

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/07-09-2009-ECCC/SC**Party Filing:** The Defence for MEAS Muth**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 4 October 2021**CLASSIFICATION****Classification of the document
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MEAS MUTH'S REQUEST TO TERMINATE CASE 003

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Mr. MEAS Muth, through his Co-Lawyers (“The Defence”), pursuant to the Supreme Court Chamber’s inherent jurisdiction to “ensure that legal certainty and finality” and “provide legal remedies and make final determination in cases where statutes or law are unclear,”¹ hereby requests it to terminate Case 003 and order the Co-Investigating Judges (“CIJs”) to archive Case File 003 in accordance with its decision terminating Case 004/2.

I. BACKGROUND

1. Mr. MEAS Muth has been under investigation for 13 years. One National and five International CIJs investigated the case. At the conclusion of the investigation, the National Co-Investigating Judge (“NCIJ”), YOU Bunleng and International Co-Investigating Judge (“ICIJ”), Michael Bohlander, opting not to seize the Pre-Trial Chamber (“PTC”) of their disagreements, issued separate and opposing Closing Orders, simultaneously sending to trial and dismissing Case 003. The PTC declared the issuance of those Closing Orders to be illegal, just as they did in Case 004/2. The PTC did not avail itself to the remedies to the illegal Closing Orders outlined by the Supreme Court Chamber when terminating Case 004/2, instead ordering that Case 003 be both archived and sent to trial. When requested to forward Case 003 to the Trial Chamber (“TC”), the CIJs determined that the PTC remains seized and responsible for the pre-trial proceedings. When the parties again turned to the PTC to conclude the pre-trial proceedings, it declared that it had already fulfilled its judicial duties and that the CIJs are responsible for processing the case in accordance with the PTC’s unanimous considerations. The CIJs consider that Case 003 is ripe for termination, leaving it to the International Co-Prosecutor (“ICP”) to declare whether she intends to seize the Supreme Court Chamber “with a request for termination as in Case 004/2.”²
2. ***The Co-Prosecutors disagreed on whether Case 003 should be prosecuted.*** On November 2008, ICP seized the PTC of a disagreement, stating that he intended to file new Introductory Submissions in what would become Cases 003 and 004.³ His National counterpart, the National Co-Prosecutor (“NCP”), “disagree[d] with prosecuting the crimes identified in the new submissions,”⁴ considering that the facts of Case 003 were already

¹ *Case of AO An*, 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2 (“Case 004/2 Supreme Court Chamber Decision”), paras. 64-65.

² Order to File Submissions on Residual Jurisdiction to Terminate Case 003, 16 September 2021, D273 (“Order to File Submissions on Residual Jurisdiction to Terminate Case 003”), para. 7.

³ International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1, para. 2.

⁴ *Id.*, para. 120.

covered by the Introductory Submission in Case 002, that Mr. MEAS Muth and SOU Met (who passed away in 2015)⁵ “were not senior leaders or those most responsible because of their comparatively low rank in the Democratic Kampuchea regime,” and that “peace, stability, and national reconciliation in Cambodia argue against initiating new prosecutions.”⁶

3. ***The PTC Judges disagreed on whether Case 003 should be prosecuted.*** The PTC could not reach a supermajority on the Co-Prosecutors’ disagreement.⁷ The National PTC Judges agreed with the NCP that the facts of Case 003 were covered by Case 002,⁸ and considered that the ICP unilaterally opened the investigation without notifying the NCP.⁹ The International PTC Judges disagreed with the NCP’s assessment as to the ICP’s conduct of the preliminary investigation and found that the Introductory Submission in Case 003 refers to new facts in addition to those that overlap with Case 002.¹⁰ Since the PTC failed to reach a supermajority, the investigation proceeded,¹¹ and Acting ICP William Smith filed the Introductory Submission in Case 003 on 7 September 2009.¹²
4. ***The CIJs begin investigating.*** NCIJ YOU Bunleng and ICIJ Marcel Lemonde, the ECCC’s first ICIJ, began investigating and developing a detailed work plan.¹³ The NCIJ and ICIJ Lemonde investigated crimes committed by the Khmer Rouge for over two years, determining whether those investigated were most responsible during the Democratic

⁵ Dismissal of Allegations Against SOU Met, 2 June 2015, D86/3.

⁶ Annex I: Public Redacted Version Consideration of the PTC Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, paras. 29-32.

⁷ *Id.*, para. 45.

⁸ *Id.*, Opinion of Judges Prak Kisman, Ney Thol, and Huot Vuthy, paras. 27, 30.

⁹ *Id.*, Opinion of Judges Prak Kisman, Ney Thol, and Huot Vuthy, para. 18.

¹⁰ *Id.*, Opinion of Judges Downing and Lahuis, paras. 4, 22.

¹¹ See 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. 7(4). See also Rule 72(4).

¹² Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

¹³ ECCC Court Report: Issue 26 (June 2010), p. 2, <https://www.eccc.gov.kh/sites/default/files/publications/The%20Court%20Report%20%5BJunc%202010%5D%20FINAL.pdf>.

Kampuchea period.¹⁴ Before ICIJ Lemonde resigned “to take up other long-standing plans,”¹⁵ the CIJs collected more than 1,130 pieces of evidence in Case 003.¹⁶

5. ***The investigation concludes.*** When ICIJ Siegfried Blunk took over from ICIJ Lemonde on 1 December 2010,¹⁷ he continued investigating alongside the NCIJ,¹⁸ focusing on determining whether Mr. MEAS Muth falls under the ECCC’s personal jurisdiction.¹⁹ The CIJs “established joint working groups,”²⁰ “agreed on the investigative methods,”²¹ and investigated “in a smooth manner and in complete agreement.”²² After 20 months of investigation, on 29 April 2011, the CIJs concluded their investigation, “unanimously agree[ing]” not to charge Mr. MEAS Muth.²³ After statements in the press called into question ICIJ Blunk’s independence and integrity, he resigned out of principle.²⁴
6. ***The investigation reopens.*** Then came Reserve International Co-Investigating Judge (“RICIJ”) Laurent Kasper-Ansermet, who was never sworn in as ICIJ.²⁵ He unilaterally reopened the investigation²⁶ for fear that the NCIJ would issue the Forwarding Order drafted alongside ICIJ Blunk, even though he admitted he did not review the Case File, and

¹⁴ The CIJs were seized of the investigations into Cases 001 and 002 on 18 July 2007. *See Case of KAINING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order indicting KAINING Guek Eav alias Duch, 8 August 2008, D99, para. 4; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 3.

¹⁵ ECCC Court Report: Issue 29 (September 2010), p.2, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_September2010.pdf. *See also* ECCC Website, *Judge Marcel Lemonde*, <https://www.eccc.gov.kh/en/person/judge-marcel-lemonde>.

¹⁶ A search on ZyLAB reveals that, between 7 September 2009 and 30 November 2010, the Office of the Co-Investigating Judges (“OCIJ”) placed 1,134 documents in English, Khmer, and French on the Case File. *See* ZyLAB “Case File: CF003,” “Filing Date: between 7 September 2009 and 30 November 2010,” and “Filing Party: OCIJ.” Some documents placed on the Case File during this period may be duplicates.

¹⁷ ECCC Press Release, *Dr. Siegfried Blunk appointed as new international Co-Investigating Judge*, 1 December 2010, <https://www.eccc.gov.kh/en/articles/dr-siegfried-blunk-appointed-new-international-co-investigating-judge>.

¹⁸ ECCC Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2012-12-24%2016%3A37/E189_3_1_1.1.3_EN.pdf.

¹⁹ ECCC Court Report: Issue 33 (February 2011), p. 7, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_February_2011.pdf.

²⁰ ECCC Court Report: Issue 33 (February 2011), p. 7, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_February_2011.pdf.

²¹ Order Dismissing the Case Against MEAS Muth, 28 November 2010, D266 (“Dismissal Order”), para. 48.

²² *Id.*, para. 41.

²³ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13. Dismissal Order, para. 53.

²⁴ ECCC Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2012-12-24%2016%3A37/E189_3_1_1.1.3_EN.pdf. ICIJ Blunk resigned effective 31 October 2011. *See* ECCC Website, *Dr. Siegfried Blunk*, <https://www.eccc.gov.kh/en/person/dr-siegfried-blunk>.

