

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/07-09-2009-ECCC/OCIJ (PTC35) **Party Filing:** The Defence for MEAS Muth**Filed to:** Co-Investigating Judges**Original language:** ENGLISH**Date of document:** 11 May 2021**CLASSIFICATION****Classification of the document  
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**MEAS MUTH'S RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S  
REQUEST TO THE CO-INVESTIGATING JUDGES TO FORWARD CASE FILE  
003 TO THE TRIAL CHAMBER**

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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 to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber.<sup>1</sup> The ICP’s Request is inadmissible and should be denied.

## I. PROLEGOMENA

1. After 16 months of deliberation,<sup>2</sup> the Pre-Trial Chamber unanimously declared that the Co-Investigating Judges violated the legal framework of the ECCC by intentionally deciding to evade the dispute resolution mechanism and to illegally issue two conflicting Closing Orders “with the full knowledge of the problems that their actions would be causing for the ensuing proceedings within the ECCC legal system.”<sup>3</sup> Notably disregarding the Supreme Court Chamber’s ruling in Case 004/2, the Pre-Trial Chamber provides neither cogent reasons to depart from, nor explanations for declining to avail itself to, the remedies outlined by the Supreme Court Chamber, which, incidentally, echoed those identified by the Pre-Trial Chamber.<sup>4</sup> Sparing no opportunity to pointlessly belittle and devalue the Co-Investigating Judges and the Supreme Court Chamber Judges, the International Pre-Trial Chamber Judges ungraciously and unnecessarily indulge in injudicious, intemperate, and inappropriate language and tone,<sup>5</sup> attempting, it would seem, to tactically divert attention from and give cover to the Pre-Trial Chamber’s profound failure to perform its “judicial duty to pronounce, based on the law, a decision on [the] matter in dispute.”<sup>6</sup> Uncannily, the impasse created by the Pre-Trial Chamber – despite having generously conferred itself 16 months to deliberate, decide, and copy-paste from its Case 004/2 Considerations – portends a *déjà vu* of indecisiveness and intransigence, which, when the blame-fixing subsides, will, as it must, result in the archiving of the Case File – as was done in Case 004/2.

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<sup>1</sup> International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 19 April 2021, D270 (“ICP’s Request”).

<sup>2</sup> Considerations on Appeals Against Closing Orders, 7 April 2021, D266/27 & D267/35 (“Case 003 PTC Considerations”), para. 90, p. 41. Oral arguments on the Appeals were held *in camera* on 27-29 November 2019.

<sup>3</sup> Case 003 PTC Considerations, paras. 90, 108.

<sup>4</sup> *Case of AO An*, 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutor’s 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”), para. 61, quoting *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), Considerations on Appeals Against Closing Orders, 19 December 2019, D359/24 & D360/33 (“Case 004/2 PTC Considerations”), para. 30.

<sup>5</sup> Case 003 PTC Considerations, paras. 139-41, 143-44, 146-48, 154, 160-61, 260, 273-75, 277-80, 282-283, fn. 594.

<sup>6</sup> Case 004/2 PTC Considerations, para. 122.

2. “[C]ondemn[ing] once again the legal predicament that the Co-Investigating Judges’ unlawful actions precipitated upon yet another ECCC proceeding,”<sup>7</sup> the Pre-Trial Chamber acidly intimates (as in Case 004/2) that the Co-Investigating Judges deliberately and calculatedly perverted the course of justice, since “they may have intended to defeat the default position and frustrate the authority of the Pre-Trial Chamber”<sup>8</sup> by agreeing to simultaneously issue separate and conflicting Closing Orders. Yet, other than vexingly venting, the Pre-Trial Chamber provides no legal basis for claiming ill-intent by the Co-Investigating Judges who, based on their analysis of the ECCC framework and their independent judicial discretion, opted to register their disagreements internally as provided by Rule 72(1) and to issue separate and conflicting Closing Orders, as opposed to seizing the Pre-Trial Chamber of their disagreement.<sup>9</sup>
3. Unjustifiably, the Pre-Trial Chamber accused the Co-Investigating Judges of deliberately committing a series of inappropriate and ill-conceived actions during the investigative process culminating in the illegal issuance of the two conflicting Closing Orders,<sup>10</sup> thus affecting their seemingly intent to frustrate the ends of justice.<sup>11</sup> Interpreting Rule 67(1) to unambiguously provide for a single Closing Order *either* indicting the Charged Person *or* dismissing the case,<sup>12</sup> the Pre-Trial Chamber found that the Co-Investigating Judges “committed a gross error of law in this case by finding that the ECCC legal framework permits the issuance of separate and opposing Closing Orders,”<sup>13</sup> “undermin[ing] the very foundations of the hybrid system and proper functioning of the ECCC.”<sup>14</sup> Accepting that the Co-Investigating Judges misinterpreted Rule 67(1), insinuating bad faith in executing their judicial functions and in undermining the ECCC’s hybrid system is fantastical.

<sup>7</sup> Case 003 PTC Considerations, para. 109.

<sup>8</sup> Case 003 PTC Considerations, para. 108.

