



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

Case File No. 003/07-09-2009-ECCC/OCIJ (PTC35)

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de recep. on):
27 / 11 / 2019
ពេលវេលា (Time/Heure) : 10 : 00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: Sann Rada

REPORT OF THE CASE & APPEALS

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I- INTRODUCTION

This report is issued on behalf of the whole Pre-Trial Chamber. It sets out the relevant facts and procedural history of Case 003, as well as the details of the appeals currently before this Chamber.

II- IDENTIFICATION OF THE CHARGED PERSON

The Charged Person is MEAS Muth, a Cambodian male born on 10 August 1938 in Po Village, Srae Khnong Commune, Chhuk District, Kampot Province. He currently resides in Battambang Province.¹ Following its Scheduling Order ordering, *inter alia*, that any dispense with personal appearance of the Charged Person would require a request with sufficient justification,² the Pre-Trial Chamber granted a Request from MEAS Muth,³ dispensing him with personal appearance at the hearing for health reasons.⁴

MEAS Muth is represented by Defence Co-Lawyers Mr. ANG Udom and Mr. Michael

¹ [REDACTED]

² Case 003/07-09-2009-ECCC/OCIJ (“Case 003”), Scheduling Order for the Pre-Trial Chamber’s Hearing on Appeals against Closing Orders, 24 October 2019, D266/12 and D267/17, p. 2.

³ Case 003, MEAS Muth’s Request to Dispense with Personal Appearance at the hearings on the Appeals against the Closing Orders, 18 November 2019, D266/13 and D267/18.

⁴ Case 003, Decision on MEAS Muth’s Request to Dispense with Personal Appearance at the hearings on the Appeals against the Closing Orders, 20 November 2019, D266/14 and D267/19.

KARNAVAS (“Co-Lawyers”).

III- CASE BACKGROUND

On 20 November 2008, the International Co-Prosecutor signed the Second Introductory Submission (“Introductory Submission”) alleging, *inter alia*, that SOU Met and MEAS Muth were responsible for national and international crimes within the ECCC’s jurisdiction.⁵ On the same day, the International Co-Prosecutor brought a disagreement before the Pre-Trial Chamber, reporting that the National Co-Prosecutor disagreed with prosecuting the crimes identified in the new Submissions.⁶ The Pre-Trial Chamber issued considerations on this disagreement on 18 August 2009.⁷

On 7 September 2009, the Acting International Co-Prosecutor filed the Introductory Submission,⁸ followed by a Supplementary Submission on 31 October 2014 (“Supplementary Submission”),⁹ requesting the Co-Investigating Judges to open and conduct a judicial investigation against SOU Met and MEAS Muth regarding allegations of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the 1956 Cambodian Penal Code, committed during the Democratic Kampuchea (“DK”) era, at different locations such as the Central Zone, New North Zone and East Zone; DK Navy; S-21 and S-22 Security Centres; Stung Tauch Execution Site; Kampong Chhnang Airport Construction Site; and other security centres run by Divisions of the Revolutionary Army of Kampuchea (“RAK”). Confidential disagreements between the Co-Investigating Judges regarding this investigation were registered on 7 and 22 February 2013, 17 July 2014, 16 January 2017 and 17 September 2018. None of these disagreements were brought before the Pre-Trial Chamber.

On 29 April 2011, the Co-Investigating Judges issued a Notice of Conclusion of Judicial Investigation (“Notice of Conclusion”), notifying the Parties that they considered the investigation completed.¹⁰

On 2 December 2011, the Reserve International Co-Investigating Judge resumed the judicial

⁵ Case 003/07-09-2009-ECCC/OCIJ (“Case 003”), Co-Prosecutor’s Second Introductory Submission regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.

⁶ Disagreement 001/18-11-2008-ECCC/PTC, International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1.

⁷ Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3.

⁸ Case 003, Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

⁹ Case 003, International Co-Prosecutor’s Supplementary Submission regarding Crime Sites related to Case 003, 31 October 2014, D120.

¹⁰ Case 003, Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

investigation.¹¹

On 24 February 2012, the Reserve International Co-Investigating Judge notified SOU Met and MEAS Muth that they were suspects and informed them of their rights.¹²

On 7 February 2013, the National Co-Investigating Judge forwarded the Case File to the Co-Prosecutors, inviting them to file their final submissions (“Forwarding Order”).¹³ On the same day, the International Co-Investigating Judge signed a Rogatory Letter, ordering the international investigators of the Office of the Co-Investigating Judges to conduct investigative acts.¹⁴ On 8 February 2013, the International Co-Prosecutor responded to the Forwarding Order, taking the view that the investigation remained open, and returned the Case File to the Co-Investigating Judges.¹⁵ On 28 February 2013, the National Co-Investigating Judge stated that he regarded the International Co-Prosecutor’s response as his final submission, while the International Co-Investigating Judge stated that Case 003 remained open and the investigation into facts alleged in this case were proceeding.¹⁶