²⁵ UN Press Release, *Statement Attributable to the Spokesperson for the Secretary-General on Cambodia*, 20 January 2012, <https://www.un.org/sg/en/content/sg/statement/2012-01-20/statement-attributable-spokesperson-secretary-general-cambodia>.

²⁶ Order on Resuming the Judicial Investigation, 2 December 2011, D28.

despite the NCIJ's caution to review the evidence before taking any "hasty actions."²⁷ Five months after reopening the investigation, RICIJ Kasper-Ansermet resigned.²⁸

7. **Mr. MEAS Muth is charged.** The NCIJ withheld from issuing the Forwarding Order, waiting for his new International counterpart, ICIJ Mark Harmon, to familiarize himself with the Case File,²⁹ discuss the status of the investigation, and internally register a disagreement on 7 February 2013.³⁰ Following the disagreement, the NCIJ issued his Forwarding Order, considering the investigation complete on 29 April 2011.³¹ ICIJ Harmon meanwhile continued investigating,³² since, to his understanding, the CIJs have "discretion to decide independently when they consider that an investigation has been concluded."³³ When the NCIJ later sent a memorandum to ICIJ Harmon "regarding the conclusion of the investigation and possibilities for [the ICIJ] to appeal to the [PTC], requesting [the] re-opening [of] the investigation,"³⁴ ICIJ Harmon did not respond and continued investigating and gathering evidence.³⁵ He eventually charged Mr. MEAS Muth³⁶ four months before resigning "for strictly personal reasons."³⁷
8. **The final ICIJ is sworn in.** After being sworn in on 31 July 2015, ICIJ Michael Bohlander, the ECCC's last ICIJ, familiarized himself with the Case File, investigated and gathered evidence,³⁸ re-issued decisions made by ICIJ Harmon,³⁹ rescinded some of ICIJ Harmon's

²⁷ ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/cn/node/17495>.

²⁸ RICIJ Kasper-Ansermet resigned effective 4 May 2012. See ECCC Press Release, *Press Release by the International Reserve Co-Investigating Judge*, 19 March 2012, <https://www.eccc.gov.kh/cn/articles/press-release-international-reserve-co-investigating-judge>.

²⁹ ICIJ Mark Harmon was sworn in as the fourth ICIJ on 26 October 2012. ECCC Press Release, *Mark Harmon sworn in as International Co-Investigating Judge*, 26 October 2012, <https://www.eccc.gov.kh/cn/articles/mark-harmon-sworn-international-co-investigating-judge>.

³⁰ See Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 10.

³¹ Forwarding Order dated 07 February 2013, 7 February 2013, D52; Dismissal Order, para. 32. See also ECCC Press Release, *Statement by the Co-Investigating Judges Regarding Case 003*, 28 February 2013, <https://www.eccc.gov.kh/cn/articles/statement-co-investigating-judges-regarding-case-003>.

³² See Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 12; Rogatory Letter, 7 February 2013, D54; Rogatory Letter, 7 February 2013, D55.

³³ Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 5 (internal citations omitted).

³⁴ Dismissal Order, para. 44.

³⁵ *Id.*, para. 44.

³⁶ Notification of Charges Against MEAS Muth, 3 March 2015, D128.1.

³⁷ ICIJ Harmon resigned effective 31 July 2015. ECCC Press Release, *Judge Harmon announces his resignation*, 7 July 2015, <https://www.eccc.gov.kh/cn/articles/judge-harmon-announces-his-resignation>.

³⁸ See e.g. Extension of Rogatory Letter D59, 26 August 2015, D59.13; Extension of Rogatory Letter D89, 26 August 2015, D89.11.

³⁹ Notice from the International Co-Investigating Judge to the Parties regarding Re-Issue of Decisions Taken by Judge Harmon on or After 31 July 2015, 8 September 2015, D149. See e.g. Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 11 September 2015, D120/3.

charges,⁴⁰ and charged Mr. MEAS Muth with additional crimes.⁴¹ The NCIJ waited for ICIJ Bohlander to conclude his investigation.

9. ***A funding crisis threatens the integrity of ECCC proceedings.*** When the court's budgetary situation reached a "crisis point" in mid-2017, the CIJs contemplated permanently staying the proceedings,⁴² finding it incompatible with the basic demands of a fair trial and the rule of law to issue a Closing Order – especially an Indictment that could "hang over the charged person" – if there were insufficient funds for appellate review by the PTC, "and, by extension, serious doubt about the parties getting their day in court before the [TC] ... and SCC."⁴³ With rapid funding coming in, the CIJs deferred staying the proceedings pending further developments – prepared to take measures should judicial independence, fairness, and the integrity of the proceedings be threatened.⁴⁴
10. ***The investigation concludes, with a hint.*** After the filing of the ICP's Final Submission and Defence Response, the CIJs notified the parties on 18 September 2017 that they considered separate and opposing Closing Orders based on a disagreement to be permissible under the ECCC framework "and of the likely consequences for appellate process under Internal Rule 77(13)."⁴⁵ In their understanding, the Rules did not require the Co-Prosecutors or the CIJs to seize the PTC of disagreements, thus permitting the filing of separate Final Submissions and issuance of separate Closing Orders.⁴⁶ No appeals were filed against the CIJs' decision. Nor did the PTC, which was publicly notified of the decision, order the CIJs to issue a single Closing Order or offer an advisory opinion.
11. ***The CIJs issue their Closing Orders.*** Just as they informed the parties,⁴⁷ on 28 November 2018, the CIJs issued separate and opposing Closing Orders based on the results of their investigation. The NCIJ called for dismissal, finding that Mr. MEAS Muth is not among

⁴⁰ Written Record of Initial Appearance, 14 December 2015, D174, p. 10.

⁴¹ *Id.*, p. 9-10.

⁴² Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249, paras. 1, 75, 84.

⁴³ *Id.*, paras. 53-54.

⁴⁴ Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017, D249/6, paras. 63, 67.

⁴⁵ Closing Order, 28 November 2018, D267, para. 19; *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 14.

⁴⁶ *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An's Request for Clarification, 5 September 2017, D353/1, para. 34; *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 14.

⁴⁷ *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 14.

those most responsible because, despite holding several roles, he “did not exercise much power” and “[h]is participation was inactive, unimportant, and not proximate to the commission of the crimes.”⁴⁸ ICIJ Bohlander found to the contrary,⁴⁹ indicting Mr. MEAS Muth for genocide, crimes against humanity, war crimes, and national crimes.⁵⁰

12. *The parties appeal the Closing Orders.* In their appeals filed on 8 April 2019, the Defence and ICP agreed that the ECCC framework permits the CIJs to issue separate and opposing Closing Orders, given the discretionary language of Rule 72, the interpretive guidance in Rule 1(2), and the CIJs’ equal status over the investigation, though disagreeing on which Closing Order prevails in the event neither is overturned by PTC supermajority.⁵¹ The Defence argued that: (a) Rule 72’s dispute resolution mechanism cannot apply since the CIJs did not refer any disagreement to the PTC;⁵² (b) Rule 77(13) cannot apply to appeals of the opposing Closing Orders since it exclusively applies to appeals against Closing Orders;⁵³ (c) both CIJs are of equal status;⁵⁴ and (d) unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, the Dismissal Order prevails over the Indictment under the principle of *in dubio pro reo*.⁵⁵ The ICP argued that: (a) Rule 77(13)(b) is *lex specialis* relating to Indictments and prevails over the general terms of Rule 77(13)(a); (b) the ECCC framework reflects “the principle that the CIJs and Co-Prosecutors can act independently to advance proceedings and to continue in the case of unresolved disagreements;” and thus (c) the TC must be seized of the case if the PTC fails to overturn an Indictment by supermajority.⁵⁶

13. *Oral arguments are heard between 27 and 29 November 2019.* On the third day of hearings, Judge Olivier Beauvallet questioned the ICP “regarding the simultaneous delivery of two contradictory Closing Orders.”⁵⁷ The ICP argued that the issuance of two Closing Orders is permissible, since “converting the permissive disagreement mechanism ... into a mandatory mechanism” would violate the language of the Agreement, Establishment Law,

⁴⁸ Dismissal Order, para. 428.