<sup>9</sup> Order Dismissing the Case Against MEAS Muth, 28 November 2018, D266, para. 7; Closing Order, 28 November 2018, D267, para. 19. Notably, the Pre-Trial Chamber was requested to provide its understanding of the law: (a) should the Co-Investigating Judges disagree on whether to dismiss the case or indict and (b) should the disagreement come before the Pre-Trial Chamber and the Pre-Trial Chamber fails to achieve a supermajority when deciding on the disagreement. The Pre-Trial Chamber found that it has “no jurisdiction to deal with hypothetical matters or provide advisory opinions.” *Case of YIM Tith*, 004/07-09-2009-ECCC/OCIJ (PTC11), Decision on YIM Tith’s Appeal Against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, paras. 4, 8.

<sup>10</sup> Case 003 PTC Considerations, paras. 102-109.

<sup>11</sup> Case 003 PTC Considerations, para. 108.

<sup>12</sup> Case 003 PTC Considerations, para. 103.

<sup>13</sup> Case 003 PTC Considerations, para. 88. *See also* para. 105, where the Pre-Trial Chamber claimed that the Co-Investigating Judges committed “manifest errors of law on which their reasoning is based.”

<sup>14</sup> Case 003 PTC Considerations, para. 106.

4. Unsupportedly, the Pre-Trial Chamber imprudently claimed that the Co-Investigating Judges “were aware of the difficulties their actions would be causing not only on appeal, but beyond the pre-trial and appellate stage of the Case 003 proceedings,”<sup>15</sup> yet wantonly refrained from exercising their judicial duty to decide matters of which they were seized.<sup>16</sup> Poppycock. The Co-Investigating Judges, as independent judges, were entitled to apply the law as they understood it and to select their course of actions accordingly. While the Pre-Trial Chamber may have disagreed with the legal reasoning for issuing conflicting Closing Orders, nothing in the legal authority cited by the Pre-Trial Chamber shows that the Co-Investigating Judges were in wanton disregard of explicit and uncontestable ECCC legal provisions or rules or acted with malfeasance.
5. Trivially, the Pre-Trial Chamber found it “disturbing that the conflicting Closing Orders were issued on the same day in only one language with a joint declaration by the two Co-Investigating Judges that they agreed on the issuance of the separate and conflicting Closing Orders,”<sup>17</sup> while inaccurately claiming that the Co-Investigating Judges offered “remarkably minimal reasoning, simply recalling two of their prior Decisions.”<sup>18</sup> Those two prior decisions, “reproduc[ed] [in] large excerpts”<sup>19</sup> by the Pre-Trial Chamber, succinctly set out the Co-Investigating Judges’ reasoning: the ECCC framework does not compel the Co-Investigating Judges to seize the Pre-Trial Chamber of their disagreements. While the Pre-Trial Chamber may disagree with the Co-Investigating Judge’s reasoning, nothing suggests the abominable accord as portrayed in its Considerations.
6. Irrationally, the Pre-Trial Chamber found that the Co-Investigating Judges’ “errors have jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations,”<sup>20</sup> and that more than a mere violation of the ECCC framework, “the Co-Investigating Judges’ *mauvaises pratiques* may amount to a denial of justice,” since the Pre-Trial Chamber “[was] unable to exclude that they may have intended to defeat the default position and frustrate the authority of the Pre-Trial Chamber.”<sup>21</sup> Since when is

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<sup>15</sup> Case 003 PTC Considerations, para. 107.

<sup>16</sup> Case 003 PTC Considerations, para. 105.

<sup>17</sup> Case 003 PTC Considerations, para. 107.

<sup>18</sup> Case 003 PTC Considerations, para. 106.

<sup>19</sup> Case 003 PTC Considerations, paras. 85-87 (internal citations omitted).

<sup>20</sup> Case 003 PTC Considerations, para. 108.

<sup>21</sup> Case 003 PTC Considerations, para. 108.

adhering to interpretation of rules derived from a judicially independent analysis reflective of *mauvaises pratiques* – a characterization intended to affect professional injury?

7. Absurdly, the Pre-Trial Chamber continued in the same vein by claiming that “more than an isolated example, [the Co-Investigating Judges’] actions in this case confirm a pattern that the Co-Investigating Judges have apparently adopted in dealing with all the final cases on the ECCC’s docket,”<sup>22</sup> and “not[ing] with regret that never, to its knowledge, has there been criminal cases in the history of other national and international legal systems that concluded with the simultaneous issuance of two contrary decisions emanating from one single judicial office.”<sup>23</sup> Had the ECCC adopted a run-of-the-mill French-modeled civil law procedure, the Pre-Trial Chamber’s claim might have traction. But seeing that the ECCC is both hybrid and *sui generis*, a margin of error in less-than precise Internal Rules is expected. By concluding intentional gross and manifest legal errors the Pre-Trial Chamber oversteps.
8. Superfluously, and with no small dose of irony, after unanimously holding the issuance of contradictory Closing Orders illegal, the Pre-Trial Chamber spilt into their respective National/International camps to, unsurprisingly, give preference to the Closing Order of their choice.<sup>24</sup> Being aware of its powers to investigate and issue a revised Closing Order, the Pre-Trial Chamber, in disregard of the Supreme Court Chamber’s ruling, declined to carry out its functions by “provid[ing] an actual ruling” on the consequence of declaring the issuance of the two Closing Orders illegal.<sup>25</sup>
9. As in Case 004/2, though taking a different tack, the National Pre-Trial Chamber Judges found that Case File 003 “should be held at the ECCC archives.”<sup>26</sup> They reasoned that the Pre-Trial Chamber cannot apply the dispute resolution mechanism in Rule 72 because the Co-Investigating Judges agreed not to refer their disagreement to the Pre-Trial Chamber, “the two Closing Orders are of the same value and stand valid”<sup>27</sup> in light of Rule 77(13), the Co-Investigating Judges enjoy equal status, and according to the principle of the

