

**BEFORE THE PRE-TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/07-09-2009-ECCC/OCIJ (PTC37) **Party Filing:** The Defence for MEAS Muth**Filed to:** The Pre-Trial Chamber**Original language:** ENGLISH**Date of document:** 12 July 2021**CLASSIFICATION****Classification of the document suggested by the filing party:****PUBLIC****Classification by OCIJ or Chamber:****សាធារណៈ/Public****Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**


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**MEAS MUTH'S RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S  
REQUEST FOR CONCLUSION OF THE PRE-TRIAL STAGE OF THE CASE 003  
PROCEEDINGS**

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Judge PRAK Kimsan

Judge NEY Thol

Judge HUOT Vuthy

Judge Olivier BEAUVALLET

Judge BAIK Kang Jin

Reserve Judge Steven J. BWANA

Reserve Judge PEN Pichsaly

**Co-Prosecutors:**

CHEA Leang

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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”) request for conclusion of the pre-trial stage of the Case 003 proceedings.<sup>1</sup> The ICP seeks inaccessible relief. The Pre-Trial Chamber (“PTC”) did not unanimously uphold the Indictment; at best, the National PTC Judges’ intentions are ambiguous. But even if the National and International PTC Judges unanimously upheld the Indictment issued by one Co-Investigating Judge (“CIJ”), it does not follow that the Dismissal Order by the other CIJ is outweighed. Both Closing Orders are equipoised, affecting inertia. Failure to agree by supermajority to forward the Indictment to the Trial Chamber (“TC”) – which seems to be the current situation – compels the PTC to terminate, seal, and archive Case 003 to avoid an abuse of process that inescapably will trigger the Supreme Court Chamber’s (“SCC”) or the CIJs’ intervention. The Defence requests to file this Response in English with the Khmer translation to follow, since the Interpretation and Translation Unit cannot complete the translation within the PTC’s deadline.<sup>2</sup>

## I. BACKGROUND

1. Seized of two conflicting Closing Orders, the PTC failed to reach a supermajority decision on whether Case 003 should proceed to trial,<sup>3</sup> despite taking 16 months to deliberate,<sup>4</sup> and having eight months hindsight of the SCC’s intervention in terminating the PTC’s impasse in Case 004/2.<sup>5</sup> While the PTC agreed in part, the National and International PTC Judges issued separate and conflicting opinions, calling for Case 003 to be both archived and sent to trial.<sup>6</sup> The National PTC Judges – rather than upholding the Dismissal Order and finding the Indictment invalid under Rule 77(13), as they did in Case 004/2<sup>7</sup> – found that “the two

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<sup>1</sup> International Co-Prosecutor’s Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 21 June 2021, D271/1 (“ICP’s Request”).

<sup>2</sup> Email from Interpretation and Translation Unit, “Re: Translation Request,” 9 July 2021. Pre-Trial Chamber’s Instructions to the Parties in Case File N° 003/07-09-2009-ECCC/OCIJ (PTC37), 29 June 2021.

<sup>3</sup> Considerations on Appeals Against Closing Orders, 7 April 2021, D266/27 & D267/35 (“Case 003 PTC Considerations”), para. 110, p. 40.

<sup>4</sup> Oral arguments on the Appeals were held *in camera* on 27-29 November 2019. Scheduling Order for the Pre-Trial Chamber’s Hearing on Appeals Against Closing Orders, 24 October 2019, D266/12.

<sup>5</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 Determination of Case 004/2, 10 August 2020, E004/2/1/1/2 (“SCC Case 004/2 Decision”).

<sup>6</sup> Case 003 PTC Considerations, p. 40, paras. 111-18, p. 42, paras. 119-358, p. 145.

<sup>7</sup> *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ, Considerations on Appeals Against Closing Orders, 19 December 2019, D359/24 & D360/33 (“Case 004/2 PTC Considerations”), para. 302.

Closing Orders are of the same value and stand valid” under Rule 77(13).<sup>8</sup> Contrarily, the International PTC Judges – adopting their Case 004/2 approach – upheld the Indictment and found the Dismissal Order null and void.<sup>9</sup>

2. Claiming that the PTC unanimously upheld the Indictment, the ICP requested the CIJs to take all necessary administrative actions to forward Case File 003 to the TC.<sup>10</sup> The CIJs rejected her request as ill-founded, finding that its premise that the PTC unanimously upheld the Indictment “tak[es] the NJs’ words out of context, both within the 003 Considerations themselves and compared with the Case 004/2 Considerations which were after all handed down almost *immediately* after hearings in case 003.”<sup>11</sup> Finding they had no jurisdiction since the case remains with the PTC, the CIJs provided the PTC three solutions to break the deadlock (unheeded solutions provided to the PTC by the Defence in prior submissions):<sup>12</sup> (a) remanding the case with instructions; (b) “doing so itself by unanimously applying its own alleged default rule and sending the case for trial;” or (c) “terminating the case, as the SCC had to do ultimately in case 004/2.”<sup>13</sup>
3. The Defence requests the PTC to terminate, seal, and archive Case 003, considering Mr. MEAS Muth’s right to have proceedings against him concluded within a reasonable time, the unreasonable delay in the 13-year-long pre-trial proceedings, and the fact that trial and appeal proceedings will last at least four additional years – all of which in conjunction with the indeterminately ongoing impasse among the PTC’s two facets amounts to a sustained and irreversible abuse of process.<sup>14</sup> Conversely, the ICP requests the PTC to conclude the pre-trial proceedings by sending Case 003 to trial consistent with the PTC’s “unanimous” finding that the Indictment is valid,<sup>15</sup> alternatively claiming that even if the PTC ignores its

<sup>8</sup> Case 003 PTC Considerations, para. 115.