On 22 October 2013, the Co-Investigating Judges notified the Parties that SOU Met had died¹⁷ and terminated the proceedings against him on 2 June 2015.¹⁸

On 26 November 2014, the International Co-Investigating Judge summoned MEAS Muth for an initial appearance at the ECCC, scheduled on 8 December 2014.¹⁹ The summons was challenged by the Co-Lawyers,²⁰ and, on 3 December 2014, the Pre-Trial Chamber recognised the validity of the summons.²¹ On 10 December 2014, the International Co-Investigating Judge issued a warrant of arrest against MEAS Muth following his failure to appear.²²

On 3 March 2015, the International Co-Investigating Judge charged MEAS Muth *in*

¹¹ Case 003, Order on Resuming the Judicial Investigation, 2 December 2011, D28.

¹² Case 003, Notification of Suspect’s Rights [Rule 21(1)(d)], 24 February 2012 [regarding MEAS Muth], D30; Case 003, Notification of Suspect’s Rights [Rule 21(1)(d)], 24 February 2012 [regarding SOU Met], D31.

¹³ Case 003, Forwarding Order, 7 February 2013, D52.

¹⁴ Case 003, International Co-Investigating Judge’s Rogatory Letter, 7 February 2013, D54.

¹⁵ Case 003, International Co-Prosecutor’s Response to Forwarding Order of 7 February 2013, 8 February 2013, D52/1.

¹⁶ Statement by the Co-Investigating Judges regarding Case 003, <https://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-003>

¹⁷ Case 003, Notification of the Death of a Suspect in Case File 003, 22 October 2013, D86.

¹⁸ Case 003, Dismissal of Allegations against SOU Met, 2 June 2015, D86/3.

¹⁹ Case 003, Summons to Initial Appearance, 26 November 2014, A66.

²⁰ Case 003, Notice concerning Mr. MEAS Muth’s Decision Not to Recognise Summons, 3 December 2014, A67/1.1.

²¹ Case 003, Decision on MEAS Muth’s Appeal against the International Co-Investigating Judge’s Order on Suspect’s Request concerning Summons signed by Onc Co-Investigating Judge, 3 December 2014, D117/1/1/2.

²² Case 003, Arrest Warrant of MEAS Muth, dated 10 December 2014 and filed 11 December 2014, C1.

*absentia*²³ and detailed the charges in an annex to the decision,²⁴ against which the Co-Lawyers appealed on 12²⁵ and 16²⁶ June 2015. The Pre-Trial Chamber issued its decision and considerations on the appeals on 3 February 2016 and 30 March 2016, respectively.²⁷

On 14 December 2015, at MEAS Muth’s first appearance, the International Co-Investigating Judge rescinded some charges against him and charged him with genocide, crimes against humanity, grave breaches of the Geneva Conventions, and premeditated homicide,²⁸ committed from at least 17 April 1975 to 6 January 1979, in his former capacities as member of the Military General Staff, Commander of the Division 164 (which included the DK Navy), and the highest civilian authority of the Kampong Som Autonomous Sector. MEAS Muth was charged through different modes of liability including commission via joint criminal enterprise (“JCE”), planning, ordering, superior responsibility, and co-perpetration.²⁹

On 10 January 2017, the International Co-Investigating Judge reduced the scope of the investigation by excluding allegations related to S-22 Security Centre, Kampong Chhnang Airport Construction Site, Stung Tauch Execution Site, and RAK involvement in the purges of the Central Zone, New North Zone and East Zone.³⁰ As such, these excluded facts can no longer form the basis for any charges against MEAS Muth.³¹

On 24 May 2017, the International Co-Investigating Judge issued a Second Notice of Conclusion of Judicial Investigation against MEAS Muth³² and, on 25 July 2017, forwarded the Case File to the Co-Prosecutors, inviting them to file their final submission within three months.³³ On

²³ Case 003, Decision to Charge MEAS Muth *in Absentia*, 3 March 2015, D128.

²⁴ Case 003, Notification of Charges against MEAS Muth, 3 March 2015, D128.1.

²⁵ Case 003, MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Notification of Charges against MEAS Muth, 12 June 2015, D128.1/1/3.

²⁶ Case 003, MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *in Absentia*, 16 June 2015, D128/1/3.

²⁷ Case 003, Decision on MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Notification of Charges against MEAS Muth, 3 February 2016, D128/1/11; Case 003, Considerations on MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *in Absentia*, 30 March 2016, D128/1/9.

²⁸ Case 003, Written Record of Initial Appearance, 14 December 2015, D174.

²⁹ However, the International Co-Investigating Judge advised MEAS Muth that he must remain at the disposal of the ECCC. MEAS Muth also declared that he voluntarily accepted weekly control visits by the police to his residence and that his only passport had expired five years ago. MEAS Muth further stated that he or his Counsel would inform the Co-Investigating Judges should he needed to leave the country for medical reasons (Case 003, Written Record of Initial Appearance, 14 December 2015, D174, p. 11).