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<sup>22</sup> Case 003 PTC Considerations, para. 108.

<sup>23</sup> Case 003 PTC Considerations, para. 109.

<sup>24</sup> Case 003 PTC Considerations, paras. 111-18; 119-358.

<sup>25</sup> SCC Case 004/2 Decision, para. 61.

<sup>26</sup> Case 003 PTC Considerations, para. 118.

<sup>27</sup> NOTE: There appears to be a translation discrepancy in paragraph 115. According to an unofficial translation, it should read “the two Closing Orders are of the same value and same validity.” It is unclear as to whether the National Pre-Trial Chamber Judges held that the two Closing Orders stand, despite their illegal issuance, or if they held that they are of the same *value* under the ECCC framework.

presumption of innocence, “the law does not allow the Pre-Trial Chamber to rule that the act of any Co-Investigating Judge has preponderance,”<sup>28</sup> since “the two Closing Orders maintain the same value.”<sup>29</sup>

10. Similar to their position in Case 004/2, despite claiming perceived ill-intent and unsound flaws, despite condemning the International Co-Investigating Judge’s agreement to issue his Indictment simultaneously with his national colleague’s Dismissal Order, and despite declaring the issuance of two Closing Orders to be illegal, the International Pre-Trial Chamber Judges pronounced the International Co-Investigating Judge’s Indictment valid and the National Co-Investigating Judge’s Dismissal Order *ultra vires*.<sup>30</sup> Despite the discretionary language in Rule 72(2), the International Pre-Trial Chamber Judges reasoned that the Co-Investigating Judges were required to resort to the dispute resolution mechanism prior to issuing the Closing Orders.<sup>31</sup>
11. The International Pre-Trial Chamber Judges pronounced that the “principle of continuation of judicial investigation governs the issue at hand,” citing no legal authority suggesting that this principle extends past the Closing Order stage.<sup>32</sup> Claiming that the National Co-Investigating Judge’s “proposal to issue a dismissal order” is “nothing more than a different characterization of the National Co-Investigating Judge’s disagreement on the issuance of the Indictment” (despite the National Co-Investigating Judge issuing a Dismissal *Order*, and not merely proposing the dismissal),<sup>33</sup> the International Pre-Trial Chamber Judges conjured up a slight-of-hand fix: to effectively treat the two Closing Orders as registered disagreements as if they had been filed under Rule 72(2) – purging the illegality and triggering the default position in Rule 72(4)(d) to find that only the Indictment stands.<sup>34</sup>
12. The International Pre-Trial Chamber Judges fervidly attacked the International Co-Investigating Judge for no discernable profit beyond perhaps the seemingly cold satisfaction derived from self-righteously raising *sua sponte* innocuous matters, such as:<sup>35</sup>

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<sup>28</sup> Case 003 PTC Considerations, paras. 113-16.

<sup>29</sup> Case 003 PTC Considerations, para. 117.

<sup>30</sup> Case 003 PTC Considerations, para. 259.

<sup>31</sup> Case 003 PTC Considerations, paras. 256-58.

<sup>32</sup> Case 003 PTC Considerations, para. 256.

<sup>33</sup> Case 003 PTC Considerations, paras. 256-58.

<sup>34</sup> Case 003 PTC Considerations, paras. 258-62.

<sup>35</sup> Regrettably, the Co-Lawyers feel compelled to recall, yet again, the International Pre-Trial Chamber Judges predilection for embracing motifs design to gratuitously impugn, such as, latching on to issues neither determinative of nor essential to the appeals for the sole purpose of maligning the Co-Investigating Judges, but