<sup>9</sup> Case 003 PTC Considerations, paras. 260, 262.

<sup>10</sup> International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 19 April 2021, D270.

<sup>11</sup> Decision on the International Co-Prosecutor’s Request to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7 (“CIJs’ Decision on Forwarding Case File 003”), para. 30 (emphasis in original).

<sup>12</sup> Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 12.00.18-12.03.17; MEAS Muth’s Request for Clarification of the Pre-Trial Chamber’s Considerations on Appeals Against Closing Orders in Case 004/2, 26 March 2020, D266/24 & D267/24, paras. 1, 15, 23, 31, 33; MEAS Muth’s Supplement to his Appeal Against the International Co-Investigating Judge’s Indictment, 6 May 2020, D267/27 (“MEAS Muth’s Supplement”), paras. 25-49.

<sup>13</sup> CIJs’ Decision on Forwarding Case File 003, paras. 25, 40.

<sup>14</sup> MEAS Muth’s Request to Terminate, Seal, and Archive Case 003, 22 June 2021, D272 (“MEAS Muth’s Request to Terminate, Seal, and Archive Case 003”), paras. 47-73.

<sup>15</sup> ICP’s Request, paras. 11-21.

own finding, the ECCC framework mandates that the case proceed to trial.<sup>16</sup> Amid the diametrically opposed reliefs sought by the Defence and ICP, the PTC is left with no room to contrive a middle path or legal compromise in lieu of a conclusive decision.

## II. ADMISSIBILITY

4. Case 003 is in judicial limbo. The ICP rightly observes that the PTC's failure to unambiguously decide the fate of Case 003 – to send it to trial or to archive it – shifts the responsibility to the ECCC's other Chambers "to bring such finality to the pre-trial stage of the proceedings to prevent this judicially imposed institutional impotence."<sup>17</sup> If past is prologue, termination is a foregone conclusion if the PTC fails to act; the TC's rejection of the ICP's extension request for her witness list<sup>18</sup> will "ultimately open a path to another SCC ruling as in case 004/2."<sup>19</sup> Moreover, while the CIJs "do not have jurisdiction to decide the fate of case 003 as such because the case is still pending with the PTC," appreciatively, they have indicated their willingness to decisively cut the Gordian knot:

[W]e would, as an *ultima ratio* and after all other jurisdictions have run their course, be open to receiving or requesting arguments about whether we have an exceptional residual jurisdiction of last resort to terminate the case ourselves in order to give effect to the higher-order fair trial principles of providing for an orderly disposal of the case and of safeguarding Meas Muth's right to a speedy final determination of the case against him.<sup>20</sup>

5. Within this context, the ICP appropriately raises two overarching issues demanding the PTC's resolution. Exclusively seized with Case 003, the PTC must discontinue its paralytic obfuscation and intransigence, hence why the Defence does not object to the admission of the ICP's Request even though it is formally inadmissible,<sup>21</sup> and even though the all-too-familiar *déjà-vu* circumstances warrant summary dismissal.

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<sup>16</sup> ICP's Request, paras. 22-33.

<sup>17</sup> ICP's Request, para. 14.

<sup>18</sup> Email from IM Suy-Hong entitled "Re: Request for extension of time to file Rule 80 list of witnesses and experts," 27 April 2021.

<sup>19</sup> CIJs' Decision on Forwarding Case File 003, para. 40.

<sup>20</sup> CIJs' Decision on Forwarding Case File 003, para. 42.

<sup>21</sup> The ICP has a right under Rule 74(2) to appeal all decisions and orders from the CIJs and was expressly encouraged by the CIJs to appeal their decision on her request to forward Case File 003 to the TC. She chose not to, instead notifying the PTC, the Parties, and the Public of her intent to file this Request. *See* CIJs Decision on Forwarding Case File 003, para. 43. International Co-Prosecutor's Notice of Intent to File a Request that the Pre-Trial Chamber Conclude the Pre-Trial Stage of the Proceedings in Case 003, 25 May 2021, D271.

### III. OVERARCHING ISSUES AND SHORT ANSWERS

**Issue** *Whether the National PTC Judges intended to uphold the Indictment or join with their international colleagues in other aspects of the “unanimous” Considerations when they concluded in their separate opinion that Case 003 should be archived.*

**Answer** No. It is debatable whether the PTC unanimously upheld the Indictment. When considering their separate opinion in conjunction with the “unanimous” Considerations, it is unclear whether the National PTC Judges fully understood and appreciated the full content and context of the “unanimous” findings. Clarification is required, which only the National PTC Judges can and must provide.