³⁰ Case 003, Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66*bis*, 10 January 2017, D226.

³¹ Internal Rule 66*bis*(5).

³² Case 003, Second Notice of Conclusion of Judicial Investigation against MEAS Muth, 24 May 2017, D252.

³³ Case 003, Forwarding Order pursuant to Internal Rule 66(4), 25 July 2017, D256.

14 November 2017, the National Co-Prosecutor filed a final submission requesting that all allegations be dismissed on the ground that MEAS Muth does not fall within the ECCC's personal jurisdiction.³⁴ On the same day, the International Co-Prosecutor filed a final submission requesting that MEAS Muth be indicted for the charges set out in the Introductory and Supplementary Submissions and sent to trial.³⁵

IV- THE CLOSING ORDERS UNDER APPEAL

A. Introduction

Pursuant to Internal Rule 67, “[t]he Co-Investigating Judges shall conclude the investigation by issuing a [reasoned] Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.”³⁶ An indictment must set “out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.”³⁷ “The Co-Investigating Judges shall issue a Dismissal Order” where: (a) the acts in question do not amount to crimes within the ECCC's jurisdiction; (b) the perpetrators of the acts have not been identified; or (c) there is not sufficient evidence of the charges against the Charged Person.³⁸

On 18 September 2017, the Co-Investigating Judges informed the Parties that they considered separate and opposing closing orders based on a disagreement between them to be permitted under the applicable law.³⁹ They registered a disagreement regarding the issuance of opposing closing orders on 17 September 2018, which was not brought before the Pre-Trial Chamber.

On 28 November 2018, the International Co-Investigating Judge issued the Closing Order (Indictment), sending MEAS Muth to trial,⁴⁰ while the National Co-Investigating Judge issued the Closing Order (Dismissal), dismissing all the charges against him.⁴¹

We will now provide a brief overview of the main findings of each Closing Order issued in

³⁴ Case 003, Final Submission concerning MEAS Muth pursuant to Internal Rule 66, 14 November 2017, D256/6.

³⁵ Case 003, International Co-Prosecutor's Rule 66 Final Submission, 14 November 2017, D256/7.

³⁶ Internal Rule 67(1).

³⁷ Internal Rule 67(2).

³⁸ Internal Rule 67(3).

³⁹ Case 003, Decision to Place Decisions regarding Disagreements onto Case File 003, 18 September 2017, D262; Case 003, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, paras 13-16.

⁴⁰ Case 003, Closing Order, 28 November 2018, D267 (“Closing Order (Indictment) (D267)”).

⁴¹ Case 003, Order Dismissing the Case Against Meas Muth, 28 November 2018, D266 (“Closing Order (Dismissal) (D266)”).

this case.

B. Closing Order (Indictment)

In the Closing Order (Indictment), the International Co-Investigating Judge considered and analysed evidence regarding allegations pertaining to the RAK structure;⁴² existence of a JCE;⁴³ armed conflicts with Vietnam and Thailand;⁴⁴ and crimes committed by the DK Navy⁴⁵ and at the Durian Plantation Killing Site,⁴⁶ against members of the RAK Divisions 164, 502, 310 and 117,⁴⁷ at Ream Area⁴⁸ and Stung Hav⁴⁹ Worksites, and Toek Sap⁵⁰ and Wat Enta Nhien⁵¹ Security Centres; and forced marriages in Kampong Som,⁵² with respect to any indication of MEAS Muth’s role and participation therein.

The International Co-Investigative Judge found that MEAS Muth’s roles and responsibilities during the DK Regime indicated that he was very close to the senior leadership level of the Communist Party of Kampuchea (“CPK”).⁵³ The Judge determined that MEAS Muth’s position in the DK hierarchy meant that he was working at “the highest level of the DK military command structure below the national political leadership” and was further tasked with undertaking purges of the RAK military beyond the Kampong Som area and his duties as the Commander of the DK military.⁵⁴

The International Co-Investigating Judge further found that from 17 April 1975 until at least 6 January 1979, MEAS Muth, SON Sen, SOU Met, TA Mok and other senior RAK cadres shared the common purpose of implementing four CPK policies⁵⁵ within the territorial waters of DK, the

⁴² Closing Order (Indictment) (D267), paras 149-170.

⁴³ Closing Order (Indictment) (D267), paras 171-205.

⁴⁴ Closing Order (Indictment) (D267), paras 206-216.

⁴⁵ Closing Order (Indictment) (D267), paras 217-257.

⁴⁶ Closing Order (Indictment) (D267), paras 258-269.

⁴⁷ Closing Order (Indictment) (D267), paras 270-329.

⁴⁸ Closing Order (Indictment) (D267), paras 330-354.

⁴⁹ Closing Order (Indictment) (D267), paras 355-402.