- a. Arbitrarily complying with the Rule 66(1) notice of conclusion, depriving the parties of the 15-day period to file investigative requests – even though neither party appealed nor sought reconsideration of the second notice of conclusion.<sup>36</sup>
- b. Not being diligent in communicating the Case File and creating excessive delay by waiting two months after the issuance of the second Rule 66(1) notice to forward the Case File to the Co-Prosecutors<sup>37</sup> – even though the Co-Prosecutors have electronic access to the Case File and were not impeded in the drafting of their Final Submissions.
- c. Failing to issue his Indictment within a reasonable time – despite the Co-Investigating Judges completing their Closing Orders within eight months from the Defence’s response to the Final Submission<sup>38</sup> and the Pre-Trial Chamber taking 16 months to deliver its Considerations, without investigating the case, as it is empowered.<sup>39</sup>
- d. Erroneously “readopting the hierarchical and formalistic categorization of evidence based on its provenance, rather than its substance”<sup>40</sup> – even though the International Co-Investigating Judge assessed all the evidence on the Case File, did not create a hierarchy or exclude categories of evidence based on provenance, and freely evaluated the probative value of the evidence on a case-by-case basis, reasonably considering well-established jurisprudence regarding the types of evidence.<sup>41</sup>
- e. Failing to order Mr. MEAS Muth’s pre-trial detention – even though Mr. MEAS Muth abided by the terms of his assurances to the International Co-Investigating Judge provided when he was charged.<sup>42</sup>

13. The National Co-Investigating Judge also did not escape the International Pre-Trial Chamber Judges’ unwarranted vituperation, finding that the Dismissal Order is “an attempt

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especially the International Co-Investigating Judge. The unwarranted and unattractive innuendo and recriminations in this case reminiscent of Cases 004/1 and 004/2. *See* MEAS Muth’s Request for Leave to Supplement his Response to the International Co-Prosecutor’s Final Submission, 6 August 2018, D256/12, paras. 11, 16-19, fn. 39; MEAS Muth’s Supplement to his Appeal against the International Co-Investigating Judge’s Indictment, 5 May 2020, D267/27 (“MEAS Muth’s Supplement to his Appeal”), paras. 13-15.

<sup>36</sup> Case 003 PTC Considerations, paras. 139-41.

<sup>37</sup> Case 003 PTC Considerations, paras. 142-43.

<sup>38</sup> Case 003 PTC Considerations, para. 147.

<sup>39</sup> Case 003 PTC Considerations, para. 130.

<sup>40</sup> Case 003 PTC Considerations, para. 156.

<sup>41</sup> Closing Order, 28 November 2018, D267, paras. 118-48. This is but another example of the Pre-Trial Chamber’s deliberate misapprehensions or misinterpretations of the International Co-Investigating Judge’s Closing Order that were neither determinative of nor essential to the Appeals. *See Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Closing Order (Indictment), 16 August 2018, D360, para. 37.

<sup>42</sup> Case 003 PTC Considerations, paras. 345-58.

to avoid the compulsory disagreement procedure,” is “a brazen attempt to entirely circumvent this essential and mandatory requirement, thwarting the ECCC founding legal texts,” and is “*ultra vires* .... constitut[ing] an attempt to defeat the default position enshrined in the ECCC framework”<sup>43</sup> – even though both Co-Investigating Judges agreed not to seize the Pre-Trial Chamber of their disagreement and to simultaneously issue conflicting Closing Orders.

14. Both Co-Investigating Judges were needlessly chastised for violating the Practice Direction on Filing Documents and “instigat[ing] further undue delays in the whole proceedings of Case 003” by filing their Closing Orders in one language only<sup>44</sup> – even though by doing so, the Co-Investigating Judges provided the parties additional time to prepare their appellate arguments, since the timelines for appeals run from the date of notification in both languages.<sup>45</sup>
15. While the Supreme Court Chamber outlined the remedies that were available to the Pre-Trial Chamber in resolving the illegal Closing Orders based on the Pre-Trial Chamber’s own pronouncements – issuing a revised Closing Order and investigating the case itself<sup>46</sup> – the International Pre-Trial Chamber Judges made no attempt to follow these remedies. Instead, they calculatedly chose to attack the Supreme Court Chamber for:
  - a. Making a “notable leap of reasoning” by “appear[ing] to equivocate the Pre-Trial Chamber’s holding that the Co-Investigating Judges’ course of action in issuing the Closing Orders was illegal with the conclusion that the Closing Orders were ‘void’ as such”<sup>47</sup> – even though according to the civil law rules of interpretation, the applicable Cambodian criminal procedure, and procedural rules established at the international level, when Judges act *illegally* in issuing a Closing Order, the legal consequence is that the Closing Order is null and void.<sup>48</sup>
  - b. Making a “sweeping conclusion without a reasoned demonstration” as to why the procedural illegality of the Co-Investigating Judges’ actions in producing the Closing Orders “would result in the complete vitiation of the two Closing Orders in question”

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<sup>43</sup> Case 003 PTC Considerations, paras. 260, 262.

<sup>44</sup> Case 003 PTC Considerations, para. 148.

<sup>45</sup> Practice Direction on Filing Documents before the ECCC, Art. 8.5.

<sup>46</sup> SCC Case 004/2 Decision, para. 61, quoting Case 004/2 PTC Considerations, para. 30.

<sup>47</sup> Case 003 PTC Considerations, para. 273.