**Issue** *Whether the ECCC framework mandates that the Indictment prevails over the Dismissal Order and seize the TC since it was not overturned by PTC supermajority.*

**Answer** No. Even if the PTC indeed unanimously upheld the Indictment, under the ECCC framework, an indictment by one CIJ cannot trump a dismissal order by another CIJ. Both Closing Orders will hang indefinitely unless and until the PTC or one of the ECCC’s other Chambers exercises its authority and responsibility to terminate, seal, and archive Case 003.

### IV. RESPONSE

#### A. It is debatable that the PTC unanimously upheld the Indictment

6. The ICP erroneously claims that the PTC must send Case 003 to trial following its “unanimous” finding that the Indictment is valid.<sup>22</sup> When considering their separate opinion in conjunction with the “unanimous” Considerations, it is unclear whether the National PTC Judges totally understood and appreciated the full content and context of the “unanimous” findings, especially where the CIJs’ professionalism and integrity are

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<sup>22</sup> ICP’s Request, paras. 12-21.  
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unreasonably and gratuitously impugned. Tellingly, their separate opinion is irreconcilable with the “unanimous” Considerations on core and determinative issues such as whether: (a) the default position applies; (b) Rule 77(13) applies; (c) the principle of *in dubio pro reo* applies; and ultimately, (d) the ECCC has personal jurisdiction over Mr. MEAS Muth. It is as illogical as it is absurd to ignore these inconsistencies and pretend otherwise, rather than having the National PTC Judges clarify, as only they *can* and *must*.

7. ***The National PTC Judges seemingly agree that the default position does not apply.*** Unanimously, the PTC – unseemly for a judicial organ of an international(ized) tribunal flying the banner of the United Nations – accused the CIJs of “*mauvaises pratiques*” in deliberately and calculatedly perverting the course of justice by “wilfully decid[ing] to evade” the dispute resolution mechanism<sup>23</sup> to “defeat the default position and frustrate the authority of the [PTC].”<sup>24</sup> Since the CIJs could not agree on a course of action coherent with the default position (under which the case always proceeds), the PTC found that they were required to seize the PTC under Rule 72’s dispute resolution mechanism.<sup>25</sup> “[C]ondemn[ing] once again the legal predicament that the [CIJs’] unlawful actions precipitated upon yet another ECCC proceeding,”<sup>26</sup> the PTC found that by wantonly refraining from exercising their judicial duty to pronounce on the matter,<sup>27</sup> the CIJs “jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations,”<sup>28</sup> and “undermine[d] the very foundations of the hybrid system and proper functioning of the ECCC.”<sup>29</sup>
8. Contrarily – and without the vitriolic language used in the “unanimous” Considerations in denigrating the CIJs’ professionalism and integrity (and more consistent with the respect and dignity expected under Cambodia’s Code of Judicial Conduct<sup>30</sup> and Cambodian culture) – the National PTC Judges in their separate opinion considered that: (a) both CIJs agreed to keep their disagreement internally as opposed to seizing the PTC consistent with

<sup>23</sup> Case 003 PTC Considerations, para. 90.

<sup>24</sup> Case 003 PTC Considerations, para. 108.

<sup>25</sup> Case 003 PTC Considerations, paras. 94, 100. *See also* CIJs’ Decision on Forwarding Case File 003, para. 22.

<sup>26</sup> Case 003 PTC Considerations, para. 109.

<sup>27</sup> Case 003 PTC Considerations, para. 105.

<sup>28</sup> Case 003 PTC Considerations, para. 108.

<sup>29</sup> Case 003 PTC Considerations, para. 106.

<sup>30</sup> CIJs’ Decision on Forwarding Case File 003, para. 11, citing Cambodian Code of Judicial Conduct, Arts. 1, 15, 24. *See also* ECCC Code of Judicial Ethics, Arts. 3(1), 6(1), 6(3), 7(2).

Rule 72; (b) the PTC “cannot apply its competence as provided for in Internal Rule 72;” and (c) under Rule 77(13), both Closing Orders “are of the same value and stand valid.”<sup>31</sup>

9. Relevant to the question of whether the “unanimous” Considerations were indeed “drafted unanimously,”<sup>32</sup> the CIJs meritoriously took exception to “the PTC’s vitriolic language and thinly veiled insinuation that [they] issued two separate COs with the intention of derailing the process in Cases 004/2 and 003.”<sup>33</sup> “[R]emind[ing] [their] colleagues in the PTC of their duties under the respective codes of judicial ethics, and of the general law of libel and slander,” the CIJs felt obliged to inform their colleagues in the PTC that the Cambodian Code of Judicial Conduct “prohibits the expression in public of opinions which affect the honour and the respect for the integrity of other judges,”<sup>34</sup> lamenting:

What our colleagues say, without a shred of evidence other than their own skewed interpretation of the events, is in effect nothing else but that we perverted the course of justice, the worst professional accusation that can be made against a judge, and which also means alleging that we committed a criminal offence.<sup>35</sup>

10. *Query: (1) Whether the National PTC Judges intended to professionally accuse CIJs YOU Bunleng and Michael Bohlander of perverting the course of justice in purposely evading the dispute resolution mechanism; (2) whether the CIJs’ Closing Orders consequently may be treated as an unresolved disagreement so that the default position progresses the case to trial on the Indictment; and if they did not agree to these findings (3) whether the National PTC Judges participated in the deliberations and drafting of the “unanimous” Considerations with their international counterparts – as opposed to merely being presented with a Khmer version for their signature upon their review and revision.*
11. ***The National PTC Judges seemingly agree that Rule 77(13) does not apply.*** Unanimously, the PTC made no findings or conclusions on whether either or both Closing Orders stand under Rule 77(13) if no PTC supermajority is achieved. The PTC neither mentioned Rule 77(13) in the applicable law section nor cited it in the joint analysis on the

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<sup>31</sup> Case 003 PTC Considerations, paras. 113, 115.

<sup>32</sup> CIJs’ Decision on Forwarding Case File 003, para. 23.

<sup>33</sup> CIJs’ Decision on Forwarding Case File 003, para. 9.

<sup>34</sup> CIJs’ Decision on Forwarding Case File 003, paras. 10-11.

<sup>35</sup> CIJs’ Decision on Forwarding Case File 003, para. 12.

issuance of conflicting Closing Orders.<sup>36</sup> It merely stated in the disposition that under Rule 77(13), the Considerations are not subject to appeal.<sup>37</sup>

12. The National PTC Judges found that “[i]n light of ... Rule 77(13), the two Closing Orders are of the same value and stand valid,”<sup>38</sup> providing no reasons for departing from their Case 004/2 approach of upholding the Dismissal Order under Rule 77(13) as “the most appropriate solution” given the *lacuna* in Rule 77(13) – which they considered does not address contradictory Closing Orders.<sup>39</sup> The International PTC Judges upheld the Indictment over the Dismissal Order (as in Case 004/2),<sup>40</sup> “clarify[ing]” that an indictment not reversed by PTC supermajority stands under Rule 77(13)(b) and seizes the TC.<sup>41</sup>
13. Taking note of their *volte-face* from their Case 004/2 approach in seemingly agreeing with Mr. MEAS Muth’s arguments that both Closing Orders could stand if Rule 77(13) applies,<sup>42</sup> the CIJs did not try to “decipher the reasons which have brought the NJs to using a different approach and language in case 003, and what their exact intentions were.”<sup>43</sup> Yet the CIJs were “entirely satisfied that by saying both COs are valid they did certainly *not* mean to consent to the indictment being forwarded to the TC, because they themselves ordered the case file to be archived.”<sup>44</sup> They found that had the National PTC Judges joined with their international colleagues in considering that the default position applies, “the question of whether IR 77(13)(b) applies directly or not to the present scenario would have been solved” since the case would proceed on the Indictment.<sup>45</sup>
14. *Query: (1) Whether the National PTC Judges consider that Rule 77(13) applies to the contradictory Closing Orders; and if so, (2) how do they reconcile upholding a Dismissal Order over an Indictment under Rule 77(13) in one case while holding in another case that both Closing Orders are of equal value and stand valid under Rule 77(13)?*

<sup>36</sup> See Case 003 PTC Considerations, paras. 79-83; 92-110.

<sup>37</sup> Case 003 PTC Considerations, p. 40.

<sup>38</sup> Case 003 PTC Considerations, paras. 115-18.

<sup>39</sup> Case 004/2 PTC Considerations, paras. 302(vi)-(viii).

<sup>40</sup> Case 004/2 PTC Considerations, paras. 683, 685-87, 694.

<sup>41</sup> Case 003 PTC Considerations, para. 261.

<sup>42</sup> See MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4 (“MEAS Muth’s Appeal”), paras. 41-46. See also *infra*, para. 18.

<sup>43</sup> CIJs’ Decision on Forwarding Case File 003, para. 34.

<sup>44</sup> CIJs’ Decision on Forwarding Case File 003, para. 34.

<sup>45</sup> CIJs’ Decision on Forwarding Case File 003, para. 22.



15. ***The National PTC Judges seemingly agree that the principle of in dubio pro reo applies.***

Unanimously, the PTC found Mr. MEAS Muth's appeal inadmissible, considering that the principle of *in dubio pro reo* does not apply to the decision on whether to indict because it stems from the presumption of innocence, "according to which MEAS Muth remains innocent even after being indicted and will remain as such until proven guilty."<sup>46</sup> Finding that it had already clarified the law governing the Closing Orders in Case 004/2,<sup>47</sup> the PTC found that a broad interpretation of Mr. MEAS Muth's right to appeal was not warranted "to avoid any irreparable harm to [his] fair trial rights."<sup>48</sup> Yet, contradictorily, the National PTC Judges seemingly applied the principle of *in dubio pro reo*, albeit inferentially, in finding the Dismissal Order controlling to the otherwise equivoiced Closing Orders.