⁴⁹ Indictment, para. 460.

⁵⁰ Indictment, p. 256-64.

⁵¹ MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4, (“MEAS Muth’s Appeal”), paras. 34-48; International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against MEAS Muth (D266), 8 April 2019, D266/2 (“ICP’s Appeal”), paras. 191-98.

⁵² MEAS Muth’s Appeal, paras. 35-38.

⁵³ MEAS Muth’s Appeal, paras. 41-46.

⁵⁴ MEAS Muth’s Appeal, paras. 34, 37, 45, 60, 66.

⁵⁵ MEAS Muth’s Appeal, paras. 50-72.

⁵⁶ ICP’s Appeal, paras. 191-98.

⁵⁷ Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 11.25.07-11.26.26.

and Rules, and unduly limit the CIJs' independent discretion.”⁵⁸ Though the Defence agreed with the ICP in its written appeal, it submitted that both parties may be in error: “[I]f we were wrong, and if [the CIJs] acted *ultra vires*, nothing would prevent [the PTC] from either remanding the matter back, having them reconstitute, and with instructions that they are to issue an order, or the possibility exists for [the PTC] to take it upon [itself].”⁵⁹

14. ***The PTC issues its Considerations in Case 004/2.*** On 19 December 2019, before disposing of the cross-appeals in Case 003, the PTC issued its Considerations in Case 004/2, declaring the “issuance of Two Closing Orders was illegal, violating the ECCC framework.”⁶⁰ Nonetheless, the National and International PTC Judges reviewed the merits of, and gave preference to, the Closing Orders of their choice.⁶¹

15. ***The PTC issues contradictory instructions.*** Amid the subsequent litigation in Case 004/2, the PTC Judges issued contradictory memoranda on the legal effect of their Considerations:

- a. On 29 January 2020, PTC President Judge Prak Kimsan issued an interoffice memorandum stating that only the joint reasoning and disposition have legal effect and that notifying the Considerations to the TC “violat[es] the unanimous decision of [the] PTC;”⁶²
- b. On 29 January 2020, the International PTC Judges responded that the President does not have the authority to instruct the Court Management Section (“CMS”), noting that CMS received contradictory instructions from the National and International PTC Greffiers – respectively, to archive the case and to notify the TC of the PTC’s Considerations;⁶³
- c. On 12 March 2020, the International PTC Judges insisted that their 29 January 2020 response was the “authoritative clarification” sought by the Office of Administration, stating: “[i]f the Office of Administration were to persists in its inactivity without legal

⁵⁸ Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 11.26.26-11.40.55. *See esp. id.* at 11.34.54-11.35.57.

⁵⁹ Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 12.00.18-12.03.17.

⁶⁰ *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.

⁶¹ *Id.*, p. 61. *See also id.*, paras. 273-302, 304-687, p. 266.

⁶² *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Clarification of the decision in the case 004/2,” 29 January 2020, D359/34, p. 2.

⁶³ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Notification of the PTC’s Considerations in Case 004/2,” 29 January 2020, D359/35, p. 5.

basis, the re-composition of the [OCIJ] would have to be considered by the relevant stakeholders for the proceedings enshrined in Internal Rule 69(2)(a),”⁶⁴ and

- d. On 16 March 2020, the PTC President stated that the PTC “has already fulfilled its duty in accordance with the law and none of the administrative actions is required,” reiterating his position in his 29 January 2020 memorandum that only the joint reasoning and disposition have legal effect.⁶⁵

16. **Mr. MEAS Muth requests clarification.** On 27 March 2020, given the procedural stalemate in Case 004/2, the Defence requested clarification as to the legal basis under which the PTC Judges separately considered the merits of the illegal Closing Orders, as opposed to remitting the Case File to the CIJs with instructions to issue a single Closing Order or reviewing the Case File itself and issuing its own Closing Order.⁶⁶ In addition to questioning the legal basis as to how can a “default position” reserved for disagreements between the CIJs during the investigations be applied to resolve the illegal issuance of two Closing Orders,⁶⁷ the Defence requested specific clarification on whether:⁶⁸

- a. The CIJs followed the letter and spirit of the Agreement, Establishment Law, Rules, and PTC jurisprudence in issuing separate and opposing Closing Orders;
- b. Neither the Indictment nor Dismissal Order can stand since both were issued in contravention of Rule 67(1);
- c. The PTC considered referring to Rule 76(7) to determine the consequences of declaring the issuance of separate and opposing Closing Orders illegal;
- d. The PTC failed to apply what it considers to be the applicable law by not remitting the Closing Orders to the CIJs with instructions and not reviewing the Case File itself;
- e. The PTC Judges were required to work collegially in reviewing the Case File once they opted not to remit the Closing Orders to the CIJs;

⁶⁴ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Transfer of Case File 004/2,” 12 March 2020, D359/36, para. 37.

⁶⁵ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Re-Confirmation of the Decision on Case File 004/2,” 16 March 2020, D359/37, p. 2.

⁶⁶ MEAS Muth’s Request for Clarification of the PTC’s Considerations Against Closing Orders in Case 004/2, 27 March 2020, D267/24, (“MEAS Muth’s Request for Clarification”), para. 15.

⁶⁷ *Id.*, para. 37.

⁶⁸ *Id.*, paras. 17, 19, 21, 23, 25, 27, 28, 31, 33, 35, 39.

- f. The PTC would have better guaranteed legal certainty and transparency by remitting the Case File to the CIJs with instructions or reviewing the Case File itself;
- g. The PTC was obligated to provide a unanimous decision on the legal effect of the illegal issuance of the Closing Orders to guarantee legal certainty;
- h. The legal authority the National PTC Judges applied to justify reviewing the illegal Closing Orders;
- i. The National PTC Judges consider the Dismissal Order a legitimate basis to dismiss the case when the unanimous PTC held that the CIJs violated the ECCC framework;
- j. The National PTC Judges resorted to the principle of *in dubio pro reo* after applying the civil rules of interpretation to Rule 76(7) to resolve the illegal issuance of separate and opposing Closing Orders; and
- k. The TC can be seized of a procedurally defective, illegal Indictment under Rule 77(13)(b).

17. ***The TC declines to be seized of Case 004/2.*** Following the ICP's request for the TC to progress Case 004/2 to trial, the TC Judges issued a Press Release on 3 April 2020 stating they could not agree on common reasoning. The National TC Judges considered the TC had no authority to make any decision because it did not have access to the Case File, which was still under the PTC's authority, and because the Case was closed by virtue of the PTC's Considerations.⁶⁹ The International TC Judges considered the TC "has *inherent authority* to address some of the preliminary issues raised by the parties...." Since the TC could not reach a supermajority, "issuing a formal decision ... [was] not possible."⁷⁰

18. ***Mr. MEAS Muth requests to supplement his appeal.*** Following the TC's Press Release, the Defence requested to supplement his appeal, since the TC's statements raised the prospect of having an unchallengeable Indictment hanging over Mr. MEAS Muth in perpetuity.⁷¹ The Defence submitted that the PTC, in accordance with their oath of office

⁶⁹ 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> ("Trial Chamber's Statement in Case 004/2").

⁷⁰ *Id.*

⁷¹ MEAS Muth's Supplement to his Appeal Against the International Co-Investigating Judge's Indictment, 5 May 2020, D267/27 ("MEAS Muth's Supplement"), para. 24.

and responsibility to ensure the fairness of proceedings, must permanently stay proceedings unless the PTC agrees on the progress of Case 003.⁷²

19. ***The ICP appeals the TC's press release in Case 004/2.*** Claiming the TC's inaction and 3 April 2020 Press Release constituted a "decision" effectively terminating the case, the ICP appealed to the Supreme Court Chamber on 4 May 2020.⁷³ She argued that the TC failed to give effect to the "default position," failed to invoke its inherent powers to pronounce on justiciable issues, arbitrarily imposed additional administrative requirements for formal notification of the PTC's Considerations, and effectively terminated the case on impermissible grounds.⁷⁴

20. ***Mr. MEAS Muth requests to intervene in Case 004/2.*** Since the Supreme Court Chamber's ruling in Case 004/2 would invariably impact on the proceedings in Case 003, the Defence sought to intervene in Case 004/2 to demonstrate why:⁷⁵

- a. The TC was not seized of the case since there were no valid Closing Order;
- b. The TC's 3 April 2020 Press Release, inaction, and return of the ICP's submissions was not an "appealable" decision terminating the proceedings;
- c. The PTC was still seized of Case 004/2, and thus it was not necessary for the Supreme Court Chamber to exercise its inherent powers;
- d. The "default" position in the Agreement and Establishment Law providing that the "investigation shall proceed" when the Co-Prosecutors or CIJs disagree *only applies during the investigation phase*;
- e. 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;

⁷² *Id.*, paras. 44-52.

