

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 004/2/07-09-2009-ECCC-TC/SC**Party Filing:** The Defence for MEAS Muth**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 29 May 2020**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:**

MEAS MUTH'S REQUEST FOR LEAVE TO INTERVENE AND RESPOND TO THE INTERNATIONAL CO-PROSECUTOR'S IMMEDIATE APPEAL OF THE TRIAL CHAMBER'S EFFECTIVE TERMINATION OF CASE 004/2

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All Defence Teams in Cases 004/2, 003, and 004**All Civil Parties in Cases 004/2, 003, and 004**

Mr. MEAS Muth, through his Co-Lawyers (“The Defence”), hereby requests leave to intervene and respond to discrete arguments in the International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2 (“ICP’s Immediate Appeal”) which, invariably, will impact Case 003, as rightly acknowledged by the ICP in reasoning, in part, that the Supreme Court Chamber’s (“SCC”) intervention is required.¹ Granting Mr. MEAS Muth leave to intervene is not only fair and equitable, considering this will be his only opportunity to do so, but is in the interests of justice: it will promote legal certainty and judicial economy at no prejudice to the Co-Prosecutors or Civil Parties as it will assist all Parties in determining whether any future submissions are necessary and the proper forum for such submissions.

I. REQUEST FOR LEAVE TO INTERVENE

Intervention is permissible when a decision would affect Parties in other cases

1. Intervention by one Party in another Party’s case may be permitted “on a case-by-case basis where the interests of justice so dictate.”² “[T]he primary consideration in allowing an intervention is whether it is in the legitimate interests of the requesting entity, and denial thereof could cause them prejudice.”³
2. ECCC Chambers previously have permitted interventions when the issue under consideration is one that would affect Parties in other cases. The Pre-Trial Chamber (“PTC”) has invited submissions from Case 001 Civil Parties on an application made in Case 002, on the ground that determination of the application would lead to the issuance of general directions on the rights of unrepresented Civil Parties to address the PTC and thus would affect Civil Parties in both Cases 001 and 002.⁴
3. In Cases 003 and 004, the Co-Investigating Judges (“CIJs”) recognized the importance of having Parties’ submissions on the ECCC’s budgetary situation and its impact on Cases 003, 004, and 004/2 in addition to submissions from the Office of Administration before

¹ *Case of AO An*, 004/2/07-09-2009-ECCC-TC/SC, International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020, E004/2/1 (“ICP’s Immediate Appeal”), paras. 4, 48, 61.

² *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Decisions on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 12.

³ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Decisions on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 11.

⁴ *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC02), Decision on IENG Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch”, 6 October 2008, D99/3/19, para. 11, referring to those Civil Party directions, which appear to be confidential.

deciding whether to issue a permanent stay of the proceedings.⁵ The SCC should similarly recognize the impact its decision on the ICP's Immediate Appeal will have on Cases 003 and 004 and should permit submissions on this matter from *all* interested Parties.

4. Other international tribunals have permitted intervention when a decision would impact the interests of other Accused before the tribunal. At the Special Court for Sierra Leone ("SCSL"), the Appeals Chamber permitted Augustine Gbao and Moinina Fofana to intervene in *Prosecutor v. Kallon & Kamara* regarding the applicability of the Lomé Accord amnesty.⁶ The Appeals Chamber also permitted Moinina Fofana to intervene in two matters in *Prosecutor v. Norman* regarding the SCSL's jurisdiction to prosecute the Accused for child recruitment⁷ and the SCSL's judicial independence.⁸ Third party interventions in criminal appeals are common in domestic tribunals as well.⁹

The interests of justice and judicial economy favor granting leave to intervene

5. It is in the interests of justice¹⁰ to allow the Defence to intervene in Case 004/2 by filing written submissions in response to discrete arguments in the ICP's Immediate Appeal, which the Defence submits the SCC has no jurisdiction to hear and should reject.¹¹ Mr. MEAS Muth has a legitimate interest in this matter and should be permitted to intervene, lest he be prejudiced and his rights to a fair trial and due process be irreparably harmed.¹²

⁵ Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249, para. 85.

