

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS**

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**MEAS MUTH'S SUPPLEMENT TO HIS APPEAL AGAINST THE
INTERNATIONAL CO-INVESTIGATING JUDGE'S INDICTMENT**

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All Civil Parties in Case 003

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Article 33 new of the Establishment Law,¹ Rules 21 and 39(4) of the ECCC Internal Rules (“Rules”), and the Pre-Trial Chamber’s inherent powers,² hereby files this Supplement to Mr. MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment (“MEAS Muth’s Appeal”).³ This Supplement is made necessary because the Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An (“Trial Chamber’s Statement”)⁴ raises the prospect of having an unchallengeable indictment hanging over Mr. MEAS Muth in perpetuity, which would irreparably harm and permanently deprive him of his rights under the Cambodian Constitution and ECCC framework.⁵ The Trial Chamber’s Statement constitutes newly discovered information meriting submissions from the Defence in keeping with its duty of due diligence.⁶ Permanently staying the proceedings with full prejudice in light of the Trial Chamber’s Statement is necessary to avoid manifest injustice and will promote judicial efficiency and legal certainty.⁷ Admitting this Supplement will not prejudice any Party nor unduly impact the Pre-Trial Chamber’s (“PTC”) timeframe for disposing of the cross-appeals in Case 003.⁸ Considering the importance and complexity of the legal and procedural issues raised herein, the Defence further requests an oral hearing.

¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2004) (“Establishment Law”).

² *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”), paras. 32, 51.

³ MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4 (“MEAS Muth’s Appeal”).

⁴ 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”).

⁵ 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 (“Cambodian Constitution”), Art. 31; 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”), Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 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 (“ICCPR”), Art. 14(2).

⁶ Due diligence requires a Charged Person’s Co-Lawyers to do anything and everything to ensure that all fair trial rights are fully accorded to their client, including making all necessary legal and factual challenges and so on. See ALASKA RULES OF PROF’L CONDUCT (2017-2018 ed.), Rule 1.3; *Id.*, Comment to Rule 1.3. See also Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 7; Law on the Statutes of the Bar (1995), Art. 58; Rule 22(4).

⁷ Rule 21.

⁸ The PTC projected that it will dispose of the cross-appeals in Case 003 by the third quarter of 2020. Completion Plan, Rev. 24, 31 March 2020, paras. 11(a), 13(ii), 25(b).

I. ADMISSIBILITY

1. Additional submissions are reasonable, necessary, and indeed mandatory when newly discovered facts emerge that are relevant to a material issue, and when considered, could impact the outcome of the case.⁹ Considering that the Trial Chamber's Statement surfaced after written submissions in the cross-appeals against the Closing Orders,¹⁰ oral arguments,¹¹ and Mr. MEAS Muth's Request for Clarification of the Pre-Trial Chamber's Considerations on Appeals Against Closing Orders in Case 004/2 ("Request for Clarification"),¹² it constitutes newly discovered information meriting submissions from the Defence in keeping with its duty of due diligence.¹³ The new developments give rise to new information akin to newly discovered evidence under Rule 87(4). Such evidence may be admitted and considered if it is conducive to ascertaining the truth and was unavailable or could not have been discovered through reasonable diligence.¹⁴
2. The ECCC framework favors admitting this Supplement to protect Mr. MEAS Muth's constitutionally guaranteed rights to a fair trial and due process. Article 33 new of the Establishment Law requires that proceedings before the ECCC be conducted in accordance with "international standards of justice, fairness, and due process of law," set out in the ICCPR,¹⁵ which is enshrined in the Cambodian Constitution.¹⁶ Rule 21 requires the PTC to interpret the ECCC framework to always safeguard Mr. MEAS Muth's interests.¹⁷ Rule

⁹ See *Prosecutor v. Popović et al.*, IT-05-88-A, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011, para. 9.

¹⁰ MEAS Muth's Appeal; International Co-Prosecutor's Appeal of the Order Dismissing the Case Against MEAS Muth (D266), 8 April 2019, D266/2 ("ICP's Appeal"); National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order in Case 003, 5 April 2019, D267/3; MEAS Muth's Response to the International Co-Prosecutor's Appeal of the Dismissal Order, 24 June 2019, D266/5 ("MEAS Muth's Response"); International Co-Prosecutor's Response to MEAS Muth's Appeal Against the International Co-Investigating Judge's Indictment (D267), 28 June 2019, D267/10; International Co-Prosecutor's Reply to MEAS Muth's Response to the Appeal of the Order Dismissing the Case Against MEAS Muth (D266), 9 August 2019, D267/11; 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 ("MEAS Muth's Reply").

¹¹ Scheduling Order for the Pre-Trial Chamber's Hearing on Appeals Against Closing Orders, 24 October 2019, D266/12.

¹² MEAS Muth's Request for Clarification of the Pre-Trial Chamber's Considerations Against Closing Orders in Case 004/2, 27 March 2020, D267/24.

¹³ See *supra* fn. 6.

¹⁴ Rule 87(4); *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Decision Concerning New Documents and Other Related Issues, 30 April 2012, E190, paras. 22-23. See also Rule 112(1)(a) regarding revising a final judgement when there is newly discovered evidence.

¹⁵ ICCPR, Arts. 14-15. See also Establishment Law, Art. 35 new; Agreement, Arts. 12-13.

¹⁶ Cambodian Constitution, Art. 31.

¹⁷ Rule 21(1). See also Case 004/2 PTC Considerations, para. 51.

39(4) allows the PTC to validate any action executed by a Party after the expiration of a time limit.