⁷³ *Case of AO An*, 004/2/07-2009-ECCC-TC/SC, International Co-Prosecutor's Immediate Appeal of the Chamber's Effective Termination of Case 004/2, 4 May 2020, E004/2/1, para. 42.

⁷⁴ *Id.*, para. 43.

⁷⁵ *Case of AO An*, 004/2/07-2009-ECCC-TC/SC, 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, 29 May 2020, E004/2/2 ("MEAS Muth's Intervention Request"), paras. 11-12.

- f. Rule 79(1) was also designed for a single Closing Order and does not mean that the TC can be seized of an illegally issued Indictment; and
- g. The Parties to the Agreement and drafters of the Establishment Law did not agree to send cases to trial when the CIJs issue separate and opposing Closing Orders.

21. The Supreme Court Chamber denied the Defence's request for intervention on 17 June 2020.⁷⁶

22. ***The Supreme Court Chamber terminates Case 004/2.*** On 10 August 2020, the Supreme Court Chamber terminated Case 004/2,⁷⁷ holding that once the PTC unanimously declared CIJs acted illegally, the Closing Orders were a nullity and it was irrelevant that the PTC did not attain a supermajority on the merits of the parties' appeals.⁷⁸ *"A void act cannot create a lawful consequence or result. It therefore logically follows that the source action – each Closing Order – was of no legal effect."*⁷⁹ Despite finding that the objective of the dispute resolution mechanism is to "prevent a deadlock from derailing the proceedings from moving to trial," the Supreme Court Chamber "unequivocal[ly]" held that a "case cannot go to trial in the absence of a valid Closing Order."⁸⁰

23. Noting that the PTC's findings that Rule 79(1) suggests that the PTC "has the power to issue a new or revised closing order," and that "fulfil[ing] the role of the Cambodian Investigation Chamber in the ECCC," the PTC shall investigate itself when seized of a Dismissal Order, the Supreme Court Chamber considered that these findings "lead a reasonable reader to conclude that the [PTC] was aware of its powers to go beyond the illegality of the situation relating to the issuance of two conflicting Closing Orders and to issue its own valid closing order."⁸¹ It found that the PTC "should have gone a step further and provided an actual final ruling."⁸²

24. Considering that the CIJs' "rigidly held" irreconcilable differences led them to register disagreements and inevitably to issue separate and opposing Closing Orders,⁸³ that the ICP

⁷⁶ *Case of AO An*, 004/2/07-09-2009-ECCC/TC/SC, Decision on 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, 17 June 2020, E004/2/2/1.

⁷⁷ Case 004/2 Supreme Court Chamber Decision.

⁷⁸ *Id.*, para. 53.

⁷⁹ *Id.*, para. 67.

⁸⁰ *Id.*, para. 68.

⁸¹ *Id.*, para. 61, quoting *inter alia* Case 004/2 PTC Considerations, para. 30.

⁸² Case 004/2 Supreme Court Chamber Decision, para. 61.

⁸³ *Id.*, para. 62.

is acting without the support (or opposition of) the NCP,⁸⁴ and that “there was no agreement after thirteen years of investigations that AO An was within the jurisdiction of the Court,” the Supreme Court Chamber found that absent an enforceable Indictment, Case 004/2 should be terminated.⁸⁵

25. *The PTC denies Mr. MEAS Muth’s request for clarification.* On 3 November 2020, the PTC denied Mr. MEAS Muth’s request for clarification, considering that the PTC’s issuance of considerations or decisions in different proceedings “has no immediate impact on the pending case,” though stating that the PTC “is not insensitive to the argument that its rulings may be misunderstood.”⁸⁶ Despite the contradictory memoranda from the PTC as to the legal effect of its Case 004/2 Considerations, it found that the “Considerations in Case 004/2 provided the legal certainty and transparency required for a judicial decision emanating from the Chamber under the specific circumstances of that case.”⁸⁷

26. *The PTC denies Mr. MEAS Muth’s supplement.* The PTC denied Mr. MEAS Muth’s supplement on the same day it denied his request for clarification, finding that the TC’s Press Release in another case “has neither immediate nor direct impact on the pending case,”⁸⁸ that the appeals have been extensively briefed and orally argued,⁸⁹ and that the circumstances did not warrant recourse to its inherent powers (though reaffirming it has inherent powers to safeguard the good and fair administration of justice).⁹⁰

27. *The PTC issues its Considerations in Case 003.* On 7 April 2021, 16 months after oral arguments, the PTC issued its Considerations in Case 003, adopting and incorporating much of its reasoning from its considerations in Case 004/2.⁹¹ “[C]ondemn[ing] once again the legal predicament that the [CIJs’] unlawful actions precipitated upon yet another ECCC proceeding,”⁹² the PTC acidly intimates (as in Case 004/2) that the CIJs deliberately and calculatedly perverted the course of justice, since “they may have intended to defeat the

⁸⁴ *Id.*, para. 64.

⁸⁵ *Id.*, para. 69.

⁸⁶ Decision on MEAS Muth’s Request for Clarification of the PTC Considerations on Appeals Against Closing Orders in Case 004/2, 3 November 2020, D266/24 & D267/32, para. 28.

⁸⁷ *Id.*, para. 31.

⁸⁸ Decision on MEAS Muth’s Supplement to His Appeal Against the International Co-Investigating Judge’s Indictment, 3 November 2020, D267/33, para. 32.

⁸⁹ *Id.*, para. 33.

⁹⁰ *Id.*, para. 35.

⁹¹ Compare Considerations on Appeals Against Closing Orders, 7 April 2021, D266/27 & D267/35 (“Case 003 PTC Considerations”), paras. 78-109 with Case 004/2 PTC Considerations, paras. 91-124.

⁹² Case 003 PTC Considerations, para. 109.

default position and frustrate the authority of the [PTC]”⁹³ by agreeing to simultaneously issue separate and opposing Closing Orders.

28. The PTC found that the CIJs’ “errors have jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations,” and that more than a mere violation of the ECCC framework, “the [CIJs] *mauvaises pratiques* may amount to a denial of justice,” since the PTC “[was] unable to exclude that they may have intended to defeat the default position and frustrate the authority of the PTC.”⁹⁴

29. Interpreting Rule 67(1) to unambiguously provide for a single Closing Order *either* indicting the Charged Person *or* dismissing the case,⁹⁵ the PTC found that the CIJs “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,”⁹⁶ “undermine[d] the very foundations of the hybrid system and proper functioning of the ECCC,”⁹⁷ “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,”⁹⁸ and wantonly refrained from exercising their judicial duty to decide matters of which they were seized.⁹⁹

30. The PTC also 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 [CIJs] that they agreed on the issuance of the separate and conflicting Closing Orders,”¹⁰⁰ and that the CIJs offered “remarkably minimal reasoning, simply recalling two of their prior Decisions.”¹⁰¹ Continuing in the same vein, the PTC found that “more than an isolated example, [the CIJs’] actions in this case confirm a pattern that the [CIJs] have apparently adopted in dealing with all the final cases on the ECCC’s docket,”¹⁰² “not[ing] with regret that never, to its knowledge, has there been criminal cases in the history of other national and

⁹³ *Id.*, para. 108.

⁹⁴ *Id.*, para. 108.

⁹⁵ *Id.*, para. 103.

⁹⁶ *Id.*, para. 88. *See also id.*, para. 105, where the PTC claimed that the CIJs committed “manifest errors of law on which their reasoning is based.”

⁹⁷ Case 003 PTC Considerations, para. 106.

⁹⁸ *Id.*, para. 107.

⁹⁹ *Id.*, para. 105.