<sup>48</sup> See MEAS Muth’s Supplement to his Appeal, para. 31.



because procedural errors must result in a “grossly unfair outcome in judicial proceedings” to lead to a reversal of a judgment<sup>49</sup> – even though the Closing Orders are not a “judgment” and even though the Pre-Trial Chamber found that this procedural illegality was “more than a mere violation of the fundamental principles of the ECCC framework,” “jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations” and “may have amounted to a denial of justice.”<sup>50</sup>

- c. “[C]raft[ing] as a convenient pretext to bring the proceedings to an end” the “alleged administrative prerequisites of notification and transmission”<sup>51</sup> – even though under the ECCC framework, notification and transmission of the Case File are required to enable the Trial Chamber to be seized and take any action and the Pre-Trial Chamber did not notify the Trial Chamber of its decision.<sup>52</sup>
- d. Finding it unnecessary “to analyse the body text of the Pre-Trial Chamber’s actual decision to clarify ... whether the Pre-Trial Chamber unanimously found both Closing Orders null and void”<sup>53</sup> – even though nothing in the common reasoning and disposition would lead a reasonable reader to conclude that both Closing Orders are valid.
- e. Arbitrarily ending Case 004/2 with no Closing Order, which “does not bring legal certainty, clarity, nor finality”<sup>54</sup> – even though the Pre-Trial Chamber chose not to avail itself to any of the remedies available under the law and chose to leave the case in judicial limbo.
- f. Making its decision without reviewing the evidence “through termination instruction in the nature of an executive fiat”<sup>55</sup> – even though the questions submitted by the ICP in her Immediate Appeal solely concerned legal issues.
- g. Misreading the Pre-Trial Chamber’s unanimous decision on the illegal accord between the Co-Investigating Judges “to evade the disagreement settlement procedure,” by

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<sup>49</sup> Case 003 PTC Considerations, fn. 609.

<sup>50</sup> Case 003 PTC Considerations, para. 108.

<sup>51</sup> Case 003 PTC Considerations, fn. 594.

<sup>52</sup> SCC Case 004/2 Decision, para. 49.

<sup>53</sup> Case 003 PTC Considerations, para. 274.

<sup>54</sup> Case 003 PTC Considerations, para. 279.

<sup>55</sup> Case 003 PTC Considerations, para. 280.

failing to appreciate that the investigation proceeds<sup>56</sup> – even though there remained no valid Closing Order (Indictment) on which to proceed once declaring them illegal.

- h. “[I]nsinuat[ing] that the termination of the proceedings was appropriate considering the thirteen-year long investigations ... [which] cannot serve as a valid legal basis since the ECCC legal framework does not proscribe a rigid time limit after which the Supreme Court Chamber can close a case by executive order”<sup>57</sup> – even though all accused at the ECCC are afforded the right to be tried “without undue delay.”<sup>58</sup>

16. The Co-Investigating Judges are now called upon by the ICP to take all necessary administrative actions to direct the Court Management Section (“CMS”) “to forward the Considerations, together with the Indictment, to the Trial Chamber to allow it to access the remaining Case File electronically.”<sup>59</sup> Immediately after this Request, the ICP sought an extension of time to file her Rule 80 list of witnesses and experts,<sup>60</sup> with the Trial Chamber Greffier advising the parties that “the Trial Chamber has not been notified of the ‘Considerations on Appeals against the Closing Orders’ and is not in receipt of the case file. Therefore, the Trial Chamber does not accept any communications from the parties, (see also IR 77/14).”<sup>61</sup>

17. *Déjà vu all over again.*<sup>62</sup>

## II. ADMISSIBILITY

18. The ICP’s Request is inadmissible because: (a) both Closing Orders are null and void, and thus there is no Indictment on which to proceed; (b) the International Pre-Trial Chamber Judges provided no cogent reasons or legal authority for departing from the Supreme Court Chamber’s analysis; (c) the Pre-Trial Chamber remains seized of the case and is responsible for forwarding the Case File to the Trial Chamber; (d) the Pre-Trial Chamber did not find by supermajority that the Indictment is valid and did not notify the Trial Chamber of its Considerations pursuant to Rule 79(1).

<sup>56</sup> Case 003 PTC Considerations, para. 275.

<sup>57</sup> Case 003 PTC Considerations, fn. 621.

<sup>58</sup> Agreement, Arts. 12(2), 13(1); Establishment Law, Art. 35 *new(c)*; Rule 21(4).

<sup>59</sup> ICP’s Request, para. 1.

<sup>60</sup> Email from Brenda J. Hollis, entitled “Request for extension of time to file Rule 80 list of witnesses and experts,” 22 April 2021.

<sup>61</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>62</sup> Attributed to American baseballer Yogi Berra.