⁶ See *Prosecutor v. Kallon & Kamara*, SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, title page (listing Gbao and Fofana as interveners) and p. 3, noting that Gbao and Fofana had filed written submissions and were granted leave to intervene at the oral hearing.

⁷ See *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, title page (listing Fofana as an intervener), and p. 3, noting that Fofana had filed written submissions and was granted leave to intervene at the oral hearing.

⁸ *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), 13 March 2004, title page (listing Fofana as an intervener).

⁹ In Canada, for example, "[t]hird party intervention has become the norm rather than the exception in cases before the Supreme Court of Canada," with third party interventions being welcomed and encouraged so that the Court would have the widest variety of information, argument, and perspective available to it when making a decision. It is also becoming a regular feature before the House of Lords in the United Kingdom. Andrea C. Loux, *Hearing a 'Different Voice': Third Party Interventions in Criminal Appeals*, 53(1) CURRENT LEGAL PROBLEMS 449, 452-54 (2000).

¹⁰ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Decisions on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 12.

¹¹ See *infra* paras. 10-11.

¹² See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-SC, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 11. Articles 12(2) of the Agreement and Article 33 new of the Establishment Law require that proceedings before the ECCC be conducted in accordance with "international standards of justice, fairness, and due process of law," set out in the International Covenant on Civil and Political Rights, which is enshrined in the Cambodian Constitution. Rule 21 requires the SCC to interpret the ECCC framework so as to always safeguard Mr. MEAS Muth's fair trial rights. See MEAS MUTH'S REQUEST FOR LEAVE TO INTERVENE AND RESPOND TO THE INTERNATIONAL CO-PROSECUTOR'S IMMEDIATE APPEAL OF THE TRIAL CHAMBER'S EFFECTIVE TERMINATION OF CASE 004/2

Intervention is necessary because, as the ICP rightly points out, a decision on the legal issues raised by the ICP will carry *stare decisis* effect, “setting ... precedent for similar procedural circumstances likely to occur in Cases 003 and 004.”¹³

6. It is in the interests of judicial economy to permit the Defence to intervene. Intervention at this stage will reduce the number of submissions filed and hearings ultimately held before the SCC or any other Chamber, rendering the proceedings more efficient. The SCC would be best served by having all potential arguments before it now – including arguments from other Parties not in Case 004/2 – before a decision is taken.
7. Intervention by the Defence would not prejudice any Parties in Case 004/2. The Defence’s submissions would ensure that the SCC receives comprehensive arguments on all relevant points of law concerning the SCC’s jurisdiction to hear the ICP’s Immediate Appeal (a novel legal issue yet to be litigated), rather than repeating, supporting, or supplementing any of the arguments of the Parties in Case 004/2.¹⁴
8. Intervention by the Defence would not unduly delay the SCC’s disposition of the ICP’s Immediate Appeal. The ICP filed her Immediate Appeal on 4 May 2020, which was formally notified on 19 May 2020.¹⁵ The Defence has yet to be notified of any response by AO An. Receiving the Defence’s submissions now would not cause a need for significant time before the SCC begins to deliberate.

II. SCOPE OF THE PROPOSED INTERVENTION

9. Should leave to intervene be granted, the proposed intervention will be limited to responding to the ICP’s arguments as to whether: **a.** the SCC has jurisdiction to hear the

Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (2003) (“Agreement”), Art. 12(2); Establishment Law, Art. 33 new; Rule 21; International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Art. 14(1). Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999, Art. 31.

¹³ ICP’s Immediate Appeal, para. 61.

¹⁴ *C.f. Case of NUON Chea et al.*, 002/19-09-2007-ECCC-SC, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 14. The SCC denied intervention requests by the Case 003 and Case 004 Defence teams, finding that the content of the proposed interventions would inevitably be similar to the arguments of NUON Chea and KHIEU Samphan, given the parallel and overlapping nature of the interests to be represented and the extent the subject matter had already been litigated.