⁵⁰ Closing Order (Indictment) (D267), paras 403-425.

⁵¹ Closing Order (Indictment) (D267), paras 426-443.

⁵² Closing Order (Indictment) (D267), paras 444-455.

⁵³ Closing Order (Indictment) (D267), paras 32-37, 459. *See also* Closing Order (Indictment) (D267), providing that MEAS Muth’s roles and responsibilities included being: (i) Commander of Division 164 (the largest RAK division, previously Division 3) prior to April 1975, which entailed being Commander of the DK Navy (one of the three branches of the DK Armed Forces) (paras 156, 158, 459(i)); (ii) responsible for the territorial waters claimed by the DK (paras 158, 459(ii)); (iii) a reserve member of the General Staff Committee and one of SON Sen’s deputies (paras 162, 459(iii)); and (iv), from late 1978, a reserve member of the Central Committee (paras 162, 459(iv)).

⁵⁴ Closing Order (Indictment) (D267), para. 461.

⁵⁵ The four PCK’s policies included: (i) establishing cooperatives and forced labour worksites; (ii) re-educating “bad elements” and killing “enemies” both inside and outside the military; (iii) targeting specific groups, particularly those of Vietnamese and Thai ethnicity or nationality (both real and perceived), as well as current or former military personnel

autonomous sector of Kampong Som and various other locations in DK *via* the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions implemented through a JCE,⁵⁶ in which MEAS Muth was a willing and driven participant,⁵⁷ and *via* violations of the 1956 Cambodian Penal Code through co-perpetration and planning and ordering.⁵⁸

In the Closing Order (Indictment), the International Co-Investigating Judge adopted an approach of “the minimum number of victims which could be estimated on the evidence”⁵⁹ when assessing the number of victims for each crime. This notwithstanding, the Judge acknowledged that the actual victim numbers are very likely to be much higher than estimated.⁶⁰ He, *inter alia*, attributed to MEAS Muth, at a minimum, 1,200 Thai and 3,276 Vietnamese victims killed during the DK Navy’s capture operations;⁶¹ 2,152 victims in relation to the RAK purges;⁶² and 845 victims killed at the Kampong Som crime sites.⁶³ He considered that as a minimum number, 2,000 people at the Ream Area sites and 100 people at any given time at Stung Hav were victims of forced labour.⁶⁴ He also approximates 15,000 people were likely subjected to forced labour under appalling conditions in the Kampong Som area.⁶⁵

The International Co-Investigating Judge concluded that the ECCC have personal jurisdiction over MEAS Muth as one of the persons “most responsible” for the DK-era crimes, because of the combination of his rank and scope of authority in the DK hierarchy, alongside the character and magnitude of his crimes.⁶⁶ After reviewing the evidence and concluding that the legal elements of the crime⁶⁷ and modes of liability⁶⁸ were established, the International Co-Investigating Judge indicted MEAS Muth and committed him for trial for:

- Genocide against the Vietnamese by killing members of the group, through commission via JCE; or alternatively, through planning or ordering; or in the further alternative, through

and civilians; and (iv) implementing the forced marriage of civilians and soldiers of the RAK. *See* Closing Order (Indictment) (D267), paras 171, 562.

⁵⁶ Closing Order (Indictment) (D267), paras 462-466, 562.

⁵⁷ Closing Order (Indictment) (D267), paras 461, 469.

⁵⁸ Closing Order (Indictment) (D267), paras 576-577.

⁵⁹ Closing Order (Indictment) (D267), para. 133.

⁶⁰ Closing Order (Indictment) (D267), para. 133.

⁶¹ Closing Order (Indictment) (D267), para. 464.

⁶² Closing Order (Indictment) (D267), para. 467.

⁶³ Closing Order (Indictment) (D267), para. 468.

⁶⁴ Closing Order (Indictment) (D267), para. 468.

⁶⁵ Closing Order (Indictment) (D267), para. 468.

⁶⁶ Closing Order (Indictment) (D267), paras 456-469.

⁶⁷ Closing Order (Indictment) (D267), paras 470-561.

⁶⁸ Closing Order (Indictment) (D267), paras 562-577.

superior responsibility;

- Crimes against humanity—including murder, extermination, torture, imprisonment, enslavement, persecution on racial or political grounds and other inhumane acts (such as, *inter alia*, enforced disappearance, forced marriage, and rape)—committed at various locations, including the waters and the islands claimed by DK and in the Kampong Som area, S-21 Security Centre, Durian Plantation Killing Site, Ream Areas and Stung Hav Worksites, Toek Sap and Wat Enta Nhien Security Centres—through commission via JCE or planning, ordering, or superior responsibility.
- War crimes as Grave breaches of the Geneva Conventions for unlawful confinement of civilians, wilful killing, wilfully causing great suffering or serious injury to body or health, and, additionally at S-21 Security Centre, torture—against the Vietnamese and Thai by the DK Navy—committed through JCE; or in the alternative, through planning or ordering; or in the further alternative through superior responsibility; and
- Premeditated homicide in violation of Articles 501 and 506 of the 1956 Penal Code—committed at various locations, including Durian Plantation Killing Site; Stung Hav Worksites; and Toek Sap and Wat Enta Nhien Security Centres—and including the killing of the Vietnamese and the Thai by the DK Navy, and the Purges of Divisions 164, 502, 310, and 117—through commission via co-perpetration; and (except for crimes relating to Division 502 and 310), alternatively, planning or ordering.