¹⁰⁰ *Id.*, para. 107.

¹⁰¹ *Id.*, para. 106.

¹⁰² *Id.*, para. 108.

international legal systems that concluded with the simultaneous issuance of two contrary decisions emanating from one single judicial office.”¹⁰³

31. While reaffirming its powers to investigate and to issue a revised Closing Order, the PTC declined to follow the Supreme Court Chamber’s ruling in Case 004/2. As they did in Case 004/2, the PTC Judges split into their respective National and International sides to give preference to the Closing Orders of their choice.¹⁰⁴
32. Though taking a different tack than in their separate opinion in Case 004/2, the National PTC Judges similarly found that Case File 003 “should be held at the ECCC archives.”¹⁰⁵ They reasoned that the PTC cannot apply the dispute resolution mechanism in Rule 72 because the CIJs agreed not to refer their disagreement to the PTC, “the two Closing Orders are of the same value and stand valid”¹⁰⁶ in light of Rule 77(13), the CIJs enjoy equal status, and according to the principle of the presumption of innocence, “the law does not allow the PTC to rule that the act of any [CIJ] has preponderance,”¹⁰⁷ and “[t]herefore, the two Closing Orders maintain the same value.”¹⁰⁸
33. Similar to their position in Case 004/2, despite claiming perceived ill-intent and unsound flaws, despite condemning the ICIJ’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 PTC Judges pronounced the ICIJ’s Indictment valid and the NCIJ’s Dismissal Order *ultra vires*.¹⁰⁹ Notwithstanding the discretionary language in Rule 72(2), the International PTC Judges reasoned that the CIJs were required to resort to the dispute resolution mechanism prior to issuing the Closing Orders,¹¹⁰ pronouncing that the “principle of continuation of judicial investigation governs the issue at hand.”¹¹¹
34. Ruling on the validity of each Closing Order, the International PTC Judges, despite finding the Indictment to be valid, found that the ICIJ:

¹⁰³ *Id.*, para. 109.

¹⁰⁴ Case 003 PTC Considerations, paras. 111-18; 119-358.

¹⁰⁵ *Id.*, para. 118.

¹⁰⁶ A translation discrepancy appears in paragraph 115. It should read “the two Closing Orders are of the same value and same validity.” (Unofficial translation).

¹⁰⁷ Case 003 PTC Considerations, paras. 113-16.

¹⁰⁸ *Id.*, para. 117.

¹⁰⁹ *Id.*, para. 259.

¹¹⁰ *Id.*, paras. 256-58.

¹¹¹ *Id.*, para. 256.

- a. Arbitrarily complied with the Rule 66(1) notice of conclusion, depriving the parties of the 15-day period to file investigative requests;¹¹²
 - b. Was not diligent in communicating the Case File and created 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;¹¹³
 - c. Failed to issue his Indictment within a reasonable time;¹¹⁴
 - d. Erroneously “readopt[ed] the hierarchical and formalistic categorisation of evidence based on its provenance, rather than its substance;”¹¹⁵ and
 - e. Failed to order Mr. MEAS Muth’s pre-trial detention.¹¹⁶
35. Concerning the NCIJ, the International PTC Judges found that the Dismissal Order is “an attempt 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* and, therefore, void, as it constitutes an attempt to defeat the default position enshrined in the ECCC framework.”¹¹⁷
36. The International PTC Judges also expressed their disagreement with the Supreme Court Chamber, though declining to explain why the PTC did not follow the remedies outlined by the Supreme Court Chamber based on the PTC’s own pronouncements, finding that the Supreme Court Chamber:
- a. Made a “notable leap of reasoning” by “appear[ing] to equivocate the [PTC’s] holding that the [CIJs’] course of action in issuing the Closing Orders was illegal with the conclusion that the Closing Orders were ‘void’ as such;”¹¹⁸
 - b. Made a “sweeping conclusion without a reasoned demonstration” as to why the procedural illegality of the CIJs’ actions in producing the Closing Orders “would result in the complete vitiation of the two Closing Orders in question” because procedural

¹¹² *Id.*, paras. 139-41.

¹¹³ Case 003 PTC Considerations, paras. 142-43.

¹¹⁴ *Id.*, para. 130.

¹¹⁵ *Id.*, para. 156.

¹¹⁶ *Id.*, paras. 345-58.

¹¹⁷ *Id.*, paras. 260, 262.

¹¹⁸ *Id.*, para. 273.



errors must result in a “grossly unfair outcome in judicial proceedings” to lead to a reversal of a judgment;¹¹⁹

- c. “[C]rafted as a convenient pretext to bring the proceedings to an end” the “alleged administrative prerequisites of notification and transmission;”¹²⁰
- d. Found it unnecessary “to analyse the body text of the [PTC’s] actual decision to clarify ... whether the PTC unanimously found both Closing Orders null and void;”¹²¹
- e. Arbitrarily ended Case 004/2 with no Closing Order, which “does not bring legal certainty, clarity, nor finality;”¹²²
- f. Made its decision without reviewing the evidence “through termination instruction in the nature of an executive fiat;”¹²³
- g. Misread the PTC’s unanimous decision on the illegal accord between the CIJs “to evade the disagreement settlement procedure,” by failing to appreciate that the investigation proceeds;¹²⁴ and
- h. “[I]nsinuated 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.”¹²⁵

37. ***The TC informs that it is not seized of Case 003.*** Following the PTC’s Considerations in Case 003, the ICP filed her witness list. The TC Greffier advised that “the [TC] has not been notified of the ‘Considerations on Appeals against the Closing Orders’ and is not in receipt of the case file. Therefore, the [TC] does not accept any communications from the parties, (see also IR 77/14).”¹²⁶

38. ***The ICP requests the CIJs to forward Case File 003 to the TC.*** On 19 April 2021, the ICP requested the CIJs to take all necessary administrative actions to direct the CMS to forward

¹¹⁹ *Id.*, fn. 609.

¹²⁰ *Id.*, fn. 594.

¹²¹ *Id.*, para. 274.

¹²² *Id.*, para. 279.

¹²³ *Id.*, para. 280.

¹²⁴ *Id.*, para. 275.

¹²⁵ *Id.*, fn. 621.

¹²⁶ Email from IM Suy-Hong entitled “Re: Request for extension of time to file Rule 80 list of witnesses and experts,” 27 April 2021.

Case 003 to the TC.¹²⁷ The Defence responded that the ICP's request is inadmissible because both Closing Orders are null and void, the International PTC Judges provided no cogent reasons or legal authority for departing from the Supreme Court Chamber's analysis, the PTC remains seized of the case, and the PTC did not find by supermajority that the Indictment is valid.¹²⁸

39. *The CIJs deny the ICP's request to forward the Case File.* On 20 May 2021, the CIJs rejected the ICP's request as ill-founded.¹²⁹ While previously opting for judicial restraint "on occasion of the aftermath of the PTC's considerations in Case 004/2," the CIJs, as a preliminary matter, felt the need to remind their colleagues in the PTC of their duties under their respective national codes of judicial ethics, and of the general law of libel and slander, in accusing the CIJs of perverting the course of justice by deliberately evading the dispute resolution mechanism.¹³⁰ The CIJs then explained in detail the events leading to their issuing the separate and opposing Closing Orders, their understanding of the soundness and impact of the Supreme Court Chamber's ruling in Case 004/2, and their understanding of the remedies available to the PTC in resolving the current procedural deadlock.¹³¹

40. The CIJs found that there "was no point whatsoever in triggering the disagreement procedure over jurisdiction before the PTC, because the result was a foregone conclusion."¹³² It "would have meant needless delay and a useless waste of time and resources,"¹³³ because "even if we had asked the PTC for a ruling on the issue of the lawfulness of split COs, we would very likely have been told that this was not a disagreement procedure but a request for an advisory opinion, something which the PTC has ... consistently refused to entertain."¹³⁴

41. The CIJs also noted that the PTC as early as August 2014 was requested to provide its own understanding of the law should the CIJs issue separate and opposing Closing Orders based

¹²⁷ International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 19 April 2021, D270.

¹²⁸ 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, 12 May 2021, D270/4, para. 18.

¹²⁹ Decision on the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7 ("CIJs' Decision on Forwarding Case File 003"), para. 28.