16. Concluding that Case 003 should be archived,<sup>49</sup> the National PTC Judges effectively adopted Mr. MEAS Muth's appeal arguments, essentially agreeing with the substance and outcome that: (a) Rule 72 cannot apply because the CIJs issued opposing Closing Orders; (b) Rule 77(13) cannot apply so that the Indictment automatically prevails over the Dismissal Order; and (c) the principle of *in dubio pro reo*, a corollary of the presumption of innocence, mandates the subordination of the Indictment to the Dismissal Order.

17. The National PTC Judges effectively adopted Mr. MEAS Muth's arguments on Rule 72 in considering that: (a) "[b]oth [CIJs] agreed to keep their disagreement in their respective offices and also agreed not to refer it before the [PTC];" (b) "they agreed not to implement what is provided for in Internal Rule 72,"<sup>50</sup> and (c) "[t]herefore, the [PTC] cannot apply its competence as provided for in Internal Rule 72."<sup>51</sup> Mr. MEAS Muth had argued Rule 72 does not apply since "[t]he CIJs did not seize the PTC with a request under Rule 72 to settle their opposing views prior to issuing their Closing Orders."<sup>52</sup>

18. The National PTC Judges effectively adopted Mr. MEAS Muth's arguments on Rule 77(13) in considering that "[i]n light of ... Rule 77(13), the two Closing Orders are of the same

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<sup>46</sup> Case 003 PTC Considerations, para. 77.

<sup>47</sup> Case 003 PTC Considerations, para. 74.

<sup>48</sup> Case 003 PTC Considerations, para. 77.

<sup>49</sup> Case 003 PTC Considerations, para. 118.

<sup>50</sup> Compare Case 003 PTC Considerations, para. 113 with MEAS Muth's Appeal, para. 36.

<sup>51</sup> Compare Case 003 PTC Considerations, para. 113 with MEAS Muth's Appeal, para. 37.

<sup>52</sup> MEAS Muth's Appeal, paras. 36-37.

value and stand valid.”<sup>53</sup> Mr. MEAS Muth had argued that applying Rule 77(13) would lead to an absurd result and cause irreparable harm to Mr. MEAS Muth’s fair trial rights (including the presumption of innocence) since both Closing Orders would stand (or only the Indictment would stand contrary to the principle of *in dubio pro reo*).<sup>54</sup>

19. The National PTC Judges effectively adopted Mr. MEAS Muth’s arguments on *in dubio pro reo* in considering that “[t]he two [CIJs] enjoy equal status, and in accordance with the exception of the presumption of innocence, the law in force does not allow the [PTC] to rule that any act of any [CIJ] has preponderance.”<sup>55</sup> Mr. MEAS Muth had argued that (a): “both CIJs enjoy equal status;”<sup>56</sup> (b) “one CIJ’s investigation, assessment of the facts, application of the law, or issuance of a Closing Order is neither superior nor subordinate to the other CIJ’s;”<sup>57</sup> and (c) absent a PTC supermajority finding that the NCIJ committed errors or abuses of discretion fundamentally determinative of his exercise of discretion, under the principle of *in dubio pro reo*, “the Closing Order calling for the dismissal of the case trumps the Closing Order calling for indictment.”<sup>58</sup>
20. Considering that the National PTC Judges may have intended to adopt some of Mr. MEAS Muth’s arguments, the CIJs found it “a baffling assertion to imply that the NJs should have changed their views for case 003 after hearing arguments in case 003 which they could – and should – already have taken into account in case 004/2.”<sup>59</sup> They considered the “principle that like cases must be treated alike” and presumed “that the same judges will decide an identical legal issue in the same manner” unless their views have changed (and they state the reasons) or the law has changed (and demands a different answer).<sup>60</sup>
21. *Query: (1) Whether the National PTC Judges intended to adopt Mr. MEAS Muth’s appeal arguments in departing from their Case 004/2 approach and considering in Case 003 that since both Closing Orders are of equal value under the ECCC framework, the Indictment cannot trump the Dismissal Order and seize the TC; and if they did not, (2) whether the*

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<sup>53</sup> Compare Case 003 PTC Considerations, para. 115 with MEAS Muth’s Appeal, paras. 41-43.

<sup>54</sup> MEAS Muth’s Appeal, paras. 41-46.

<sup>55</sup> Case 003 PTC Considerations, para. 116 with MEAS Muth’s Appeal, paras. 34, 37.

<sup>56</sup> MEAS Muth’s Appeal, p. 2, paras. 34, 37.

<sup>57</sup> MEAS Muth’s Appeal, p. 2, paras. 64, 69.

<sup>58</sup> MEAS Muth’s Appeal, p. 2, paras. 2, 49-66, 69-71.

<sup>59</sup> CIJs’ Decision on Forwarding Case File 003, paras. 33-34.

<sup>60</sup> CIJs’ Decision on Forwarding Case File 003, paras. 33-34.