The International Co-Investigating Judge dismissed some charges of crimes against humanity and war crimes due to insufficient evidence.⁶⁹ He further considered that MEAS Muth's pre-trial detention was not necessary.⁷⁰

C. Closing Order (Dismissal)

In the Closing Order (Dismissal), the National Co-Investigating Judge specified that his findings regarding the facts alleged against MEAS Muth rest on the materials that were filed in the Case File before the first Notice of Conclusion was issued on 29 April 2011,⁷¹ and focus on whether MEAS Muth is a senior leader or among those most responsible pursuant to the ECCC's personal

⁶⁹ Closing Order (Indictment) (D267), paras 496, 511, 519, 535, 549-550, 581.

⁷⁰ Closing Order (Indictment) (D267), paras 578-579.

⁷¹ Closing Order (Dismissal) (D266), paras 2-3, 39, 262.

jurisdiction.⁷² The Judge found it unnecessary to describe the types of crimes, legal qualifications or modes of liability, but did consider the alleged facts based on two criteria: (i) the severity of the crimes and (ii) the level of MEAS Muth’s participation.⁷³ He clarified that in case of any doubt raised while determining the ECCC’s personal jurisdiction over MEAS Muth, the Charged Person shall benefit thereby.⁷⁴

The National Co-Investigating Judge indicated that he investigated seven of the ten facts set out in the Introductory Submission.⁷⁵ The Closing Order (Dismissal) also considers MEAS Muth’s role and authority within the administrative structure of the CPK, including in the Central Committee;⁷⁶ Standing Committee;⁷⁷ Government and Political Offices;⁷⁸ Ministries;⁷⁹ and RAK Military,⁸⁰ especially Division 164.⁸¹ The Closing Order (Dismissal) further contains findings on the policy to purge in the Military Rank (including the East Zone); and the formation of the policy itself;⁸² RAK’s participation in the purges;⁸³ and MEAS Muth’s participation in the purges.⁸⁴

Although the National Co-Investigating Judge found, *inter alia*, that MEAS Muth was Secretary of Division 164, Secretary in charge of political affairs focusing mainly on dissemination of Party policies,⁸⁵ and fourth assistant of the Central Committee, he determined that MEAS Muth was not one of the thirteen individuals who had the right to order arrests and executions.⁸⁶ The Judge considered that, according to the CPK structure, MEAS Muth’s position was under around 50 other cadres and held the same position as many other cadres, including Zone and Division secretaries.⁸⁷

⁷² Closing Order (Dismissal) (D266), para. 3.

⁷³ Closing Order (Dismissal) (D266), para. 3.

⁷⁴ Closing Order (Dismissal) (D266), para. 3.

⁷⁵ Closing Order (Dismissal) (D266), para. 54. The Judge determined that only eight facts concern MEAS Muth and that facts related to the suppression of Division 801 and 810 Security Centre interlink. Accordingly, the Closing Order (Dismissal) provides findings regarding MEAS Muth’s alleged participation in (i) purges of Division 164 and General Staff personnel (paras 263-287); (ii) Wat Enta Nhien Security Centre (paras 288-297); (iii) working and living conditions at Stung Hav Rock Quarry (paras 298-305); (iv) arrests or destruction of Thai and Vietnamese vessels by the DK Navy (paras 306-322); (v) leading the armed forces that arrested and killed Vietnamese soldiers and civilians in late 1977 to 1978 (paras 323-329); as well as MEAS Muths’s scope of responsibilities at (vi) Detention Centre 810 (paras 330-351) and (vii) within RAK Security Centres and other execution sites (paras 352-353).

⁷⁶ Closing Order (Dismissal) (D266), paras 108-122.

⁷⁷ Closing Order (Dismissal) (D266), paras 123-131.

⁷⁸ Closing Order (Dismissal) (D266), paras 132-139.

⁷⁹ Closing Order (Dismissal) (D266), paras 140-150.

⁸⁰ Closing Order (Dismissal) (D266), paras 151-181, 204-228.

⁸¹ Closing Order (Dismissal) (D266), paras 182-203.

⁸² Closing Order (Dismissal) (D266), paras 229-244.

⁸³ Closing Order (Dismissal) (D266), paras 245-253.

⁸⁴ Closing Order (Dismissal) (D266), paras 254-258.

⁸⁵ Closing Order (Dismissal) (D266), para. 416.