¹⁵ *Case of AO An*, 004/2/07-09-2009-ECCC-TC/SC, Appeal Register, 19 May 2020, E004/2.1.

ICP's Immediate Appeal;¹⁶ **b.** any applicable default position exists under the ECCC framework according to which the Trial Chamber ("TC") should have progressed the case to trial;¹⁷ and **c.** the TC erred in not exercising any inherent authority to address any of the issues before it.¹⁸

A. The SCC lacks jurisdiction to hear the ICP's Immediate Appeal

10. The ICP claims that the SCC has jurisdiction to hear her Immediate Appeal under Rule 104(4)(a) or pursuant to its inherent jurisdiction because: **a.** the TC was lawfully seized of Case 004/2;¹⁹ **b.** the TC's 3 April 2020 Press Statement,²⁰ (in)action, and physical return of documents constituted an appealable "decision" effectively terminating the proceedings,²¹ and **c.** the SCC is the "sole entity able to maintain the integrity of the proceedings and safeguard the interests of justice."²²

11. Should leave to intervene be granted, the Defence would submit that:

a. The TC was never seized of Case 004/2 because there is no Closing Order. The illegally issued Closing Orders are procedurally defective since they were issued in contravention of Rule 67(1).²³ Rule 67(2) does not contemplate the annulment or voiding of a Closing Order not issued in conformity with the ECCC framework because the drafters of the Rules could not have envisaged the "unprecedented simultaneous issuance of two separate and opposing Closing Orders in one single case."²⁴ Interpreting Rule 67(2), including its *lacuna*, according to civil law rules of interpretation and applicable Cambodian criminal procedure, and resorting to procedural rules established at the international level, support that the effect of the PTC's unanimous holding in Case 004/2 is that the illegal Closing Orders are, *ipso facto*, null and void.²⁵ The ECCC

¹⁶ ICP's Immediate Appeal, paras. 41-49.

¹⁷ ICP's Immediate Appeal, paras. 50-57.

¹⁸ ICP's Immediate Appeal, paras. 58-61.

¹⁹ ICP's Immediate Appeal, para. 41.

²⁰ ECCC Press Release, *Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An*, 3 April 2020, <https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> ("TC's 3 April 2020 Press Statement").

²¹ ICP's Immediate Appeal, paras. 42-44.

²² ICP's Immediate Appeal, para. 48.

²³ *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"), p. 61.

²⁴ Case 004/2 PTC Considerations, para. 88.

²⁵ See MEAS Muth's Supplement to His Appeal Against the International Co-Investigating Judge's Indictment, 5 May 2020, D267/27, paras. 26-32.

framework dictates that the procedurally defective Closing Orders must be annulled and removed from the Case File.²⁶

- b. The TC's 3 April 2020 Press Statement, (in)action, and return of the ICP's submissions is not an appealable "decision" terminating the proceedings under Rule 104(4). Since the TC was never seized of Case 004/2, it could not have terminated the proceedings when stating that "issuing a formal decision from the [TC] is not possible."²⁷ The National and International TC Judges could not agree as to whether the TC has inherent authority to address the issues raised in the Case 004/2 Parties' submissions and explicitly stated that its Press Statement had "no legal force."²⁸
- c. The SCC is not the "sole entity able to maintain the integrity of the proceedings and safeguard the interests of justice,"²⁹ such that it is necessary to exercise inherent jurisdiction to hear the ICP's Immediate Appeal. The PTC is still seized of Case 004/2. Under Article 606(1) of the Cambodian Code of Criminal Procedure, "[a]ny ambiguity in the interpretation of a judicial decision shall be referred to the court *which made that decision*."³⁰
- d. Even if the SCC decides it has jurisdiction to hear the ICP's Immediate Appeal, the SCC has no jurisdiction over Case 004/2. It has no jurisdiction to review the PTC's holding that both Closing Orders were illegally issued, and consequently, null and void³¹ or to issue *any* decision or order which has a binding effect. Nor can it issue an advisory opinion, which, notably, the ICP does not seek. The SCC would only be capable of offering musings of no legal force akin to the TC's 3 April 2020 Press Statement.