19. Both Closing Orders are null and void. The Supreme Court Chamber held that the legal effect of the Pre-Trial Chamber's unanimous disposition that "DECLARES that the Co-Investigating Judges' issuance of Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC" is that both Closing Orders are null and void.<sup>63</sup> The Supreme Court Chamber reasoned that the Closing Orders, being "the results of *unlawful and illegal actions*" are void as such and cannot create a lawful consequence or result,<sup>64</sup> even though it "accept[ed] that the objective of the disagreement mechanism is to 'prevent a deadlock from derailing the proceedings from moving to trial.'"<sup>65</sup> As to the question of "whether the case can go to trial in the absence of a valid Closing Order," the Supreme Court Chamber stated: "[t]he answer is an unequivocal no."<sup>66</sup>
20. No cogent reasons for departing. The International Pre-Trial Chamber Judges provide no cogent reasons or legal authority to depart from the Supreme Court Chamber's ruling in Case 004/2. The Supreme Court Chamber, noting the Pre-Trial Chamber's unanimous findings in Case 004/2 that it "has the power to issue a new or revised closing order" and "when seised of a dismissal order as a consequence of an appeal, shall investigate the case by itself,"<sup>67</sup> found that "these explicit findings would lead a reasonable reader to conclude that the Pre-Trial Chamber was aware of its powers to go beyond declaring the illegality of the situation relating to the issuance of two Closing Orders and to issue its own valid closing order."<sup>68</sup> Thus, if the Pre-Trial Chamber was unaware of the options available to it when issuing its Considerations in Case 004/2 – although a "reasonable reader" would have concluded otherwise based on the Pre-Trial Chamber's own pronouncements – no explanations were offered for deliberately rejecting any of the options available to it as expressly informed by the Supreme Court Chamber.
21. While the Pre-Trial Chamber sanctimoniously attacked the Co-Investigating Judges for not following the available procedure, the International Pre-Trial Chamber Judges went even further by misinterpreting the Supreme Court Chamber's Decision and failing to:
- a. Comprehend that the civil law rules of interpretation, the applicable Cambodian criminal procedure, and procedural rules established at the international level provide

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<sup>63</sup> SCC Case 004/2 Decision, para. 53.

<sup>64</sup> SCC Case 004/2 Decision, paras. 67, 71(v).

<sup>65</sup> SCC Case 004/2 Decision, para. 68.

<sup>66</sup> SCC Case 004/2 Decision, para. 68.

<sup>67</sup> SCC Case 004/2 Decision, para. 61, citing Case 004/2 Considerations, paras. 40-42.

<sup>68</sup> SCC Case 004/2 Decision, para. 61.

that when Judges do not have the authority to issue a particular decision, that decision is null and void;<sup>69</sup>

- b. Distinguish the nature of a Closing Order from a judgment, citing the inapposite standard of review for procedural errors on appeal;<sup>70</sup>
- c. Note where in the common part of the reasoning anything to the effect that either Closing Order is valid and stands;<sup>71</sup>
- d. Comprehend the legal (as opposed to factual) nature of the issues that were presented in the ICP's Immediate Appeal and the Supreme Court Chamber's standard of review for such errors on appeal;<sup>72</sup>
- e. Acknowledge the Charged Persons' right under Rule 21(4) to have proceedings "brought to a conclusion within a reasonable time";<sup>73</sup> and
- f. Comprehend the notification and transmission procedures as provided in the ECCC framework.<sup>74</sup>

22. The Pre-Trial Chamber remains seized of the case. The Pre-Trial Chamber is seized of the case and is responsible for transferring the Case File to the Trial Chamber. With the issuance of the Closing Orders, the Co-Investigating Judges immediately became *functus officio*.<sup>75</sup> With the filing of an appeal against the Closing Orders, the Co-Investigating Judges are "no longer seised of the case in dispute and thereby divested of any authority over all aspects of the investigation of the case."<sup>76</sup> The entire Case File is forwarded to the Pre-Trial Chamber, which, unarguably, "gains authority over the whole case file,"<sup>77</sup> thus having the "final jurisdiction of the investigation, including the jurisdiction over any request related to the pre-trial stage after the Office of the Co-Investigating Judges is

<sup>69</sup> See MEAS Muth's Supplement to his Appeal, para. 31.

<sup>70</sup> Case 003 PTC Considerations, fn. 609.

<sup>71</sup> Case 003 PTC Considerations, para. 274.

<sup>72</sup> Case 003 PTC Considerations, para. 280.

<sup>73</sup> Case 003 PTC Considerations, para. 275. See also Rule 21(4).

<sup>74</sup> SCC Case 004/2 Decision, para. 49.

<sup>75</sup> Case 003 PTC Considerations, para. 132, citing *Case of IM Chaem*, 004/1/07-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 ("Case 004/1 PTC Considerations"), para. 33.

<sup>76</sup> Case 003 PTC Considerations, para. 126.

<sup>77</sup> Case 003 PTC Considerations, paras. 126, 132.

unseised.”<sup>78</sup> “A Trial Chamber is lawfully seized of a case where the Pre-Trial Chamber transmits the relevant Case File in accordance with the ECCC legal framework.”<sup>79</sup>

23. Lacking a supermajority, the Indictment cannot be forwarded. The Pre-Trial Chamber did not find by supermajority that the Indictment is valid and accordingly, did not notify and transmit the Case File to the Trial Chamber under Rule 79(1). While the ICP claims that there was a supermajority finding that the Indictment is valid,<sup>80</sup> there is nothing in the common reasoning and disposition to this effect. The Supreme Court Chamber has held that Pre-Trial Chamber Judges’ opinions on the validity of the separate and conflicting Closing Orders “was undoubtedly a redundant exercise” since it was “irrelevant that the Pre-Trial Chamber did not attain the supermajority required in the adjudication of the parties’ appeals against the conflicting Closing Orders as this part of the Considerations was now superfluous.”<sup>81</sup>

24. Thus, since both Closing Orders are null and void, since there are no cogent reasons to depart from the Supreme Court Chamber’s ruling in Case 004/2, since the Pre-Trial Chamber remained seized of the case and responsible for forwarding the Case File to the Trial Chamber, and since the Pre-Trial Chamber did not uphold the Indictment by supermajority, the Co-Investigating Judges should find the ICP’s Request inadmissible.