*presumption of innocence can be deemed a legitimate basis to archive the case if its corollary, the principle of in dubio pro reo, does not apply.*

**22. The National PTC Judges seemingly agree that the ECCC has no personal jurisdiction.**

Unanimously, the PTC reached no conclusion on the merits of the ultimate question before it: whether Mr. MEAS Muth is a senior leader of Democratic Kampuchea (“DK”) or among those most responsible for DK-era atrocities and thus falls within the ECCC’s personal jurisdiction. While the National PTC Judges provided no analysis on the ECCC’s personal jurisdiction over Mr. MEAS Muth,<sup>61</sup> the International PTC Judges found him to be among those most responsible,<sup>62</sup> despite having “consider[ed] it unnecessary to examine in substance the [ICP’s] claim that the failure to assess all the evidence in the Case File had a determinative impact on the [NCIJ’s] review of personal jurisdiction.”<sup>63</sup>

23. The National PTC Judges did not incorporate their views expressed in Cases 003 and 004/2 that the ECCC lacks personal jurisdiction over Mr. MEAS Muth such as: (a) their agreement with the National Co-Prosecutor that Case 003 should not be prosecuted since the ICP acted unilaterally in opening the investigation;<sup>64</sup> (b) their declarations during the investigation that the ECCC lacks personal jurisdiction over Mr. MEAS Muth;<sup>65</sup> and (c) their confirmation in Case 004/2 that Cases 003 and 004 should never have been investigated and finding that the Indictment in Case 004/2 is invalid on this basis.<sup>66</sup> Yet after issuing the Case 003 Considerations, they rejected *all* Civil Party Applicants in light of their view that Case 003 should be archived.<sup>67</sup>

<sup>61</sup> Case 003 PTC Considerations, paras. 113-18.

<sup>62</sup> Case 003 PTC Considerations, para. 340.

<sup>63</sup> Case 003 PTC Considerations, para. 243.

<sup>64</sup> Annex I: Public Redacted Version Consideration of the PTC Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, Opinion of Judges Prak Kisman, Ney Thol, and Huot Vuthy, para. 18.

<sup>65</sup> Considerations on MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 April 2016, D120/3/1/8, Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy, paras. 26-29. Decision related to (1) appeal against decision on nine applications to seize the Pre-Trial Chamber with requests for annulment and (2) the two annulment requests referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy, paras. 96, 139. Decision MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Decision on MEAS Muth’s Request for Clarification concerning Crimes Against Humanity and the Nexus with Armed Conflict, 10 April 2017, D87/2/1.7/1/1/7, Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy, para. 72.

<sup>66</sup> Case 004/2 PTC Considerations, para. 302.

<sup>67</sup> Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, paras. 44-45.

24. *Query: Whether the National PTC Judges intended to uphold the Indictment even though they consider that the ECCC does not have personal jurisdiction over Mr. MEAS Muth?*
25. ***The National PTC Judges must clarify their understanding of the Considerations.*** The PTC cannot send Mr. MEAS Muth to trial,<sup>68</sup> *unless* that is what at least two of the three National PTC Judges intended. If it is indeed the opinion of some or all of the National PTC Judges that the Indictment stands *and* that the default position applies, then the National PTC Judges should unequivocally and unambiguously say so and forward the Indictment to the TC. If, however, they accept the arguments made in Mr. MEAS Muth's appeal and thus agree that the Dismissal Order cannot be set aside, then there is *analysis paralysis*, which must be solved by terminating, sealing, and archiving Case 003. Either way, the PTC must issue a final ruling in the pre-trial proceedings, disposing of Case 003 in a way that brings legal certainty and clarity and eliminates the judicial limbo. "*The proceedings against Meas Muth would remain pending forever without resolution if the situation after the 003 Considerations ... were to be the end state.*"<sup>69</sup>

**B. Even if the PTC unanimously upheld the Indictment, the ECCC framework does not mandate that it trump the Dismissal Order and seize the TC**

26. The ICP erroneously claims that the ECCC framework "clearly requires that the Case and Case File be forwarded to the TC for trial based on the PTC's unanimous finding that the Indictment is valid" and that forwarding the Indictment is "nonetheless mandated" even if the PTC ignores this "unanimous" finding.<sup>70</sup> Even if the National PTC Judges intend that the Indictment goes forward, being fully appreciative of the unanimous Considerations, an indictment issued by one CIJ cannot trump a dismissal order by another CIJ under the ECCC framework. If the National PTC Judges consider that the principle of *in dubio pro reo* does not apply, both Closing Orders would hang indefinitely over Mr. MEAS Muth unless and until Case 003 is terminated, sealed, and archived by the PTC.<sup>71</sup> If their intent

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<sup>68</sup> *Contra* ICP's Request, para. 21.

<sup>69</sup> *See* CIJs' Decision on Forwarding Case File 003, para. 26.

<sup>70</sup> ICP's Request, para. 22.

