Charging Appeal Considerations”), para. 34 (unanimous), *citing* ECCC Agreement, art. 5(4); ECCC Law, art. 23new; IR 72.

³⁵ Case 004/2-**D359/24 & D360/33** Considerations, para. 105 (unanimous), *citing* Case 004-**D236/1/1/8** Decision on Im Chaem’s Appeal Against the International Co-Investigating Judge’s Decision on her Motion to Reconsider and Vacate her Summons Dated 29 July 2014, 9 December 2015 (“Decision on Summons Appeal”), para. 30; Case 004-**A122/6.1/3** Decision on Im Chaem’s Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 August 2014, para. 14.

³⁶ Case 004/2-**D359/24 & D360/33** Considerations, para. 105 (unanimous) *citing* Case 004-**D208/1/1/2** Decision on Ta An’s Appeal Against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, 22 January 2015, para. 11; Case 004-**D236/1/1/8** Decision on Summons Appeal, para. 24; **D128/1/9** Charging Appeal Considerations, para. 34 (unanimous).

³⁷ **D266/27 & D267/35** Considerations, para. 98 (unanimous); Case 004/2-**D359/24 & D360/33** Considerations, para. 112.

³⁸ **D266/27 & D267/35** Considerations, paras 94, 97, 100 (unanimous); Case 004/2-**D359/24 & D360/33** Considerations, paras 106, 114, 116-117 (unanimous).



*Improbability of future prosecution of ECCC Charged Persons in the national courts of
Cambodia*

17. Finally, the ICP notes that the PTC has previously confirmed its view that the ordinary national courts have jurisdiction to try Khmer Rouge-era cases of which the ECCC is not seised.³⁹ In the Case 003 Considerations, the International Judges reiterated this position, recommending, *inter alia*, the initiation of prosecution by the ECCC National and/or International Co-Prosecutor of anyone found not to be within the ECCC's exclusive jurisdiction.⁴⁰ Whilst the ICP wholeheartedly agrees that all the cases brought before the ECCC are deserving of prosecution, she takes this opportunity to confirm that for various reasons she does not intend to pursue the prosecutions of ECCC charged persons in the ordinary Cambodian courts, in those instances where their cases have not or will not progress to trial at the ECCC. Nor does she have any reason to believe that her national colleague or other Cambodian authorities intend to do so. As such, she urges the CIJs to discount this unrealistic, highly speculative possibility in their deliberations and to fulfil their duties as clearly articulated in the ECCC legal framework and recalled above.

V. RELIEF REQUESTED

18. For the foregoing reasons, the International Co-Prosecutor respectfully requests the Co-Investigating Judges, jointly or individually, to take all necessary administrative actions to immediately forward the Considerations, Case 003 Indictment and remaining Case File to the Trial Chamber.

Respectfully submitted,

Date	Name	Place	Signature
19 April 2021	Brenda J. HOLLIS International Co-Prosecutor		

³⁹ Case 004/1-D308/3/1/20 Considerations on Closing Order Appeal, paras 79-80 and Disposition, EN 01575165, FR 01575307, KH 01575475-6; Case 004/2-D359/24 & D360/33 Considerations, paras 57-59 and Disposition, EN 01634239-40, FR 01634523-4, KH 01634854-5.

⁴⁰ D266/27 & D267/35 Considerations, International Judges' Opinion, paras 170-176, 344.