⁸⁶ Closing Order (Dismissal) (D266), para. 418.

⁸⁷ Closing Order (Dismissal) (D266), para. 419.

He added that, as a cadre, MEAS Muth was obliged to follow CPK policy by disseminating its policies and facilitate the arrests and transfer of prisoners as ordered by the upper echelons, and that a failure to do so would result in him being considered a traitor and smashed.⁸⁸ The National Co-Investigating Judge determined that MEAS Muth participated in the suppression of enemies from within, but queried whether the evidence showed MEAS Muth's initiative and power to order arrest, transfer or execute anyone, noting that Division 164 was under SON Sen's direct control.⁸⁹ The Judge further considered that the evidence gathered does not support the final victim tolls as set out in the Introductory Submission.⁹⁰

With respect to the criteria delineating the personal jurisdiction of the ECCC, the National Co-Investigating Judge found that the ECCC's jurisdiction only extend to a limited number of leaders⁹¹ pursuant to the existing law and case law regarding personal jurisdiction,⁹² the principles of *in dubio pro reo* and narrow interpretation of criminal law recognised, *inter alia*, by the Cambodian Constitution;⁹³ the system of decision-making that existed within the DK Regime;⁹⁴ and the genuine intent of the negotiators of the Agreement and the drafters of the Law establishing the ECCC, which recognises that the ECCC have a selective jurisdiction.⁹⁵

Following his factual and legal analysis, the National Co-Investigating Judge concluded that MEAS Muth, despite occupying several roles within the DK Regime, did not fall within the personal jurisdiction of the ECCC.⁹⁶ The Judge determined that MEAS Muth did not fall within the category of a senior leader, because he had not been a member of the Central Committee and the Party Standing Committee.⁹⁷ The Judge further found that the category of those who were most responsible extends only to specific persons, such as KAINING Guek Eav *alias* Duch,⁹⁸ and concluded that MEAS Muth was not one of those most responsible, because "his participation was inactive, unimportant and not proximate to the commission of the crimes".⁹⁹ Accordingly, the National Co-Investigating Judge

⁸⁸ Closing Order (Dismissal) (D266), para. 420.

⁸⁹ Closing Order (Dismissal) (D266), paras 422-425.

⁹⁰ Closing Order (Dismissal) (D266), para. 426.

⁹¹ Closing Order (Dismissal) (D266), paras 395, 397.

⁹² Closing Order (Dismissal) (D266), paras 361-376.

⁹³ Closing Order (Dismissal) (D266), paras 377-385.

⁹⁴ Closing Order (Dismissal) (D266), paras 386-389.

⁹⁵ Closing Order (Dismissal) (D266), paras 361-365, 368-376, 405-407.

⁹⁶ Closing Order (Dismissal) (D266), para. 429.

⁹⁷ Closing Order (Dismissal) (D266), para. 395.

⁹⁸ Closing Order (Dismissal) (D266), paras 396-397, 405.

⁹⁹ Closing Order (Dismissal) (D266), para. 428.

dismissed the charges against him.¹⁰⁰

V- OVERVIEW OF THE APPEAL PROCEEDINGS & ISSUES RAISED

The Pre-Trial Chamber is seized of three appeals regarding the Closing Orders issued in this case. The National Co-Prosecutor¹⁰¹ and MEAS Muth¹⁰² filed Appeals against the Closing Order (Indictment) on 5 April 2019 and 8 April 2019, respectively. The International Co-Prosecutor filed an Appeal against the Closing Order (Dismissal) on 8 April 2019.¹⁰³ Responses were filed by MEAS Muth and the International Co-Prosecutor on 14,¹⁰⁴ 24¹⁰⁵ and 28¹⁰⁶ June 2019, and they filed their Replies on 16¹⁰⁷ and 19¹⁰⁸ August 2019.

Although the Parties will present their submissions on appeal in detail during the *in camera* portion of this hearing, the Chamber considers it beneficial, in the interest of transparency, to now provide a brief summary of the issues raised in these proceedings. Due to time constraints, only the main submissions of the Appeals will be summarised, not those of the Responses and Replies.

A. MEAS Muth's Appeal against the Closing Order (Indictment)

MEAS Muth submits that the overarching question in this case is which conflicting Closing Orders must prevail between the Dismissal and the Indictment.¹⁰⁹ He raises two grounds of appeal, arguing that where two simultaneous and opposing Closing Orders place the question of jurisdiction over a Charged Person in equipoise, an Indictment cannot stand and trial cannot proceed under the ECCC legal framework.¹¹⁰

¹⁰⁰ Closing Order (Dismissal) (D266), para. 430.

¹⁰¹ Case 003, National Co-Prosecutor's Appeal against the International Co-Investigating Judge's Closing Order in Case 003, 5 April 2019, D267/3 ("National Co-Prosecutor's Appeal (D267/3)").