²⁶ Under Rule 76(5), procedurally defective acts are annulled and removed from the Case File and it is prohibited to draw inferences against them. Under the ECCC framework and jurisprudence, the available remedies following annulment include remitting the Closing Orders back to the CIJs with instructions to issue a single Closing Order or having the PTC investigate the case itself and issue its own Closing Order. In the present exceptional circumstances where remitting the Closing Orders is impracticable, if not impossible, and the PTC is unable to come to a consensus to issue a revised Closing Order, abuse of process doctrine – a procedural rule established at the international level – may be invoked to permanently stay the proceedings. *See* MEAS Muth's Supplement to His Appeal Against the International Co-Investigating Judge's Indictment, 5 May 2020, D267/27, paras. 33-49.

²⁷ TC's 3 April 2020 Press Statement, p. 2.

²⁸ TC's 3 April 2020 Press Statement, p. 2.

²⁹ ICP's Immediate Appeal, para. 48.

³⁰ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(16), Decision on Requests by the Trial Chamber and the Defence for IENG Thirith for Guidance and Clarification, 31 May 2013, E138/1/10/1/5/8/2, para. 8 quoting Cambodian Code of Criminal Procedure, Art. 606(1) (emphasis added).

³¹ Case 004/2 PTC Considerations, p. 61. *See also supra* para. 11(a).

B. There is no default position under the ECCC framework that sends a case to trial when the CIJs illegally issue conflicting Closing Orders

12. The ICP claims that the TC failed to give effect to the default position that where the CIJs disagree on a case moving forward, the case moves on to the next stage absent a supermajority of the PTC blocking its progress, which is embedded in: **a.** the Agreement and Establishment Law;³² **b.** Rule 77(13)(b);³³ **c.** Rule 79(1);³⁴ and **d.** the purpose of the Agreement and Establishment Law.³⁵
13. Should leave to intervene be granted, the Defence would submit that:
- a. The “default” position in the Agreement and Establishment Law that “the investigation shall proceed” when the Co-Prosecutors or CIJs disagree on progressing a case and the PTC cannot reach a supermajority only applies during the *investigation* phase.³⁶ The SCC’s *obiter dictum* relates to disagreements between the CIJs in the context of the dispute resolution mechanism *before* the CIJs issue a Closing Order – i.e. when “*proposing* to issue an Indictment or Dismissal Order,”³⁷ as the ICP acknowledges.³⁸ The “SCC’s substantive outcome”³⁹ is not equally applicable to the situation in which the CIJs *illegally issue* conflicting Closing Orders, because there is no Indictment on which the case can be sent to trial.⁴⁰
 - b. Even if Rule 77(13)(b) is considered *lex specialis vis-à-vis* Rule 77(13)(a), both rules were designed for the issuance of a single Closing Order and the PTC unanimously held that both Closing Orders were illegally issued.⁴¹

³² ICP’s Immediate Appeal, para. 51.

³³ ICP’s Immediate Appeal, paras. 52-54.

³⁴ ICP’s Immediate Appeal, para. 55.

³⁵ ICP’s Immediate Appeal, para. 56.

³⁶ See MEAS Muth’s Response to the International Co-Prosecutor’s Appeal of the Dismissal Order, 24 June 2019, D266/5, para. 19; 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, D267/12, para. 35.

³⁷ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 65 (emphasis added).

³⁸ ICP’s Immediate Appeal, para. 53.

³⁹ ICP’s Immediate Appeal, para. 54.

⁴⁰ See *supra* para. 11(a).