3. The PTC also has inherent power to admit this Supplement and grant the relief requested. In instances where statutory provisions do not expressly or by necessary implication contemplate its power to pronounce on a matter, the PTC has inherent power “to determine incidental issues which arise as a direct consequence of the procedures of which [it is] seized by reason of the matter falling under [its] primary jurisdiction.”¹⁸ Exercising this inherent power here is “necessary by the imperative need to ensure good and fair administration of justice.”¹⁹

II. BACKGROUND

The investigation

4. Mr. MEAS Muth has been under the judicial scrutiny of the ECCC for over a decade. On 7 September 2009, following a PTC split on the Co-Prosecutors’ disagreement on whether to prosecute Case 003, acting ICP Robert Pettit seized National Co-Investigating Judge (“NCIJ”) YOU Bunleng and International Co-Investigating Judge (“ICIJ”) Marcel Lemonde of his Introductory Submission.²⁰ Before ICIJ Lemonde resigned “to take up other long-standing plans,”²¹ the CIJs developed a detailed work plan to investigate Mr. MEAS Muth²² and collected more than 1,130 pieces of evidence.²³
5. ICIJ Siegfried Blunk, who replaced ICIJ Lemonde, continued investigating alongside his national counterpart in “a smooth manner and in complete agreement.”²⁴ The NCIJ and

¹⁸ Case 004/2 PTC Considerations, para. 51.

¹⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(26), Decision on Co-Prosecutor’s Request for Clarification, 26 June 2013, E284/2/1/2, para. 12; Case 004/2 PTC Considerations, para. 51.

²⁰ Annex I: Public Redacted Version Consideration of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, para. 45; Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1; Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.

²¹ 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>.

²² ECCC Court Report: Issue 26 (June 2010), p. 2, <https://www.eccc.gov.kh/sites/default/files/publications/The%20Court%20Report%20%5BJune%202010%5D%20FINAL.pdf>.

²³ 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.

²⁴ Order Dismissing the Case Against MEAS Muth, 28 November 2018, D266 (“Dismissal Order”), para. 41.

ICIJ Blunk agreed on the investigative methods,²⁵ “established joint working groups,”²⁶ and over the course of the following five months, collected evidence and reviewed over 3,000 pieces of evidence from Case Files 001, 002, and 003.²⁷ After “focus[ing] for a while on analyzing the 10,000 evidentiary documents and 700 witness interviews compiled in Case 002 for their relevance to Cases 003 and 004 ... field investigations resumed and key witnesses were questioned, including Duch.”²⁸ On 29 April 2011, after 20 months of investigation, the CIJs “unanimously agreed” not to charge Mr. MEAS Muth.²⁹ ICIJ Blunk resigned out of principle after statements in the press called into question his independence and integrity.³⁰

6. Just two months after ICIJ Blunk’s resignation, former Reserve International Co-Investigating Judge (“RICIJ”) Laurent Kasper-Ansermet (who was never sworn in as ICIJ)³¹ unilaterally reopened the investigation.³² The NCIJ cautioned RICIJ Kasper-Ansermet to review the evidence before taking any “hasty actions.”³³ RICIJ Kasper-Ansermet admitted that he did not review the Case File, but believed he “needed to take immediate action to reopen the investigation,” for fear that the NCIJ would issue the Forwarding Order drafted alongside ICIJ Blunk.³⁴ He resigned five months after reopening the investigation.³⁵
7. Rather than issuing the Forwarding Order he drafted with ICIJ Blunk, the NCIJ waited for his new international counterpart, ICIJ Mark Harmon, to familiarize himself with the Case

²⁵ Dismissal Order, para. 48.

²⁶ ECCC Court Report: Issue 33 (February 2011), p. 7, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_February_2011.pdf.

²⁷ Dismissal Order, paras. 42, 48. *See also id.*, para. 359.

²⁸ Thomas Miller, *KRT judge talks court controversies*, PHNOM PENH POST, 18 August 2011, available at <https://www.phnompenhpost.com/national/krt-judge-talks-court-controversies>.

²⁹ Dismissal Order, para. 53.

³⁰ 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>.

³¹ 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>.

³² Order on Resuming the Judicial Investigation, 2 December 2011, D28.

³³ ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>.

³⁴ ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>.

³⁵ 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/en/articles/press-release-international-reserve-co-investigating-judge>.

File.³⁶ After discussing the status of the investigation and registering a disagreement on 7 February 2013,³⁷ the NCIJ issued the Forwarding Order, considering the investigation complete on 29 April 2011.³⁸ ICIJ Harmon continued investigating,³⁹ since, to his understanding, the CIJs have “discretion to decide independently when they consider that an investigation has been concluded.”⁴⁰ He unilaterally charged Mr. MEAS Muth⁴¹ four months before resigning “for strictly personal reasons.”⁴²

8. After being sworn in on 31 July 2015,⁴³ ICIJ Michael Bohlander familiarized himself with the Case File before investigating and gathering evidence,⁴⁴ re-issuing decisions made by ICIJ Harmon,⁴⁵ rescinding some of ICIJ Harmon’s charges,⁴⁶ and charging Mr. MEAS Muth with additional crimes.⁴⁷ Meanwhile, the NCIJ patiently and unobtrusively waited for ICIJ Bohlander to conclude his investigation.
9. In May 2017, when the court’s budgetary situation reached a “crisis point,” the CIJs contemplated permanently staying the proceedings.⁴⁸ The CIJs found 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

³⁶ 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/en/articles/mark-harmon-sworn-international-co-investigating-judge>.

³⁷ 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.

³⁸ 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/en/articles/statement-co-investigating-judges-regarding-case-003>.

³⁹ 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.

⁴⁰ 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).

⁴¹ Notification of Charges Against MEAS Muth, 3 March 2015, D128.1.

⁴² ECCC Press Release, *Judge Harmon announces his resignation*, 7 July 2015, <https://www.eccc.gov.kh/en/articles/judge-harmon-announces-his-resignation>. ICIJ Harmon resigned effective 31 July 2015. See ECCC Website, *Judge Mark Brian Harmon*, <https://www.eccc.gov.kh/en/person/judge-mark-brian-harmon>.

⁴³ Closing Order, 28 November 2019, D267 (“Indictment”), para. 10; ECCC Press Release, *Michael Bohlander appointed as new Co-Investigating Judge*, 24 August 2015, <https://www.eccc.gov.kh/en/node/34050>; ECCC Website, *Judge Michael Bohlander*, <https://www.eccc.gov.kh/en/person/judge-michael-bohlander>.