<sup>71</sup> MEAS Muth's Request to Terminate, Seal, and Archive Case 003, paras. 60-69.

is to have the stalemate remain, they must clearly articulate it, so the Parties can seek redress with either the SCC (where the answer is well-resolved)<sup>72</sup> or the CIJs.<sup>73</sup>

27. ***The default position does not apply.*** The default position providing that “the investigation shall proceed” when PTC fails to reach a supermajority on the CIJs’ disagreements *does not* apply to the contradictory Closing Orders.<sup>74</sup> While the PTC unanimously described the default position as “fundamental and determinative,”<sup>75</sup> the National PTC Judges seemingly agree that it does not apply,<sup>76</sup> explicitly finding that since both CIJs agreed internally register their disagreement “the [PTC] cannot apply its competence ... in Internal Rule 72.”<sup>77</sup> Their finding is consistent with ECCC jurisprudence confirming that the terms “the investigation shall proceed” means that disagreements between the CIJs must not lead to a stalemate in their *investigation*, which concludes when they issue a Closing Order.<sup>78</sup>
28. The PTC assuredly appreciated Mr. MEAS Muth’s arguments on how Rule 72’s dispute resolution mechanism would not resolve the contradictory Closing Orders, even were the Closing Orders treated as an unresolved disagreement.<sup>79</sup> Both Closing Orders would stand under Rule 72(4)(d) in a violation of Mr. MEAS Muth’s fair trial rights<sup>80</sup> – a matter which the CIJs were cognizant of and concerned enough to seek submissions on whether to suspend their investigation.<sup>81</sup> Leaving an unchallengeable Indictment hanging over Mr. MEAS Muth is “not compatible with the basic demands of the rule of law.”<sup>82</sup>
29. Even if the object and purpose of the Agreement is to “[bring] to trial” senior leaders and those most responsible, the Parties to the Agreement did not and could not agree on a

<sup>72</sup> SCC Case 004/2 Decision, para. 71.

<sup>73</sup> CIJs’ Decision on Forwarding Case File 003, para. 42.

<sup>74</sup> *Contra* ICP’s Request, para. 23, citing Agreement, Arts. 5(4), 7(4); Establishment Law, Art. 23 *new*.

<sup>75</sup> Case 003 PTC Considerations, para. 98; Case 004/2 PTC Considerations, para. 112.

<sup>76</sup> *See supra*, paras. 7-9.

<sup>77</sup> Case 003 PTC Considerations, para. 113.

<sup>78</sup> MEAS Muth’s Appeal, para. 35; MEAS Muth’s Reply to the International Co-Prosecutor’s Response to MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 19 August 2019, D267/7 (“MEAS Muth’s Reply”), paras. 47-48; Rule 67(1); *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 65; *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30 (“Decision on IENG Sary’s Closing Order Appeal”), para. 274.

<sup>79</sup> ICP’s Request, para. 27.

<sup>80</sup> MEAS Muth’s Appeal, para. 37; MEAS Muth’s Reply, para. 26.

<sup>81</sup> Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249 (“CIJs’ Request for Submissions”), paras. 1, 54.

<sup>82</sup> CIJs’ Request for Submissions, para. 54.

default position sending the case to trial on an indictment when a dismissal order is simultaneously issued.<sup>83</sup> The Parties to the Agreement were fully cognizant of the “massive impunity gap” the ECCC’s limited personal jurisdiction would cause<sup>84</sup> and of the possibility that one CIJ would indict when the other would dismiss.<sup>85</sup> Yet they could not agree that a case proceeds to trial on an indictment when a dismissal order is simultaneously issued since doing so would strip the ECCC proceedings of the constitutional principle of *in dubio pro reo*.<sup>86</sup>

30. **Rule 77(13) does not apply.** Even if the PTC indeed unanimously upheld the Indictment, Rule 77(13) does not apply when the CIJs issue contradictory Closing Orders.<sup>87</sup> If Rule 77(13)(a) applies to dismissal orders and Rule 77(13)(b) applies to indictments, their combined application leads to an absurd result and cause irreparable harm to Mr. MEAS Muth’s fair trial rights since both Closing Orders would hang over Mr. MEAS Muth in perpetuity.<sup>88</sup> Conversely, applying Rule 77(13)(b) so that indictments automatically trump dismissal orders not only violates the constitutional principle of *in dubio pro reo*<sup>89</sup> but wrongly subordinates the NCIJ to the ICIJ, depriving him of his equal status and discretionary authority.<sup>90</sup> Given his co-equal status under the ECCC framework, absent a supermajority finding that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, his Dismissal Order cannot be set aside.<sup>91</sup>
31. **The principle of *in dubio pro reo* applies.** The principle of *in dubio pro reo*, a corollary of the presumption of innocence, applies to all stages of the proceedings, including to the decision on whether to indict or dismiss a case at the pre-trial stage.<sup>92</sup> Given that one CIJ’s

<sup>83</sup> *Contra* ICP’s Request, para. 25. MEAS Muth’s Reply, para. 18.

<sup>84</sup> *Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261, paras. 18-19, 25.

<sup>85</sup> MEAS Muth’s Appeal, paras. 33-34.