¹³⁰ *Id.*, paras. 9-14.

¹³¹ *Id.*, paras. 15-25.

¹³² *Id.*, para. 15.

¹³³ *Id.*, para. 15.

¹³⁴ *Id.*, para. 20, citing *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. 7-8.

on a disagreement between them.¹³⁵ The PTC found “that the scenario envisaged in the Request ... [was] hypothetical,” and as such the PTC held that it had “no jurisdiction to deal with hypothetical matters or provide advisory opinions.”¹³⁶

42. The CIJs – “much like the SCC – [were] at a loss as to how the PTC’s judges could say *per curiam* in case 004/2 that split COs are manifestly illegal and a violation of the very framework of the ECCC, only for the NJs and IJs to proceed to discuss the merits and to split themselves in upholding the CO the result of which appealed to them.”¹³⁷

43. The CIJs considered that “[i]f [their] error in issuing split COs was as egregious as described at length by the PTC in both Considerations, the COs should ideally have *both* been immediately and unanimously quashed for serious procedural defect without the PTC spending any time on discussing the merits, and the case be remanded to us with instructions not to split the CO.”¹³⁸ “A procedural error of such an order of magnitude in any decision during the investigation would have inevitably led to its annulment and its being struck from the case file as void.”¹³⁹

44. Concerning the legal effect of the PTC Considerations, the CIJs found “only the joint part of the PTC’s considerations can have any binding effect because it was drafted unanimously.”¹⁴⁰ “The IJ’s insistence in both Case 004/2 and Case 003 that the indictment stands – and the dismissal order is *ultra vires* or ‘less in conformity’ with the applicable law – simply because the outcome is in accordance with the default rule, is ultimately unconvincing, given that the NJs, albeit contrary to what they had held jointly with the IJs, chose to pursue the opposite direction.”¹⁴¹ They also found that the National PTC Judges’ “linguistic U-turn” in holding “in case 003 that *both COs are valid* does not change that conclusion, because they still went ahead and directly gave the *administrative* instruction that case file 003 be archived.”¹⁴²

45. The CIJs provided three solutions to break the deadlock in Case 003, noting that the PTC already had opportunities to apply them: (a) “either unanimously remanding the case back

¹³⁵ CIJs’ Decision on Forwarding Case File 003, para. 20.

¹³⁶ *Id.*, para. 20.

¹³⁷ *Id.*, para. 21.

¹³⁸ *Id.*, para. 20.

¹³⁹ *Id.*, para. 21.

¹⁴⁰ *Id.*, para. 21.

¹⁴¹ CIJs’ Decision on Forwarding Case File 003, para. 23.

¹⁴² *Id.*, para. 24.

to us for serious procedural error – and without engaging in the merits – with instructions to issue one joint CO;” (b) “or doing so itself by unanimously applying its own alleged default rule and sending the case for trial;” or (c) “given the actual remaining disagreement in the PTC from ... terminating the case, as the SCC had to do ultimately in Case 004/2.”¹⁴³

46. *The Defence and ICP seize the PTC with requests to conclude Case 003.* On 17 June 2021, the Defence requested the PTC to terminate, seal, and archive Case 003 to avoid an abuse of process and miscarriage of justice.¹⁴⁴ On 21 June 2021, the ICP requested the PTC to issue “a final agreed determination confirming that Meas Muth is indicted and ordering that he be sent to trial on the Indictment.”¹⁴⁵ Though seeking different relief, the Defence and ICP agreed that the PTC failed to perform its judicial duty to decide on the matters of which they were seized.¹⁴⁶

47. *The PTC denies both requests, claiming it already performed its judicial duty.* On 8 September 2021, the PTC denied the requests by the Defence and ICP seeking conclusion of Case 003, finding that “the Applicants demands have been met in the Considerations in Case 003.”¹⁴⁷ According to the PTC, unlike the CIJs, there is no text requiring the PTC to reach a unanimous decision.¹⁴⁸ By having issued its considerations, the PTC “effectively fulfilled its duty” and explained that it is now the CIJs who “are responsible for processing the case in accordance with Rules 77(13) and (14)” and “must comply with the Considerations immediately.”¹⁴⁹ Yet the PTC considered that the CIJs had “already ruled on ‘the fate of the case’ in the event it were to come back before them” by dismissing the ICP’s request to forward Case File 003, and “question[ed] the reasoning of the [ICIJ] who, after having ordered the trial of an accused person ... after ten years of investigation, now declares himself, on imaginary legal grounds, unable to forward the case to the Trial Chamber and potentially ready to archive it.”¹⁵⁰ Refusing “to be associated, through the

¹⁴³ *Id.*, para. 25.

¹⁴⁴ MEAS Muth’s Request to Terminate, Seal, and Archive Case 003, 17 June 2021, D272 (notified on 21 June 2021).

¹⁴⁵ International Co-Prosecutor’s Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 21 June 2021, D271/1, para. 1.

¹⁴⁶ MEAS Muth’s Request to Terminate, Seal, and Archive Case 003, 21 June 2021, D272, para. 46; International Co-Prosecutor’s Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 21 June 2021, D271/1, paras. 17, 51.

¹⁴⁷ Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for MEAS Muth Concerning the Proceedings in Case 003, 8 September 2021, D271/5 & D272/3 (“PTC Consolidated Decision”), para. 72.

¹⁴⁸ *Id.*, para. 68.

¹⁴⁹ *Id.*, para. 72.

¹⁵⁰ *Id.*, para. 74.

actions of confused [CIJs] or requests that have already been granted,” the PTC stated that it “intends to stand by its Considerations.”¹⁵¹

48. *The ICP emails a request to file a submission in one language.* On 10 September 2021, the ICP emailed a request to make a submission in English only with a Khmer translation to follow, claiming that such an extension was necessary for her submission to be within 30 days from the date of notification of the PTC’s decision.¹⁵² On 16 September 2021, the ICP submitted a formal request to file in one language only by email, claiming that “email [i]s the only mode of filing available to her,” since the CMS informed that it cannot accept her submission without further instruction from the Supreme Court Chamber.¹⁵³

II. ADMISSIBILITY

49. The Supreme Court Chamber has inherent jurisdiction to find this request admissible to ensure the good and fair administration of justice under Rule 21(1).¹⁵⁴ The Supreme Court Chamber “considers that it is the obligation as both the appellate Chamber and the Court of final instance to provide legal remedies and make final determination in cases where statutes or laws are silent or unclear,”¹⁵⁵ especially where stalemates indicate “failure of the judicial system to provide remedies.”¹⁵⁶
50. “There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.”¹⁵⁷ Yet waiting for the ICP to appeal a decision from the PTC or to appeal the TC’s email denial of her witness list would merely be a charade, since there is no Rule permitting an appeal in either instance. In Case 004/2, the Supreme Court Chamber “exercise[ed] its discretion in the interests of justice and fairness to admit the [ICP’s] Immediate Appeal” even though the TC’s press release did not constitute a decision, “solely to ensure that legal certainty and finality are achieved in the determination

¹⁵¹ *Id.*, para. 76.

¹⁵² Email from ICP entitled “Request to file submission in one language,” 10 September 2021.

¹⁵³ Email from ICP entitled “Request to be permitted to file submissions in one language only,” 16 September 2021.

¹⁵⁴ Case 004/2 Supreme Court Chamber Decision, paras. 58-65.

¹⁵⁵ *Id.*, para. 64.

¹⁵⁶ *Id.*, para. 64.

¹⁵⁷ See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 13.

of [that] case and to uphold the integrity of the institution of the ECCC.”¹⁵⁸ It considered resolution in such circumstances a “superior necessity.”¹⁵⁹

51. It is in the interests of judicial economy to admit this Request. Admitting this Request will reduce the number of submissions filed before the CIJs, the PTC, and ultimately the Supreme Court Chamber.

III. ARGUMENT

52. Mr. MEAS Muth is entitled to equal treatment before the ECCC. Like in Case 004/2, there is no valid indictment on which to proceed at trial in Case 003. Nor are there cogent reasons to depart from the Supreme Court Chamber’s legal and factual reasoning in its decision to terminate Case 004/2. While the CIJs have determined that Case 003 is ripe for termination, a Supreme Court Chamber termination order would better serve the interests of justice and the ECCC’s legacy.