⁴⁴ See e.g. Extension of Rogatory Letter D59, 26 August 2015, D59.13; Extension of Rogatory Letter D89, 26 August 2015, D89.11.

⁴⁵ 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.

⁴⁶ Written Record of Initial Appearance, 14 December 2015, D174, p. 10.

⁴⁷ Written Record of Initial Appearance, 14 December 2015, D174, p. 9-10.

⁴⁸ 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. 75, 84.

appellate review by the PTC “and, by extension, serious doubt about the parties getting their day in court before the Trial Chamber ... and [Supreme Court Chamber].”⁴⁹ When some rapid funding came in, the CIJs deferred staying the proceedings pending further development – vowing to remain seized of the matter and to take necessary measures should judicial independence, fairness, and the integrity of the proceedings be threatened.⁵⁰

10. Following the conclusion of ICIJ Bohlander’s investigation,⁵¹ six years after the NCIJ and ICIJ Blunk concluded theirs,⁵² the CIJs agreed to simultaneously issue contradictory Closing Orders.⁵³ The NCIJ called for dismissal of the case, finding that Mr. MEAS Muth is not among 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.”⁵⁴ ICIJ Bohlander found to the contrary,⁵⁵ indicting Mr. MEAS Muth for genocide, crimes against humanity, war crimes, and national crimes.⁵⁶

Cross-appeals against the Closing Orders

11. The Parties appealed the Closing Orders.⁵⁷ In their written submissions, the Defence and ICP agreed that the ECCC framework permits the CIJs to issue contradictory Closing Orders,⁵⁸ though they disagreed on which one prevails in the event neither is overturned by PTC supermajority. The Defence argued that the Dismissal Order must prevail under the principle of *in dubio pro reo*,⁵⁹ while the ICP argued that Rule 77(13)(b) mandates that the case proceeds to trial on the Indictment.⁶⁰

⁴⁹ 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. 53-54.

⁵⁰ 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.

⁵¹ Notice of Conclusion of Judicial Investigation Against MEAS Muth, 10 January 2017, D225.

⁵² Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁵³ Indictment, para. 19.

⁵⁴ Dismissal Order, para. 428.

⁵⁵ Indictment, para. 460.

⁵⁶ Indictment, p. 256-64.

⁵⁷ National Co-Prosecutor’s Appeal Against the International Co-Investigating Judge’s Closing Order in Case 003, 5 April 2019, D267/3; MEAS Muth’s Appeal; ICP’s Appeal.

⁵⁸ MEAS Muth’s Appeal, paras. 34-38; ICP’s Appeal, paras. 191-98.

⁵⁹ MEAS Muth’s Appeal, paras. 33-72.

⁶⁰ ICP’s Appeal, paras. 191-98.

12. Oral arguments were heard on 27 to 29 November 2019.⁶¹ Leading the third day of hearings, Judge Olivier Beauvallet questioned the ICP “regarding the simultaneous delivery of two contradictory Closing Orders.”⁶² The ICP maintained that the issuance of contradictory Closing Orders is permissible, arguing that “converting the permissive disagreement mechanism ... into a mandatory mechanism” would violate the language of the Agreement, Establishment Law, and Rules and unduly limit the CIJs’ independent discretion.⁶³ Though the Defence agreed with the ICP, it submitted that both 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].”⁶⁴

PTC Considerations in Case 004/2

13. Before disposing of the cross-appeals in Case 003,⁶⁵ the PTC issued its Considerations in Case 004/2, declaring that the “issuance of [t]wo Closing Orders was illegal, violating the legal framework of the ECCC.”⁶⁶ The PTC found that the CIJs “committed a gross error of law ... by finding that the ECCC framework authorises the issuance of separate and opposing Closing Orders,”⁶⁷ rejecting the CIJs’ “remarkably minimal reasoning” on the permissibility of issuing contradictory Closing Orders.⁶⁸ The PTC found it “especially disturbing that the split Closing Orders were issued ... with an explicit declaration by the two Judges that they agreed on the unlawful issuance of separate and conflicting Closing Orders,”⁶⁹ “astonishing” that the CIJs were “fully ‘aware of the problem’” the contradictory Closing Orders would cause,⁷⁰ and that the CIJs “grave[ly] disregard[ed] ... the core principles underlying the ECCC legal system ... [and] fail[ed] to uphold the paramount duties entrusted to their Office....”⁷¹ And while the PTC considered that the CIJs may have

⁶¹ Scheduling Order for the Pre-Trial Chamber’s Hearing on Appeals Against Closing Orders, 24 October 2019, D266/12.

⁶² Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 11.25.07-11.26.26.

⁶³ 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.

⁶⁴ Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 12.00.18-12.03.17

⁶⁵ Completion Plan, Rev. 24, 31 March 2020, paras. 11(a), 13(ii), 25(b).

⁶⁶ Case 004/2 PTC Considerations, p. 61.

⁶⁷ Case 004/2 PTC Considerations, para. 98.

⁶⁸ Case 004/2 PTC Considerations, paras. 122-23.

⁶⁹ Case 004/2 PTC Considerations, para. 123.

⁷⁰ Case 004/2 PTC Considerations, para. 123.

⁷¹ Case 004/2 PTC Considerations, para. 124.

committed this error in good faith, it was “unable to exclude that the [CIJs] may have willfully intended to circumvent the application of the law ... and create the current procedural stalemate.”⁷²