¹⁰² Case 003, MEAS Muth's Appeal against the International Co-Investigating Judge's Indictment, 8 April 2019, D267/4 ("MEAS Muth's Appeal (D267/4)").

¹⁰³ Case 003, International Co-Prosecutor's Appeal of the Order Dismissing the Case Against MEAS Muth (D266), 8 April 2019, D266/2 ("International Co-Prosecutor's Appeal (D266/2)").

¹⁰⁴ Case 003, International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 003 Indictment, 14 June 2019, D267/9.

¹⁰⁵ Case 003, MEAS Muth's Response to the International Co-Prosecutor's Appeal of the Dismissal Order, 24 June 2019, D266/5.

¹⁰⁶ Case 003, International Co-Prosecutor's Response to MEAS Muth's Appeal against the International Co-Investigating Judge's Indictment (D267), 28 June 2019, D267/10.

¹⁰⁷ Case 003, International Co-Prosecutor's Reply to MEAS Muth's Response to the Appeal of the Order Dismissing the Case against MEAS Muth (D266), dated 9 August 2019 and filed on 16 August 2019, D267/11.

¹⁰⁸ Case 003, 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, D266/7.

¹⁰⁹ MEAS Muth's Appeal (D267/4), p. 1.

¹¹⁰ MEAS Muth's Appeal (D267/4), p. 1.

Specifically, MEAS Muth contends in his first ground of appeal that the International Co-Investigating Judge erred in law by interpreting in his Closing Order (Indictment) the Internal Rule 77(13) in such a way as to suggest that unless the Pre-Trial Chamber upholds one of the Closing Orders by supermajority, either both Closing Orders or only his Indictment would stand.¹¹¹

In his second ground of appeal, MEAS Muth contends that the International Co-Investigating Judge erred in law by failing to conclude in his Closing Order (Indictment) that, unless the Pre-Trial Chamber finds by supermajority that the National Co-Investigating Judge committed errors or abuses fundamentally determinative of his exercise of discretion, the Closing Order (Dismissal) prevails over the Indictment pursuant to the principle of *in dubio pro reo*.¹¹²

On this basis, MEAS Muth requests the Pre-Trial Chamber to dismiss the case against him.¹¹³

B. National Co-Prosecutor’s Appeal against the Closing Order (Indictment)

In her Appeal, the National Co-Prosecutor requests the Pre-Trial Chamber to dismiss the case against MEAS Muth based on her viewpoint that he is free of liability and does not fall within the ECCC’s personal jurisdiction.¹¹⁴

Regarding her first point, the National Co-Prosecutor stresses that purges at the zone level were decided by the Zone Standing Committee which played a key role in the day-to-day leadership on behalf of the CPK’s Central Committee.¹¹⁵ She adds that suppression policy, requiring cadres to follow not to be purged, was widespread in the country, particularly in 1976.¹¹⁶

Regarding her second point, the National Co-Prosecutor argues that the Royal Government of Cambodia, as one of the founders of the ECCC, “may have an influence on the functioning of the scope of the personal jurisdiction and judicial affairs”¹¹⁷ and termination of the ECCC’s mandate,

¹¹¹ MEAS Muth’s Appeal (D267/4), paras 32-48. In support of this ground, he argues (i) that the Parties to the Agreement did not intend for a case to proceed to trial on the basis of an Indictment when a Dismissal Order is simultaneously issued (paras 33-40, 47-48) and (ii) that applying Internal Rule 77(13) to appeals of opposing Closing Orders would lead to an absurd result, cause irreparable harm to his fair trial rights, and violate the Cambodian Constitution and the ECCC legal framework (paras 41-46, 47-48).

¹¹² MEAS Muth’s Appeal (D267/4), paras 49-66. In support of this ground, he argues, *inter alia*, (i) that the *in dubio pro reo* principle requires that doubt on both facts and the interpretation of legal provisions must be resolved in his favour (paras 50-51, 66) and (ii) that absent errors or abuses of discretion committed by the National Co-Investigating Judge in his Closing Order (Dismissal), which would impede the application of the *in dubio pro reo* principle, the Dismissal Order must prevail (paras 52-65, 66).

¹¹³ MEAS Muth’s Appeal (D267/4), paras 67-72, p. 46.

¹¹⁴ National Co-Prosecutor’s Appeal (D267/3), paras 56-60, 61-74.

¹¹⁵ National Co-Prosecutor’s Appeal (D267/3), paras 56-58.

¹¹⁶ National Co-Prosecutor’s Appeal (D267/3), paras 59-60.