A. Mr. MEAS Muth has a right to equal treatment

53. Article 31 of the Cambodian Constitution provides that “[e]very Khmer citizen shall be equal before law, enjoying the same rights.” The constitutional principle of equal treatment is imbued in the ECCC framework in Rule 21(1)(b), which requires that “[p]ersons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules.” The Human Rights Committee explains that this principle “requires that similar cases are dealt with in similar proceedings.”¹⁶⁰ “Objective and reasonable grounds must be provided” to justify distinctions in procedure.¹⁶¹

54. There are no “objective and relevant grounds” to treat Mr. MEAS Muth differently than AO An. Mr. MEAS Muth and AO An were investigated by one NCIJ and five ICIJs for crimes against humanity, war crimes, genocide, and violations of the 1954 Cambodian Penal Code.¹⁶² The investigations in Cases 003 against Mr. MEAS Muth and Case 004/2

¹⁵⁸ Case 004/2 Supreme Court Chamber Decision, para. 65.

¹⁵⁹ *Id.*

¹⁶⁰ See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 14.

¹⁶¹ See *Id.*, citing *Weiss v. Austria*, Communication No. 1086/2002, para. 9.6. For another example of a violation of the principle of equality of arms see *Robinson v. Jamaica*, Communication No. 223/1987, para. 10.4.

¹⁶² Compare *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Closing Order (Indictment), 16 August 2018, D360, ERN 01580615-01580621 with Closing Order, 28 November 2018, D267, p. 256-65.

against AO An were concluded by the issuance of opposing Closing Orders due to a disagreement between the CIJs over whether they fell within the ECCC's jurisdiction.¹⁶³

55. The two Closing Orders in Case 003, like Case 004/2 are “in diametric opposition arrived at by two careful analyses of the actions attributed to the same suspect, same crime sites, and the same temporal phase.”¹⁶⁴ The irreconcilable differences of the CIJs on whether Mr. MEAS Muth “should be investigated *at all* led them to formally register fundamental disagreements and inevitably leading to the issuance of two separate Closing Orders,” as they did for AO An.¹⁶⁵ These “seemingly rigid and strongly held differences led to the current impasse” in Case 003 as they did in Case 004/2,¹⁶⁶ with the PTC failing to reach a supermajority in both cases to forward the Case Files or to dismiss them.

56. Mr. MEAS Muth is in the same position as AO An when the Supreme Court Chamber determined that his case should be terminated – two illegally issued Closing Orders with no PTC supermajority upholding or reversing either one. The only procedural difference is that the ICP did not seize the Supreme Court Chamber following the TC's rejection of her witness list, but instead seized the CIJs and later the PTC.

B. There is no valid Indictment in Case 003

57. When the Supreme Court Chamber denied Mr. MEAS Muth leave to intervene in Case 004/2, it considered his request “anticipatory” and that it had “the potential to pre-judge the outcome of the case,”¹⁶⁷ since, presumably, the PTC would abide by the Supreme Court Chamber's decision when issuing its considerations in Case 003.

58. Yet the PTC disregarded the Supreme Court Chamber's decision to terminate Case 004/2 and did not “provide an actual final ruling” disposing of Case 003 after declaring the issuance of the opposing Closing Orders to be illegal.¹⁶⁸ The National PTC Judges in claiming that the case should be archived considered that both Closing Orders are “of equal value,” while the International PTC Judges upheld the Indictment and found the Dismissal

¹⁶³ See *supra*, paras. 1-48. See also Case 004/2 Supreme Court Chamber Decision, paras. 59, 62.

¹⁶⁴ See *supra*, paras. 4-11. See also Case 004/2 Supreme Court Chamber Decision, para. 62.

¹⁶⁵ See *supra*, paras. 4-11. See also Case 004/2 Supreme Court Chamber Decision, para. 62.

¹⁶⁶ See *supra*, paras. 39-41. See also Case 004/2 Supreme Court Chamber Decision, para. 62.

¹⁶⁷ *Case of AO An*, 004/2/07-09-2009-ECCC/TC/SC, Decision on 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, 17 June 2020, E004/2/2/1, p. 2-3.

¹⁶⁸ Case 003 PTC Considerations, p. 41.

Order null and void.¹⁶⁹ The PTC did not: (a) remand the case to the CIJs with instructions to issue a single Closing Order; or (b) investigate and issue a revised Closing Order in accordance with the Supreme Court Chamber's decision.¹⁷⁰

59. Following the PTC's considerations, the CIJs considered that the Supreme Court Chamber was "clear in its views in Case 004/2 that the PTC *had* to choose a final disposition for the case before it."¹⁷¹ Finding that they lacked jurisdiction to decide the fate of Case 003 since it was still pending with the PTC to determine Civil Party admissibility, and encouraging the ICP to appeal their decision, the CIJs provided the PTC an opportunity to clarify their considerations.¹⁷²
60. When given an opportunity to clarify its Considerations by ruling on Defence's and ICP's requests to conclude the pre-trial proceedings in Case 003, the PTC considered that it was *not* required to reach a unanimous decision disposing of the case.¹⁷³ It also affirmed that it could not reach a supermajority on the issues presented in the requests – whether to terminate, seal, and archive, or whether to forward the case to trial.¹⁷⁴ Following the PTC's decision on the ICP's and Defence's requests, the CIJs now consider that "[a]ny argument that five judges upheld the indictment of the International Co-Investigating Judge ... is therefore moot by the PTC's own words."¹⁷⁵
61. Any doubt that the PTC unanimously upheld the Indictment has been removed: the two Closing Orders are "equal in value" because they are both *null* and *void*. Unless the Supreme Court Chamber finds cogent reasons to depart from its reasoning in Case 004/2, Mr. MEAS Muth must benefit from the Supreme Court Chamber's rulings that there is no valid indictment on which to proceed, Case 003 should be terminated, lest Mr. MEAS Muth's constitutionally protected right to equal protection be violated.¹⁷⁶

¹⁶⁹ See *supra*, paras. 31-33.

¹⁷⁰ Case 004/2 Supreme Court Chamber Decision, para. 61, citing *inter alia* Case 004/2 PTC Considerations, para. 30.

¹⁷¹ CIJs' Decision on Forwarding Case File 003, para. 25.

¹⁷² *Id.*, paras. 40, 43.

¹⁷³ PTC Consolidated Decision, para. 68.

¹⁷⁴ *Id.*, para. 77.

¹⁷⁵ Order to File Submissions on Residual Jurisdiction to Terminate Case 003, para. 2.

¹⁷⁶ Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 new; Rule 21(1)(b); ICCPR, Arts. 14(1), 26.

C. There are no cogent reasons to depart from the Supreme Court Chamber's reasoning in Case 004/2

62. The Supreme Court Chamber concluded that notwithstanding agreement in relation to the great number of victims, there was no agreement after 13 years of investigation that AO An falls within the ECCC's jurisdiction, and that in the absence of a definitive and enforceable indictment against him, Case 004/2 must be terminated.¹⁷⁷
63. The International PTC Judges provide no cogent reasons or legal authority to depart from the Supreme Court Chamber's decision in Case 004/2. Misinterpreting the Supreme Court Chamber's decision, the International PTC Judges failed to:
- a. Comprehend that the civil law rules of interpretation, the applicable Cambodian criminal procedure, and procedural rules established at the international level provide that when Judges do not have the authority to issue a particular decision, that decision is null and void;¹⁷⁸
 - b. Distinguish the nature of a Closing Order from a judgment, citing the inapposite standard of review for procedural errors on appeal;¹⁷⁹
 - c. Note where in the common part of the reasoning anything to the effect that either Closing Order is valid and stands;¹⁸⁰
 - 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;¹⁸¹
 - e. Acknowledge the Charged Persons' right under Rule 21(4) to have proceedings "brought to a conclusion within a reasonable time";¹⁸² and
 - f. Comprehend the notification and transmission procedures as provided in the ECCC framework.¹⁸³

¹⁷⁷ Case 004/2 Supreme Court Chamber Decision, para. 69.

¹⁷⁸ See MEAS Muth's Supplement to his Appeal, para. 31.