14. The PTC “deplor[ed] the [OCIJ’s] persistent practice of avoiding the PTC’s intervention to settle disputes ... in defiance of the ECCC legal system”⁷³ and considered that CIJs’ “malpractice ... jeopardised the whole legal system upheld by the Royal Government of Cambodia and the United Nations.”⁷⁴ “More than a blatant legal error,” the PTC considered that the CIJs’ “unlawful actions may well amount to a denial of justice,” “violating the most fundamental principles of the ECCC legal system.”⁷⁵ “[W]ith regret,” to the PTC’s knowledge, never has “there been any criminal case in the history or any national or international legal system that closed with the simultaneous issuance of two contrary decisions emanating from one single judicial office.”⁷⁶
15. After unanimously holding that the issuance of contradictory Closing orders is illegal, the National and International PTC Judges – acting separately and conflictingly – reviewed the merits of and gave preference to the Closing Orders of their choice.⁷⁷ The National PTC Judges found that the Indictment is invalid because the ICP and the ICIJ Bohlander did not strictly adhere to the Agreement and Rules, leaving the Dismissal Order the only valid Closing Order under Rule 77(13).⁷⁸ The International PTC Judges found that the NCIJ’s issuance of a Dismissal Order is *ultra vires* and void and that only the ICIJ’s Indictment stands,⁷⁹ since the Dismissal Order amounts to “nothing more than a different characterisation of the [NCIJ’s] disagreement on the issuance of an indictment,” which should have been resolved by Rule 72’s disagreement settlement procedure.⁸⁰

Subsequent stalemate

16. Following the PTC’s Considerations, the ICP and National Co-Prosecutor (“NCP”) issued a press release expressing their discordant interpretations of the legal effect of the Considerations. The ICP stated that the Trial Chamber is seized of the Indictment under

⁷² Case 004/2 PTC Considerations, para. 99.

⁷³ Case 004/2 PTC Considerations, para. 35.

⁷⁴ Case 004/2 PTC Considerations, para. 123.

⁷⁵ Case 004/2 PTC Considerations, para. 123.

⁷⁶ Case 004/2 PTC Considerations, para. 124.

⁷⁷ Case 004/2 PTC Considerations, p. 61. *Id.*, paras. 273-302, 304-687, p. 266.

⁷⁸ Case 004/2 PTC Considerations, paras. 252-60, 286-94, *esp.* paras. 290, 298.

⁷⁹ Case 004/2 PTC Considerations, para. 326.

⁸⁰ Case 004/2 PTC Considerations, para. 323.

Rule 77(13)(b) and that she “will therefore act in accordance with the ECCC’s Internal Rules and prepare for trial,”⁸¹ while the NCP stated that she is of the view that the Indictment “is illegal based on the effect of the [PTC’s] decision....”⁸²

17. On 29 January 2020, President of the Pre-Trial Chamber Judge PRAK Kisman issued an interoffice memorandum stating that only the unanimous portion of the PTC’s Considerations have legal effect and that notifying the Considerations to the Trial Chamber, “is violating the unanimous decision of [the] PTC.”⁸³ The International PTC Judges responded the same day that the President does not have authority to instruct the Court Management Section (“CMS”), noting that the CMS received contradictory instructions from the national and international PTC Greffiers – respectively, to archive the case and to notify the Trial Chamber of the PTC’s Considerations.⁸⁴
18. Following the PTC Judges’ contradictory memoranda, the ICP requested the PTC to direct the CMS to take all administrative action to forward the Indictment and Case File to the Trial Chamber.⁸⁵ Shortly thereafter, the Greffier of the Trial Chamber informed the Parties in Case 004/2 that it has still not been formally notified of the PTC’s Considerations, the Case File has not been forwarded to it, and that “[i]t is up to the [PTC] to initiate both actions.”⁸⁶ AO An in turn requested the PTC to “confirm that all administrative actions have been taken to archive Case File 004/2.”⁸⁷
19. In the midst of subsequent litigation in Case 004/2, the PTC International Judges issued another interoffice memorandum noting that the Office of Administration requested authoritative clarification as to which of the contradictory instructions were to be implemented by the CMS.⁸⁸ The International PTC Judges insisted that their 29 January

⁸¹ ECCC Press Release, *Statement by the International Co-Prosecutor on Case 004/2*, 24 December 2019, p. 2, <https://www.eccc.gov.kh/en/document/public-affair/international-and-national-ocps-press-release-case-00402>.

⁸² ECCC Press Release, *National Co-Prosecutor’s Press Statement on the Charged Person AO An of Case 004/2*, 24 December 2019, p. 1, <https://www.eccc.gov.kh/en/document/public-affair/international-and-national-ocps-press-release-case-00402>.

⁸³ Pre-Trial Chamber Memorandum entitled “Clarification of the decision in the case 004/2,” 29 January 2020, D359/34, p. 2.

⁸⁴ Pre-Trial Chamber Memorandum entitled “Notification of the Pre-Trial Chamber’s Considerations in Case 004/2,” 29 January 2020, D359/35, p. 5.

⁸⁵ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber, 4 February 2020, D359/25.

⁸⁶ Pre-Trial Chamber Memorandum entitled “Transfer of Case File 004/2,” 12 March 2020, D359/36, para. 16.

⁸⁷ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), Request for Confirmation that All Administrative Actions Have Been Taken to Archive Case File 004/02, 24 February 2020, D359/27.

⁸⁸ Pre-Trial Chamber Memorandum entitled “Transfer of Case File 004/2,” 12 March 2020, D359/36, para. 13.

2020 memorandum was an “authoritative clarification,” stating that “[i]f the Office of Administration were to be persistent in its inactivity without legal basis, the re-composition of the [OCIJ] would have to be considered....”⁸⁹ In response on 16 March 2020, the President of the PTC stated that the PTC “has already fulfilled its duty in accordance with the law and none of the administrative actions is required,” reiterating the position in his 29 January 2020 memorandum that only the joint disposition has legal effect.⁹⁰

20. The following day, AO An requested the OCIJ to seal and archive Case File 004/2, arguing that the PTC has failed to resolve its internal disagreements, the Office of Administration and Trial Chamber are unable to act, and that the OCIJ is the only judicial organ under the ECCC framework empowered to resolve the current procedural impasse.⁹¹ Given the procedural stalemate on the consequences of the CIJs’ illegal Closing Orders in Case 004/2 and the absence of certainty as to whether the case proceeds to trial, 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.⁹² Specifically, the Defence requested clarification as to:

- a. Whether the CIJs followed the letter and spirit of the Agreement, Establishment Law, Rules, and PTC Jurisprudence in issuing contradictory Closing Orders;⁹³
- b. Whether neither the Indictment nor Dismissal Order can stand since both were issued in contravention of Rule 67(1);⁹⁴
- c. Whether the PTC considered referring to Rule 76(7) to determine the consequences of declaring the issuance of contradictory Closing Orders illegal;⁹⁵

⁸⁹ Pre-Trial Chamber Memorandum entitled “Transfer of Case File 004/2,” 12 March 2020, D359/36, para. 37.