### III. RESPONSE TO THE ICP’S SUBMISSIONS

25. The ICP erroneously claims that the Pre-Trial Chamber upheld the Indictment by supermajority, with the Trial Chamber automatically becoming seized of Case 003 upon the issuance of their Considerations.<sup>82</sup> The President of the Pre-Trial Chamber informed the CMS and Directors of the Administration following the Considerations in Case 004/2, “[o]nly the joint disposition part unanimously decided and signed by all 5 judges shall have applicable effect. The personal opinions of each judge shall have no applicable effect.”<sup>83</sup> The joint disposition does not lead a reasonable reader to conclude that the Pre-Trial Chamber upheld the Indictment by supermajority.

<sup>78</sup> Case 003 PTC Considerations, para. 132.

<sup>79</sup> SCC Case 004/2 Decision, para. 71(i).

<sup>80</sup> ICP’s Request, paras. 2, 5, 12.

<sup>81</sup> SCC Case 004/2 Decision, para. 53.

<sup>82</sup> ICP’s Request, para. 12.

<sup>83</sup> *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC 60), Interoffice Memorandum: Clarification on the decision in the case 004/2, 29 January 2020, D359/34.

26. The ICP erroneously claims in a footnote that the Trial Chamber is automatically seized since the Indictment was not overturned by supermajority, and the Co-Investigating Judges are thus obliged to forward the Considerations, Indictment, and remaining Case File.<sup>84</sup> Even if the Co-Investigating Judges find that *neither* Closing Order was overturned by Pre-Trial Chamber supermajority, both Closing Orders are *null and void* according to the Supreme Court Chamber.<sup>85</sup> And even if the Co-Investigating Judges find cogent reasons to depart from the Supreme Court Chamber's ruling, both Closing Orders are of equal value since neither was overturned by Pre-Trial Chamber supermajority, and the principle of *in dubio pro reo* mandates that the Dismissal Order prevails over the Indictment.<sup>86</sup>
27. The ICP erroneously claims without authority that the Co-Investigating Judges have primary responsibility for transferring the Case File.<sup>87</sup> The ECCC framework does not provide that the Co-Investigating Judges are responsible for forwarding the Case File. "A Trial Chamber is lawfully seized of a case where the *Pre-Trial Chamber* transmits the relevant Case File in accordance with the ECCC legal framework."<sup>88</sup>
28. The ICP erroneously claims that since the Co-Investigating Judges were notified of the Considerations, they "can and must therefore apply IR 69(2)(a) *mutatis mutandis*" to direct the CMS to forward the case to the Trial Chamber.<sup>89</sup> The sources cited by the ICP belie her claim. The International Pre-Trial Chamber Judges opined that the Co-Investigating Judges "are *functus officio* ... except for the administrative functions *explicitly set forth in the ECCC framework*."<sup>90</sup> Rule 69(2)(a) *explicitly* provides that "[w]here no appeal is filed against a Closing Order" and if an Indictment is issued, the Co-Investigating Judges shall forward the Case File to the Trial Chamber.<sup>91</sup> Considering that multiple appeals were filed against the Closing Orders in Case 004/2, the International Pre-Trial Chamber Judges found

<sup>84</sup> ICP's Request, fn. 18.

<sup>85</sup> SCC Case 004/2 Decision, paras. 53, 67.

<sup>86</sup> The Pre-Trial Chamber erred in law in holding that the principle of *in dubio pro reo* does not apply because the principle "stems from the presumption of innocence." Case 003 PTC Considerations, para. 77. The principle of *in dubio pro reo* applies to all stages of the proceedings, including the pre-trial stage, and applies both to the facts and interpretation of legal provisions. Considering the flexibility of the term "most responsible," which "inherently requires a margin of appreciation," all doubt as to the ECCC's jurisdiction over Mr. MEAS Muth must be resolved in his favor. See MEAS Muth's Appeal Against the International Co-Investigating Judge's Indictment, 8 April 2019, D267/4 ("MEAS Muth's Appeal"), paras. 49-72, *esp.* para. 51.

<sup>87</sup> ICP's Request, para. 13.

<sup>88</sup> SCC Case 004/2 Decision, para. 71(i) (emphasis added).

<sup>89</sup> ICP's Request, para. 13.

<sup>90</sup> Case 003 PTC Considerations, para. 132.