¹⁷⁹ Case 003 PTC Considerations, fn. 609.

¹⁸⁰ *Id.*, para. 274.

¹⁸¹ *Id.*, para. 280.

¹⁸² *Id.*, para. 275. See also Rule 21(4).

¹⁸³ Case 004/2 Supreme Court Chamber Decision, para. 49.

64. The International PTC Judges also erroneously found in Case 003 that Rule 77(13)(b) applies to send the Indictment forward to the TC. Rule 77(13) cannot apply because there are no valid Closing Orders. But even if the Supreme Court Chamber reverses and considers that two Closing Orders are *not* null and void, Rule 77(13) cannot apply because it was designed for a *single* Closing Order. Under Rules 77(13)(a) and 77(13)(b) both Closing Orders would hang in perpetuity – a situation the CIJs found to be inconsistent with the Rule of Law.¹⁸⁴
65. Given the lack of objective reasons to distinguish Case 003 from Case 004/2 and lack of any cogent reasons to depart from the Supreme Court Chamber’s decision in Case 004/2, Mr. MEAS Muth must benefit from its holdings of law and factual considerations lest Mr. MEAS Muth’s constitutionally protected right to equal protection be violated.¹⁸⁵

D. The CIJs have determined that Case 003 is ripe for termination

66. The CIJs considered that “the time has now come” since the case has now been before the PTC twice and all relevant legal issues have been debated at length by the parties.¹⁸⁶ Their decision is a foregone conclusion, just like the result in the PTC had the CIJs triggered the dispute resolution mechanism.¹⁸⁷ As the CIJs explained, the PTC National Judges expressed their view on multiple occasions in Cases 003, 004/2, and 004/1 that they did not accept ECCC jurisdiction over any of the remaining Charged Persons after Cases 001 and 002.¹⁸⁸ Seizing the PTC “would have meant needless delays and a useless waste of time and resources” and once the CIJs concluded their investigations by issuing Closing Orders, the dispute resolution mechanism, which applies to the *investigation phase*, became inapplicable.¹⁸⁹ And even if the CIJs asked the PTC for an advisory opinion on the legality

¹⁸⁴ MEAS Muth’s Appeal, paras. 41-46; 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. 22; MEAS Muth’s Supplement, paras. 45, 50. MEAS Muth’s Request to Terminate, Seal, and Archive Case 003, 21 June 2021, D272, para. 52.

¹⁸⁵ Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 new; Rule 21(1)(b); ICCPR, Arts. 14(1), 26.

¹⁸⁶ Order to File Submissions on Residual Jurisdiction to Terminate Case 003, para. 6.

¹⁸⁷ *Id.*, para. 15.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* 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*. Once Closing Orders are issued, the investigation ceases and the CIJs are *functus officio*. 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. See also *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28 (“Case 001 Appeal Judgment”), para. 65. The Supreme Court Chamber’s *obiter dictum* in Case 001 relates to disagreements

of opposing Closing Orders, the PTC would have refused to answer it – as it did when the Case 004 Defence requested the PTC for clarification.¹⁹⁰ The CIJs now declare that had they been provided notice of the PTC’s views, “all cases could have been dealt with as soon as possible by joint decision – which . . . , could only have meant the immediate termination of all cases remaining after the dismissal in case 004/1.”¹⁹¹

67. The CIJs consider that “there is no new aspect likely to arise” since “[t]he only issue that remains to be determined is whether [the CIJs] have residual jurisdiction to terminate the case.”¹⁹² They “the possibility that the ICP might want to seize the SCC,” but characterized such request as “*a request for termination as in Case 004/2.*”¹⁹³ They only await submissions on whether *they* have the residual jurisdiction to terminate the case before hearing from the Supreme Court Chamber.¹⁹⁴

68. The CIJs “prefer not to be put in that position” – i.e. to terminate the case before the Supreme Court Chamber pronounces its views – but considered “it necessary to emphasize that the rule of law has costs and that the case must remain in limbo.”¹⁹⁵ Given the Supreme Court Chamber’s position in the ECCC hierarchy as the court of final instance and duty to bring clarity, finality, and “provide legal remedies and a final determination in cases where statutes or laws are unclear,”¹⁹⁶ a termination order from the Supreme Court Chamber and order for the CIJs to archive Case 003 would better serve the interests of justice and the ECCC’s legacy. It would also preempt unnecessary litigation before the CIJs, whose decision the ICP would have a right to appeal, and whose decision would stand after the PTC fails to reach a supermajority.

69. Considering that Mr. MEAS Muth has a right to equal treatment, that there is no valid indictment in Case 003 (like in Case 004/2), that there are no cogent reasons to depart from the Supreme Court Chamber’s decision in Case 004/2, that the CIJs consider that Case 003 is ripe for termination (since there are no new legal or factual issues), any request

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” (emphasis added).

¹⁹⁰ Order to File Submissions on Residual Jurisdiction to Terminate Case 003, paras. 19-20.

¹⁹¹ *Id.*, para. 19.

¹⁹² *Id.*, para. 6.

¹⁹³ *Id.*, para. 7 (emphasis added).

¹⁹⁴ *Id.*, para. 6.

¹⁹⁵ *Id.*, para. 6.

¹⁹⁶ Case 004/2 Supreme Court Chamber Decision, para. 64.

by the ICP that is not in accordance with the CIJs' proposal to seek the *termination* of Case 003 should be found inadmissible and/or similarly dismissed on the merits.¹⁹⁷

IV. CONCLUSION AND RELIEF SOUGHT

70. Mr. MEAS Muth is 82 years old.¹⁹⁸ For the past 13 years, he has lived with the weight and public stigma of being under investigation for crimes against humanity, grave breaches of the Geneva Conventions, genocide, and national crimes, with no definitive answer on whether he will face trial. 43 years after the events in Case 003, the proceedings against him remain pending, with the two judicial factions of the PTC obstinately clinging to their opposing positions, compromising the international standards the ECCC must adhere to, uncompromisingly. With the lapsing of time, fading of memories, and deterioration of evidence,¹⁹⁹ the prospect of a fair trial for Mr. MEAS Muth – let alone one conducive to ascertaining the truth – is exponentially diminishing.
71. Regrettably, by declining to deviate from their previous posture of not collegially investigating the case or issuing a revised Closing Order, by dismissing the Supreme Court Chamber's holdings of law, and by issuing separate contradictory Considerations, the National and International Judges of the PTC are condemning Mr. MEAS Muth to the same uncertainty, the same procedural merry-go-round, the same predicament as AO An in Case 004/2, who, but for the intervention of the Supreme Court Chamber (to which the International Judges take umbrage), would still be in legal limbo, yet without the possibility of due process, enduring the psychological fear and social stain of having an Indictment hanging over him.
72. It is now time for the Supreme Court Chamber to act decisively. The Supreme Court Chamber Judges have the authority, indeed duty, to prevent further violations of Mr. MEAS Muth's fair trial rights and to preserve the integrity of the ECCC's legacy by terminating Case 003 in accordance with its decision in Case 004/2. Anything less would be a violation of Mr. MEAS Muth's right to equal treatment, shifting the responsibility on to the CIJs to terminate Case 003.

¹⁹⁷ Case 001 Appeal Judgement, para. 20. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC47 & 48), Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, para. 22.

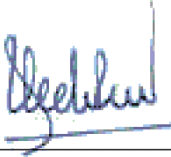

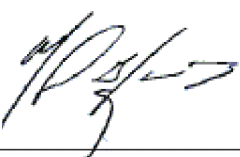
¹⁹⁸ Written Record of Initial Appearance, 14 December 2015, D174.

¹⁹⁹ *See Situation in Myanmar*, ICC-RoC46(3)-01/18-37, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," 6 September 2018, para. 86.

WHEREFORE, for all the reasons stated herein, the Supreme Court Chamber is requested to:

- a. **ADMIT** this Request;
- b. **TERMINATE** Case 003; and
- c. **ORDER** the CIJs to archive Case File 003;

Respectfully submitted,

 _____ ANG Udom		 _____ Michael G. KARNAVAS
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Co-Lawyers for Mr. MEAS Muth
Signed in Phnom Penh, Kingdom of Cambodia on this 4th day of **October, 2021**