⁹⁰ Pre-Trial Chamber Memorandum entitled “Re-Confirmation of the Decision on Case File 004/2,” 16 March 2020, D359/37, p. 2.

⁹¹ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ, Request to Seal and Archive Case File 004/2, 17 March 2020, D363, para. 2.

⁹² Request for Clarification, para. 15.

⁹³ Request for Clarification, para. 17.

⁹⁴ Request for Clarification, para. 19.

⁹⁵ Request for Clarification, para. 21.

- d. Whether the PTC failed to apply what it considers to be the applicable law by failing to remit the Closing Orders to the CIJs with instructions or failing to review the Case File itself;⁹⁶
- e. Whether 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;⁹⁷
- f. Whether 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;⁹⁸
- g. Whether 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;⁹⁹
- h. The legal authority the National PTC Judges applied to justify reviewing the illegal Closing Orders;¹⁰⁰
- i. Whether 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;¹⁰¹
- j. Whether the National PTC Judges resorted to the principle of *in dubio pro reo* after applying the civil law rules of interpretation to Rule 76(7) to resolve the issuance of two illegal Closing Orders;¹⁰²
- k. The legal basis the International PTC Judges applied to differentiate between “issuing” a Closing Order before the conclusion of the investigation and the language of Rule 67(1), which provides that the CIJs “shall conclude the investigation by issuing a Closing Order”;¹⁰³ and
- l. Whether the Trial Chamber can be seized of a procedurally defective, illegal Indictment under Rule 77(13)(b).¹⁰⁴

⁹⁶ Request for Clarification, para. 23.

⁹⁷ Request for Clarification, para. 25.

⁹⁸ Request for Clarification, para. 27.

⁹⁹ Request for Clarification, para. 29.

¹⁰⁰ Request for Clarification, para. 31.

¹⁰¹ Request for Clarification, para. 33.

¹⁰² Request for Clarification, para. 35.

¹⁰³ Request for Clarification, para. 37.

¹⁰⁴ Request for Clarification, para. 39.

21. On 3 April 2020, in an effort to provide “transparency and clarity to the public and the relevant parties,” the Trial Chamber issued its Statement, splitting along national and international lines on whether it has power to address the issues raised by the Parties in Case 004/2.¹⁰⁵ The National Trial Chamber Judges considered that the Trial Chamber “does not have *any* authority to make any decision regarding the case,” because it does not have access to the Case File, the case is still under the PTC’s authority, and the case was closed by the PTC’s Considerations.¹⁰⁶ The International Trial Chamber Judges considered that the Trial Chamber “has *inherent authority* to address some of the preliminary issues raised by the parties....”¹⁰⁷ Because the Trial Chamber Judges could not agree on common reasoning, “issuing a formal decision ... is not possible.”¹⁰⁸
22. On 22 April 2020, the UN Secretary General reinstated Michael Bohlander as ICIJ, with he and his national counterpart, the NCIJ, comprising the OCIJ from this date.¹⁰⁹
23. Following ICIJ Bohlander’s restatement, the Co-Prosecutors issued press releases again expressing discordant views on the ECCC’s ongoing judicial activity. The ICP considered the Trial Chamber’s inaction constitutes “an effective termination of Case 004/2, which she is appealing to the Supreme Court Chamber....”¹¹⁰ The NCP maintained her view that the case has been concluded: The Trial Chamber does not have any authority to make a decision “and there is no need for the [NCP] to take any action.”¹¹¹
24. The proceedings in Case 004/2 and the Trial Chamber’s Statement indicate that Case 003, without remedial action, will result in a procedural stalemate, with the Indictment hanging over Mr. MEAS Muth in perpetuity – charges he would never be able to challenge since no other forum is available to him.

¹⁰⁵ Trial Chamber’s Statement, p. 2.

¹⁰⁶ Trial Chamber’s Statement, p. 2 (emphasis in original).

¹⁰⁷ Trial Chamber’s Statement, p. 2 (emphasis in original).

¹⁰⁸ Trial Chamber’s Statement, p. 2.

¹⁰⁹ Statement from the OCIJ, *International Co-Investigating Judge Reinstated*, 22 April 2020, <https://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge-reinstated>.

¹¹⁰ ECCC Press Release, *Press Release from the International Co-Prosecutor*, 4 May 2020, <https://www.eccc.gov.kh/en/document/public-affair/press-release-international-co-prosecutor-and-national-co-prosecutor>.

¹¹¹ ECCC Press Release, *Press Release from the National Co-Prosecutor Regarding the Charged Person AO An in Case 004/2*, 4 May 2020, <https://www.eccc.gov.kh/en/document/public-affair/press-release-international-co-prosecutor-and-national-co-prosecutor>.

III. ARGUMENT

25. The consequence of the PTC's Considerations in Case 004/2 is that the illegal Closing Orders in Case 003 are null, void, and beyond judicial review on the merits. The standard remedies following annulment – remitting the Case File to the CIJs with instructions or the PTC reviewing the Case File itself and issuing its own Closing Order – are impracticable, if not impossible. There is no possibility of Trial Chamber or Supreme Court Chamber review to resolve the procedural stalemate. Given these exceptional circumstances, the PTC should exercise its inherent power to permanently stay the proceedings in Case 003.

A. The illegal Closing Orders in Case 003 are null, void, and beyond judicial review on the merits

26. The PTC's unanimous declaration in Case 004/2 that the issuance of contradictory Closing Orders “was illegal, violating the legal framework of the ECCC”¹¹² must apply to Case 003, lest Mr. MEAS Muth's constitutionally protected right to equal protection be violated.¹¹³ The consequence of that declaration is that the illegal Closing Orders in Case 003 are null, void, and beyond judicial review on the merits.