<sup>86</sup> MEAS Muth’s Appeal, para. 68.

<sup>87</sup> *Contra* ICP’s Request, paras. 23, 30.

<sup>88</sup> MEAS Muth’s Appeal, paras. 41-46.

<sup>89</sup> Cambodian Constitution, Art. 38; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.

<sup>90</sup> MEAS Muth’s Appeal, paras. 32-46, 62-70; MEAS Muth’s Response, paras. 15-20.

<sup>91</sup> Case 003 PTC Considerations, paras. 45-57.

<sup>92</sup> *Contra* ICP’s Request, para. 30. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31; Decision on IENG Sary’s Closing Order Appeal, para. 310. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 144.

investigation, assessment of the facts, application of the law, or issuance of a Closing Order is neither superior nor subordinate to the other CIJ's, since the PTC did not find by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion that would impede the application of the principle of *in dubio pro reo*, the Dismissal Order must trump the Indictment.<sup>93</sup> The National PTC Judges *did not* ignore "Rule 77(13)(b) and the default position"<sup>94</sup> but seemingly adopted Mr. MEAS Muth's arguments that the principle of *in dubio pro reo*, a corollary of the presumption of innocence, mandates that the Dismissal Order prevails over the Indictment.<sup>95</sup> If they do not consider that the principle of *in dubio pro reo* applies, then there is *analysis paralysis*, which must be solved by terminating, sealing, and archiving Case 003.

32. ***The PTC has the authority and duty to terminate, seal, and archive the case.*** A PTC split *may* result in the termination (effective dismissal) of a case.<sup>96</sup> The SCC found termination of Case 004/2 appropriate considering the 13-year-long investigation and disagreements on personal jurisdiction, the PTC's failure to "provide an actual ruling" on the CIJ's illegal Closing Orders, and the lack of a valid Indictment (meaning the default position cannot apply).<sup>97</sup> The PTC is dutybound to terminate, seal, and archive Case 003 to remedy the abuse of process from the ongoing violations of Mr. MEAS Muth's right to have proceedings concluded within a reasonable time and to avoid a miscarriage of justice.<sup>98</sup>

33. Cambodian criminal procedure *does* contemplate termination of proceedings.<sup>99</sup> The SCC explained that while criminal action may not be "extinguished" except in situations involving the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*, Cambodian law: "provides for the power to 'suspend' or 'stay' proceedings in certain circumstances of a *lasting impediment* in the conduct of the proceedings...."<sup>100</sup>

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<sup>93</sup> MEAS Muth's Appeal, p. 2.

<sup>94</sup> *Contra* ICP's Request, para. 30.

<sup>95</sup> *See supra*, paras. 15-21.

<sup>96</sup> ICP's Request, para. 29.

<sup>97</sup> SCC Decision, paras. 53, 67-68, 71.

<sup>98</sup> *See* MEAS Muth's Request to Terminate, Seal, and Archive Case 003, paras. 48-50, 60-69.

<sup>99</sup> *Contra* ICP's Request, para. 30; Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017, D249/6, para. 16.

<sup>100</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC (16), Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, 14 December 2012, E138/1/10/1/5/7, para. 38 (emphasis added).

34. The disagreement that has pervaded the Co-Prosecutors, the CIJs, the PTC, and presumably, the TC – on whether Mr. MEAS Muth should be sent to trial at all – is an intractable impediment to the conduct of the proceedings.<sup>101</sup> Having found (erroneously) that the CIJs abused the process,<sup>102</sup> were the PTC to now send Case 003 to trial knowing that Mr. MEAS Muth’s right to expeditious proceedings will be held in abeyance due to irreconcilable differences and obstinance similar to those existing between the National and International PTC Judges, the PTC, cynically, would knowingly, willfully, and unremittingly be engaging in the sort of abuse of process it claimed the CIJs committed.

### III. CONCLUSION AND RELIEF SOUGHT

35. The PTC Judges must end the ongoing *analysis paralyisis*. Unless they expeditiously decide by supermajority on the subsequent steps to be taken in Case 003, they will continue to violate Mr. MEAS Muth’s fair trial rights and further undermine integrity of the ECCC’s proceedings and legacy. If the PTC Judges are incapable of reaching a supermajority to send Case 003 to trial, they *must* adhere to their judicial oaths and faithfully follow the law by exercising their authority to terminate Case 003, seal the Case File, and archive it. Anything less simply shifts the obligation to the SCC or the CIJs to bring finality to the proceedings and end the PTC-imposed institutional impotence.

**WHEREFORE**, the PTC should:

- A. **ADMIT** the ICP’s Request;
- B. **DENY** the ICP’s relief sought;
- C. **TERMINATE** Case File 003;
- D. **SEAL** Case File 003; and
- E. **ARCHIVE** Case File 003.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **12** day of **July**, 2021

<sup>101</sup> MEAS Muth’s Request to Terminate, Seal, and Archive Case 003, para. 65.

<sup>102</sup> See Case 003 PTC Considerations, paras. 105-08.