¹¹⁷ National Co-Prosecutor’s Appeal (D267/3), para. 67; *see also* paras 61-67.

including by restricting the scope of the personal jurisdiction, as was the case for the ICTY, ICTR and SCSL.¹¹⁸ On this basis, she “urges [...]the [Pre-Trial] Chamber to act in line with”¹¹⁹ the Government’s interpretation that the applicable law requires the ECCC to investigate and try only senior leaders—understood as covering only the small number of individuals who were Members of the Party Central and Standing Committees—and those who were most responsible—understood as referring only to KAING Guek Eav *alias* Duch, the S-21 Chairman.¹²⁰ She further submits that justice has been brought to victims of the DK-era crimes through the trials of Cases 001 and 002.¹²¹

The National Co-Prosecutor requests the Pre-Trial Chamber to dismiss the case against MEAS Muth on the basis that the ECCC does not have personal jurisdiction over him.¹²²

C. International Co-Prosecutor’s Appeal against the Closing Order (Dismissal)

In his Appeal, the International Co-Prosecutor raises eight grounds arguing that the Closing Order (Dismissal) errs in law and fact by reaching the conclusion that MEAS Muth is not subject to the ECCC’s personal jurisdiction.¹²³

Firstly, the International Co-Prosecutor contends that the Closing Order (Dismissal) errs in law by failing to make factual and legal findings regarding whether crimes within the ECCC’s jurisdiction were committed and whether MEAS Muth is criminally liable for any such crimes.¹²⁴

Secondly, he argues that the Closing Order (Dismissal) errs in law by failing to consider any evidence placed on the Case File after the issuance of the first Notice of Conclusion on 29 April 2011. This concerns both the evidence gathered after that date and the materials created earlier that had not yet been filed by then.¹²⁵

Thirdly, the International Co-Prosecutor submits that the Closing Order (Dismissal) errs in law by failing to consider and to issue a decision on all the facts within the scope of Case 003 as set out in the Introductory and Supplementary Submissions.¹²⁶

¹¹⁸ National Co-Prosecutor’s Appeal (D267/3), para. 63; *see also* paras 61-67.

¹¹⁹ National Co-Prosecutor’s Appeal (D267/3), para. 67.

¹²⁰ National Co-Prosecutor’s Appeal (D267/3), para. 68. *See also* paras 67, 69-73.

¹²¹ National Co-Prosecutor’s Appeal (D267/3), para. 73.

¹²² National Co-Prosecutor’s Appeal (D267/3), para. 75.

¹²³ International Co-Prosecutor’s Appeal (D266/2), paras 2, 19-190.

¹²⁴ International Co-Prosecutor’s Appeal (D266/2), paras 20-34.

¹²⁵ International Co-Prosecutor’s Appeal (D266/2), paras 35-62.

¹²⁶ International Co-Prosecutor’s Appeal (D266/2), paras 63-82.

Fourthly, he claims that the Closing Order (Dismissal) errs in law and fact in its treatment of coercion, duress, and superior orders when determining the level of MEAS Muth's responsibility for the crimes committed.¹²⁷

Fifthly, the International Co-Prosecutor submits that the Closing Order (Dismissal) errs in law and fact in its treatment of direct participation in, and proximity to, crimes when determining the level of MEAS Muth's responsibility for the crimes committed.¹²⁸

Sixthly, he contends that the Closing Order (Dismissal) reaches several erroneous factual findings on aspects that play a key role in the assessment of whether MEAS Muth falls within the ECCC's personal jurisdiction.¹²⁹

Seventhly, the International Co-Prosecutor argues that the Closing Order (Dismissal) errs in fact in its treatment of victims.¹³⁰

Lastly, he claims that the Closing Order (Dismissal) errs in law by implying that the jurisdictional restriction delineated by the category of "those who were most responsible" could only ever apply to KAINING Guek Eav *alias* Duch.¹³¹

The International Co-Prosecutor further submits that, in the event the Pre-Trial Chamber is unable to reach a supermajority for decisions on the Appeals or denies all these Appeals, the case proceed to trial on the basis of the Closing Order (Indictment).¹³²

For all these reasons, the International Co-Prosecutor requests for relief that the Pre-Trial Chamber reverse the Closing Order (Dismissal), find that MEAS Muth was among those who were "most responsible", and send him for trial based on the Closing Order (Indictment).¹³³

VI- CONCLUSION

The Pre-Trial Chamber has provided this brief report on the case and the current appeal proceedings in the interests of justice and transparency, while recognising the principle of maintaining confidentiality at the pre-trial stage. This report will be placed on the Case File and will be made

¹²⁷ International Co-Prosecutor's Appeal (D266/2), paras 83-111.

¹²⁸ International Co-Prosecutor's Appeal (D266/2), paras 112-134.

¹²⁹ International Co-Prosecutor's Appeal (D266/2), paras 135-154.

¹³⁰ International Co-Prosecutor's Appeal (D266/2), paras 155-170.

¹³¹ International Co-Prosecutor's Appeal (D266/2), paras 171-190.

¹³² International Co-Prosecutor's Appeal (D266/2), paras 191-198.

¹³³ International Co-Prosecutor's Appeal (D266/2), paras 3, 203. *See also* paras 199-202.

available to the public on the ECCC’s website.

Phnom Penh, 27 November 2019

Pre-Trial Chamber

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