27. The Indictment and Dismissal Order in Case 003 are procedurally defective since they were issued *ultra vires* in contravention of Rule 67(1), which governs the issuance of Closing Orders.¹¹⁴ Rule 67(2) provides that “[a]n Indictment shall be *void* for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the [CIJs], including the relevant criminal provisions and the nature of the criminal responsibility.”¹¹⁵ The PTC held that Rule 76, which governs the annulment procedure, excludes the filing of annulment applications after the issuance of a Closing Order.¹¹⁶ No other Rule in the ECCC framework contemplates the annulment of Closing Orders.

¹¹² Case 004/2 PTC Considerations, p. 61.

¹¹³ 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.

¹¹⁴ Case 004/2 PTC Considerations, para. 121, p. 61. The PTC found that Rule 67(1) “clearly stipulates that “[t]he Co-Investigating Judges *shall conclude* the investigation by issuing a Closing Order, *either* indicting a Charged Person and sending him or her to trial, *or* dismissing the case” (emphasis in PTC Considerations).

¹¹⁵ Emphasis added.

¹¹⁶ Decision on MEAS Muth's Request for the Pre-Trial Chamber To Take A Broad Interpretation Of The Permissible Scope Of Appeals Against The Closing Order & To Clarify The Procedure For Annuling The Closing Order, Or Portions Thereof, If Necessary, 28 April 2016, D158/1, para. 18.

28. A *lacuna* exists in Rule 67(2). It does not contemplate the annulment or “voiding”¹¹⁷ of Closing Orders not issued in conformity with the ECCC framework, since the drafters could not have envisaged the “unprecedented simultaneous issuance of two separate and opposing Closing Orders in one single case.”¹¹⁸ The Agreement, Establishment Law, Rules and ECCC jurisprudence establish an interpretive framework for filing *lacuna*, under which civil law rules of interpretation apply, then Cambodian criminal procedure, then procedural rules established at the international level.¹¹⁹
29. Civil law rules of interpretation, according to the Supreme Court Chamber, “tak[e] into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective.”¹²⁰ The language of Rule 67(2),¹²¹ its place in the ECCC framework (i.e. its place in the rules governing the procedural requirements of Closing Orders and the absence of a Rule governing annulment of procedural defects after the close of the investigation),¹²² and its main underlying principles and objective (i.e. to ensure that a trial does not proceed on a procedurally defective Indictment since a Dismissal Order concludes the case), support the conclusion that Closing Orders not in conformity with the ECCC framework are null and void.
30. The PTC has held on appeals of Closing Orders that if it finds errors or abuses fundamentally determinative of the CIJs’ exercise of discretion, it may reverse and remit that decision to the CIJs for reconsideration,¹²³ or, “fulfil[ing] the role of the Cambodian Investigation Chamber at the ECCC,” investigate the case itself.¹²⁴ These remedies mirror

¹¹⁷ The French language version of Rule 76(5), which governs the annulment of procedurally defective acts of the CIJs, refers to “les parties annulées sont cancellées” and “[a]près annulation ou cancellation....” In French, “annuler” means “to set aside; declare void.” F.H.S. BRIDGE, THE COUNCIL OF EUROPE FRENCH-ENGLISH LEGAL DICTIONARY (Council of Europe Publishing, 1994), p. 16.

¹¹⁸ Case 004/2 PTC Considerations, para. 88.

¹¹⁹ Agreement, Article 12(1); Establishment Law, Article 33 new; Rule 2. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC06), Decision on Nuon Chea’s Appeal against Order Refusing Annulment, 26 August 2008, D55/I/8, paras. 14-15; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, paras. 118-26.

¹²⁰ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.

¹²¹ Rule 67(1): “An Indictment shall be *void* for procedural defects....” (emphasis added).

¹²² See Rule 67: “Closing Orders by the Co-Investigating Judges”; Rule 76(7): “Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”

¹²³ Case 004/2 PTC Considerations, para. 30.

¹²⁴ Case 004/2 PTC Considerations, para. 30. See also *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal Against Closing Order indicting KAING Guek Eav Alias “DUCH”, 5 December

the “consequences of *nullification*” in Article 281 of Cambodian Code of Criminal Procedure, under which the Investigation Chamber may “return the dossier to the investigating judge” or “continue the investigation of the case by itself.”¹²⁵

31. Procedural rules established at the international level provide that when a decision or act is made *ultra vires* (i.e. without legal authority), the legal consequence of that decision or act is that it is null and void.¹²⁶ The ICTY Appeals Chamber held that a Trial Chamber’s ruling to proceed by deposition was null and void for failure to comply with the ICTY Statute and Rules of Procedure and Evidence.¹²⁷ The ICTR Trial Chamber declared null and void a document issued *ultra vires* by the Registrar.¹²⁸ Judges PRAK Kisman and Rowan Downing recognized this procedural rule as applicable to the ECCC when opining, poignantly, that:

Procedural fairness ... will include a transparent and authorised procedure where the rights and obligations are properly provided, expressed and applied. In this way there is certainty in the expectation that a matter will be dealt with in a predictable, proper and defined manner. It is not for a court or judges, without any authorisation, to change stated procedures as a matter of expediency or for any other unauthorised reason. This is fundamentally procedurally unfair. Any action taken in respect of such unauthorised procedure is void.¹²⁹

32. Interpreting Rule 67(2) 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 legal effect of the PTC’s unanimous holding in Case 004/2 is that the illegal Closing Orders in Case 003 are, *ipso facto*, null, void, and beyond

2008, D99/3/42, paras. 41-42; *Case of IM Chaem*, 004/1/07-09-2009/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20, para. 22.

¹²⁵ Emphasis added.

¹²⁶ See *Prosecutor v. Kupreškić et al.*, IT-95-16-AR73.3, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 14; *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Declaration on a Point of Law, 22 April 1999, para. 17.

¹²⁷ *Prosecutor v. Kupreškić et al.*, IT-95-16-AR73.3, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 14 (“The Appeals Chamber, therefore, finds that the ruling was null and void since it was rendered without jurisdiction”).