<sup>91</sup> Rule 69(2)(a) (emphasis added).

that the Co-Investigating Judges were “misguided in basing their Order to Seal and Archive on Internal Rule 69(2)(b), even *mutatis mutandis*.”<sup>92</sup>

29. The ICP erroneously relies on the Pre-Trial Chamber’s assertions that it “performs the functions of the Cambodian Investigation Chamber” in claiming that “the procedure here comports with the procedure articulated in the Cambodian Code of Criminal Procedure (“CCCP”) in that regard.”<sup>93</sup> The Pre-Trial Chamber styles itself as an Investigation Chamber.<sup>94</sup> Though it devoted 23 paragraphs in the Case 004/2 Considerations to explain its powers and authority over the investigation stage, inexplicably it elected *not* to exercise those powers, *not* to investigate, and *not* to issue a revised Closing Order.<sup>95</sup> Notably, even after the Supreme Court Chamber reaffirmed the Pre-Trial Chamber’s powers to go beyond declaring the illegality and to issue its own valid Closing Order, the Pre-Trial Chamber opted for assured deadlocking tactics.<sup>96</sup>

30. The ICP erroneously claims that under Articles 282 and 250 of the CCCP, “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.”<sup>97</sup> To the contrary, Article 282 provides that the *investigation chamber*, not the investigating judge, is responsible for forwarding the case after investigating the case itself and issuing a revised Closing Order:

When the Investigation Chamber decides to continue to investigate the case by itself, it shall assign one of its members who shall have the power of an investigating judge to continue the investigation.... The Investigation Chamber shall close the investigation by a closing order. The provisions of Articles 247 (Closing Order) to 250 (Forwarding Case File for Trial) of this Code concerning closing orders issued by an investigating judge *shall apply to the closing order issued by the Investigation Chamber*.<sup>98</sup>

Also, meriting notice, the Pre-Trial Chamber did not avail itself of Article 282, opting instead *not* to investigate the case itself and *not* to issue a revised Closing Order.<sup>99</sup>

<sup>92</sup> Case 003 PTC Considerations, fn. 231.

<sup>93</sup> ICP’s Request, para. 14.

<sup>94</sup> Case 004/1 PTC Considerations, para. 22; Case 004/2 PTC Considerations, para. 30.

<sup>95</sup> Case 004/2 PTC Considerations, paras. 31-54; Case 003 PTC Considerations, paras. 43-49, 120-30.

<sup>96</sup> *See supra*, paras. 1-15.

<sup>97</sup> ICP’s Request, para. 14.

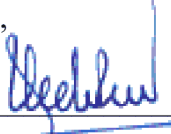
<sup>98</sup> Emphasis added.


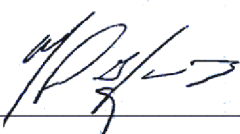
<sup>99</sup> *See supra*, paras. 1, 8, 15.

31. The ICP erroneously claims that Case File 003 must be forwarded to the Trial Chamber immediately in keeping with the Rules and CCCP provisions, “and to ensure compliance with the ‘overriding principle that the ECCC proceedings must comply with the legality, fairness and effectiveness requirements under the ECCC framework’ to achieve ‘effective criminal justice.’”<sup>100</sup> Neither the Rules nor CCCP provisions provide for the Co-Investigating Judges to forward the Case File to the Trial Chamber when the Pre-Trial Chamber has been seized of appeals, does not issue a revised Closing Order, and remains seized of the case since it stopped short of “providing an actual final ruling.”<sup>101</sup>
32. The ICP erroneously claims that the principle of continuation of judicial investigation or prosecution in the ECCC framework provides that one Co-Investigating Judge may act alone in forwarding the case to the Trial Chamber, especially where his colleague has retreated from continuing the investigation.<sup>102</sup> Even if there is a principle of continuation in the ECCC framework, Case 003 cannot go to trial absent a valid Indictment.<sup>103</sup> Alternatively, even if the Indictment is valid, so too is the Dismissal Order, which, under the principle of *in dubio pro reo*, must prevail.<sup>104</sup>
33. The ICP erroneously urges the Co-Investigating Judges to “discount [the] unrealistic, highly speculative probability” that ECCC cases that have not progressed to trial will be prosecuted in ordinary Cambodian courts.<sup>105</sup> “[A] massive impunity gap for crimes committed during the DK era ... must have *no* policy impact” on the Co-Investigating Judges’ exercise of discretion.<sup>106</sup>

**WHEREFORE**, the Co-Investigating Judges should **FIND** the ICP’s Request inadmissible and **DENY** the ICP’s Request.

Respectfully submitted,

  
 ANG Udom


  
 Michael G. KARNAVAS  
 Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **11** day of **May, 2021**

<sup>100</sup> ICP’s Request, para. 15 (internal citations omitted).

<sup>101</sup> SCC Case 004/2 Decision, para. 61.

<sup>102</sup> ICP’s Request, para. 16.

<sup>103</sup> SCC Case 004/2 Decision, para. 68.

<sup>104</sup> See MEAS Muth’s Appeal, paras. 49-72.

<sup>105</sup> ICP’s Request, para. 17.

<sup>106</sup> *Case of IM Chaem*, 004/1-07-09-2009-ECCC/OCIJ (PTC50), Closing Order (Reasons), 10 July 2017, D308/3, para. 25 (emphasis added).