⁴¹ Case 004/2 PTC Considerations, p. 61; MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4, paras. 41-48; MEAS Muth’s Response to the International Co-Prosecutor’s Appeal of the Dismissal Order, 24 June 2019, D266/5, para. 17; 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, D267/12, para. 31.

- c. Rule 79(1), like Rule 77(13)(b), was designed for a single Closing Order, not conflicting Closing Orders.⁴² The use of the word “or” in Rule 79(1) only indicates that the TC may be seized by an order “from the [CIJs]” if the PTC does not issue a revised Closing Order on appeal;⁴³ it does not mean that the TC can be seized of an illegally issued Indictment. There is no “live” Indictment on which the TC can be seized because the illegally issued Indictment in Case 004/2 is null and void.⁴⁴
- d. The Parties to the Agreement and drafters of the Establishment Law did not agree to send cases to trial when the CIJs issue conflicting Closing Orders.⁴⁵

C. The TC did not err in law or abuse its discretion in not exercising any inherent authority

14. The ICP claims that the TC erred in law and abused its discretion when it refused to exercise its inherent authority to decide on justiciable issues before it, concluding that it had no authority to make any decision on Case 004/2.⁴⁶
15. Should leave to intervene be granted, the Defence would submit that the TC did not err in law or abuse its discretion by not exercising any inherent authority because the TC Judges were not compelled under the ECCC framework to agree.⁴⁷ Under Article 4(1)(a) of the Agreement, “[t]he judges shall *attempt* to achieve unanimity in their decisions,” and if they cannot, a TC decision requires the affirmative vote of at least four of five judges.⁴⁸ While the International TC Judges were entitled to put forward their view that the TC has inherent authority to address the issues raised in the Parties’ submissions in Case 004/2, the National PTC Judges were equally entitled to state their view that the TC had no authority to make a decision because it was not seized of the case.⁴⁹ In the absence of an agreement by the National and International TC judges, the TC could not have issued a decision.

⁴² See 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, D267/12, para. 40.

⁴³ Rule 79(1): “The Trial Chamber shall be seized by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.”

⁴⁴ See *supra* para. 11(a).

⁴⁵ MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4, paras. 33-40; 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, D267/12, paras. 36-38.

⁴⁶ ICP’s Immediate Appeal, paras. 58-59.

⁴⁷ See Agreement, Art. 4(1)(a).

⁴⁸ Emphasis added.

⁴⁹ TC’s 3 April 2020 Press Statement, p. 2.

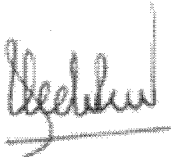

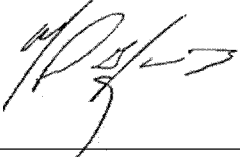
III. CONCLUSION AND RELIEF SOUGHT

16. Given that the Closing Orders are null and void and that the PTC remains seized of Case 004/2, the SCC lacks jurisdiction to hear the ICP's Immediate Appeal and has no jurisdiction to issue *any* decisions which have a binding effect. Even were the SCC to hear the ICP's Immediate Appeal, it would only be capable of offering musings of no legal force. The SCC should grant the Defence leave to intervene and respond to the discrete legal issues outlined above, which is a legitimate interest of Mr. MEAS Muth. Failure to hear from him before making a decision on the ICP's Immediate Appeal – which would dictate whether his case is sent to trial or is dismissed – would cause him prejudice and irreparably harm his rights to a fair trial and due process.⁵⁰

WHEREFORE, for all the reasons stated herein, the SCC is respectfully requested to:

- a. **Admit** this request for leave to intervene; and
- b. **Grant** the Defence leave to intervene in Case 004/2 and respond to the ICP's Case 004/2 Immediate Appeal.

Respectfully submitted,

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ANG Udom		Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth
Signed in Phnom Penh, Kingdom of Cambodia on this **29th** day of **May, 2020**

⁵⁰ See *supra* fn. 12.