¹²⁸ *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Declaration on a Point of Law, 22 April 1999, para. 17 (declaring a document issued *ultra vires* by the Registrar to be “null and void”).

¹²⁹ *Case of NUON Chea et al.*, 009/19-09-2007-ECCC/OCIJ (PTC47 & 48), Decision on Appeals Against Co-Investigating Judges’ Combined Order D250/3/3 Dated 13 January 2010 and Order 250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, Opinion of Judges PRAK Kisman and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties, para. 13.

judicial review on the merits. The ECCC framework dictates that the procedurally defective Closing Orders in Case 003 should be annulled and removed from the Case File.¹³⁰

B. The standard remedies following annulment are either impracticable or impossible

33. Rather than availing itself to the two available remedies following a finding that the CIJs committed errors and abuses fundamentally determinative of their discretion – remitting the Case File to the CIJs for reconsideration¹³¹ or investigating and issuing its own Closing Order¹³² – the PTC reviewed the merits of and gave divergent preference to the CIJs’ illegal Closing Orders,¹³³ thus creating, distressingly, the prevailing and persistent procedural stalemate and legal uncertainty. Irrefutably, the PTC’s contradictory instructions to the CMS¹³⁴ and the Trial Chamber’s inability to decide on the matter¹³⁵ has left Case 004/2 in legal limbo with no resolution in sight. This legal uncertainty will indubitably carry over to Case 003, since there is no legitimate basis¹³⁶ for the PTC to depart from its declaration that the issuance of contradictory Closing Orders is illegal.
34. Given the impossibility of the PTC coming to a consensus, collegially investigating Case 003, and issuing a revised Closing Order, the only viable option is to remit the Case File to the CIJs. Yet, effectively, this is a non-option. Remitting Case File 003 to the CIJs is as impracticable as it is injudicious, causing undue delay and violating Mr. MEAS Muth’s fair trial rights.¹³⁷

¹³⁰ Under Rule 76(5), procedurally defective acts are annulled and removed from the Case File and it is prohibited to draw inferences against them.

¹³¹ Case 004/2 PTC Considerations, para. 30. *See also Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20, para. 22.

¹³² Case 004/2 PTC Considerations, para. 30.

¹³³ Case 004/2 PTC Considerations, p. 61. *Id.*, paras. 273-302, 304-687, p. 266.

¹³⁴ Pre-Trial Chamber Memorandum entitled “Notification of the Pre-Trial Chamber’s Considerations in Case 004/2,” 29 January 2020, D359/35, p. 5.

¹³⁵ Trial Chamber’s Statement, p. 2.

¹³⁶ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC03), Decision on Application for Reconsideration of Civil Parties’ Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25.

¹³⁷ Cambodian Constitution, Art. 31; Agreement, Arts. 12(1), 13(1); Establishment Law, Arts. 33 new, 35 new (c); Rule 21(4); ICCPR, Art. 14(3)(c). *See infra* paras. 35-39.

35. Although ICIJ Bohlander was reappointed as ICIJ,¹³⁸ additional OCIJ staff (national and international) will need to be recruited and trained.¹³⁹ Realistically, one cannot expect that former OCIJ staff – currently employed at other international(ized) courts and elsewhere – are available and willing to return to their previous positions. The new staff, however talented, will not have by any stretch of the imagination, the same knowledge, experience, and institutional memory. Significant additional time and resources to review the Case File will be unavoidably necessary.
36. The PTC will also have to consider whether to instruct the NCIJ to review the *entire* Case File – including evidence gathered after he and ICIJ Blunk concluded their investigation in 2011¹⁴⁰ – before the CIJs can earnestly deliberate. If the NCIJ is ordered to review the entire Case File, this will also significantly delay the proceedings given that he concluded his investigation six years before ICIJ Bohlander.¹⁴¹
37. If the NCIJ is not ordered to review the entire Case File, even if the CIJs are ordered to deliberate before issuing a new Closing Order, it is unrealistic to expect the CIJs to agree on a common outcome.¹⁴² Even were the contradictory Closing Orders placed into a single document, the cosmetic (as opposed to substantive) revisions would amount to nothing short of a charade.¹⁴³ Or conversely, one CIJ would be forced to subordinate his views to the other's.¹⁴⁴
38. The Parties will inevitably appeal the revised Closing Order.¹⁴⁵ The (initial) appellate cycle in Case 003 lasted an entire year (from the issuance of the Closing Orders until the PTC's

¹³⁸ Statement from the OCIJ, *International Co-Investigating Judge Reinstated*, 22 April 2020, <https://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge-reinstated>.

¹³⁹ It is an indisputable fact that the OCIJ has been without staff, and for all intents and purposes, has been defunct as a judicial organ of the ECCC since the resignation of ICIJ Michael Bohlander on 28 June 2019. ECCC Press Release, *International Co-Investigating Judge resigns upon completion of Case 004*, 28 June 2019, <https://www.eccc.gov.kh/en/document/public-affair/international-co-investigating-judge-resigns-upon-completion-case-004>.

¹⁴⁰ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13; Dismissal Order, para. 2.

¹⁴¹ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13; Notice of Conclusion of Judicial Investigation Against MEAS Muth, 10 January 2017, D225.

¹⁴² It merits noting that in the Defence's Appeal and Response, it has been argued that the additional evidence placed on the Case File after the NCIJ completed his investigation would not appreciably alter his factual findings or his conclusion that Mr. MEAS Muth was not among those most responsible. MEAS Muth's Appeal, paras. 13, 53; MEAS Muth's Response, paras. 32, 72-92; MEAS Muth's Reply, paras. 15-19.

¹⁴³ See MEAS Muth's Appeal, para. 38.

¹⁴⁴ See MEAS Muth's Appeal, paras. 45, 64, 66, 69. See also Case 004/2 PTC Considerations, para. 29.

¹⁴⁵ See Rule 74(2), 74(3)(a), 74(4)(b).

hearing).¹⁴⁶ Given that the Indictment consists of 265 pages and 1378 footnotes, and the Dismissal Order, 215 pages and 1169 footnotes, any new Closing Order from the CIJs will merit reasonable extensions of time and pages to appeal, respond, and reply.¹⁴⁷ Assuming the PTC disposes of Case 003 by the end of the third quarter of 2020¹⁴⁸ and the CIJs take eight months to review the Case File and draft a Closing Order,¹⁴⁹ it would not be until May 2022 before the PTC again decides whether the case is dismissed or sent to trial. If Case 003 is sent to trial, the trial would commence no sooner than July 2023¹⁵⁰ – nearly 15 years after the NCIJ and ICIJ began investigating Case 003.

39. Lastly, given the disparaging tone and tenor of the unanimous portion of the PTC’s Considerations in Case 004/2,¹⁵¹ what confidence can the PTC have in the CIJs to faithfully follow their instructions and issue a Closing Order that is in conformity with the ECCC framework? What ensures the PTC that the CIJs will “uphold the paramount duties entrusted to their Office”¹⁵² as opposed to jeopardizing the ECCC legal system and violating its most fundamental principles.¹⁵³ Regrettably, the PTC Judges’ unanimous and public expression that the CIJs not only acted illegally by not applying the ECCC procedure, but effectively engaged in a perversion of justice by “decid[ing] to shield their disagreement from the most effective dispute resolution mechanism available under the ECCC legal framework to ensure a way out of procedural stalemates,”¹⁵⁴ casts a dark and troublesome shadow, engendering a stained perception of the judicial integrity of the CIJs

¹⁴⁶ Scheduling Order for the Pre-Trial Chamber’s Hearing on Appeals Against Closing Orders, 24 October 2019, D266/12.

¹⁴⁷ The PTC allowed the Parties to file 100-page Appeals within 60 days from the notification of the translations of both Closing Orders, 50-page Responses within 45 days from the notification of translation of each Appeal, and 30-page Replies within 25 days from the notification of translation of each Response. Decision on MEAS Muth’s Request for Extension of Time and Page Limits to Appeal the International Co-Investigating Judge’s Closing Order & Request to File His Appeal in English with the Khmer Translation to Follow, 29 January 2019, D267/1/3; Decision on Requests for Extension of Time and Page Limits for Responses and Replies relating to the Appeals against the Closing Orders in Case 003, 10 May 2019, D266/4.

¹⁴⁸ The PTC delayed its projected disposal of the cross-appeals in Case 003 from the second quarter of 2020 to the third quarter of 2020. Completion Plan, Rev. 23, 31 December 2019, paras. 11(a), 13(iii), 26(b); Completion Plan, Rev. 24, 31 March 2020, paras. 11(a), 13(ii), 25(b).

¹⁴⁹ This timespan assumes that the Parties rely on their Final Submission and Response to the Final Submission. The CIJs took 230 days (roughly seven months) to draft their Closing Orders upon receipt of the Defence’s Response to the Final Submission. MEAS Muth’s Response to the International Co-Prosecutor’s Final Submission, 12 April 2018, D256/11.

¹⁵⁰ In Case 001, the period between the Closing Order and the start of the substantive hearing was about eight months. In Case 002, this period was 14 months. *Case of KAING Guek Eav*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188, paras. 6, 9; *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 April 2014, E313, paras. 3, 7.

¹⁵¹ See e.g. Case 004/2 PTC Considerations, paras. 35-36, 54, 89, 99-100, 121-24.

¹⁵² Case 004/2 PTC Considerations, para. 124.

¹⁵³ Case 004/2 PTC Considerations, para. 123.

¹⁵⁴ Case 004/2 PTC Considerations, para. 123.

and their ability to render justice. Undeserving as this perception may be, it nonetheless exists, further militating against remitting the Closing Orders to the CIJs.

C. There is no possibility of Trial Chamber or Supreme Court Chamber review to resolve the procedural stalemate

40. The PTC Judges gave contradictory instructions to the CMS as to whether the Considerations and Case File are to be transferred to the Trial Chamber or archived.¹⁵⁵ The Trial Chamber has not been notified or seized of the PTC's Considerations or Case File 004/2; the Trial Chamber Greffier instructed that "[i]t is up to the [PTC] to initiate both actions;"¹⁵⁶ and the Trial Chamber Judges have split along national and international lines on whether they have the inherent power to address the procedural stalemate.¹⁵⁷
41. The Trial Chamber's Statement indicates that it will not be seized with Case File 003 or be able to decide on the consequences of a PTC split on the cross-appeals.¹⁵⁸ Given the divergent views expressed by the National and International PTC Judges in and subsequent to their Considerations in Case 004/2,¹⁵⁹ the PTC will, predictably, not be able to come to a consensus on whether to transfer the Case File to the Trial Chamber.
42. Since the Trial Chamber is unable to issue a formal "decision,"¹⁶⁰ the Supreme Court Chamber has no jurisdiction to rule on the matter. Under Rule 104(4), the Supreme Court Chamber only has jurisdiction over immediate appeals of "decisions" of the Trial Chamber. Such decisions include those effecting the termination of proceedings, detention and bail, protective measures, and interference with the administration of justice. No rule provides the Supreme Court Chamber jurisdiction to issue an advisory opinion on the consequences of a PTC decision.
43. Even if the Supreme Court Chamber finds it in the interests of justice to provide "legal guidance ... emanat[ing] from another judicial body,"¹⁶¹ there is no indication that the Supreme Court Chamber, like the PTC and Trial Chamber, will not split along national and

¹⁵⁵ Pre-Trial Chamber Memorandum entitled "Notification of the Pre-Trial Chamber's Considerations in Case 004/2," 29 January 2020, D359/35, p. 5.

¹⁵⁶ Pre-Trial Chamber Memorandum entitled "Transfer of Case File 004/2," 12 March 2020, D359/36, para. 16.

¹⁵⁷ Trial Chamber's Statement, p. 2.

¹⁵⁸ Trial Chamber's Statement, p. 2.

¹⁵⁹ See *supra* paras. 15, 17, 19.

¹⁶⁰ Trial Chamber's Statement, p. 2.

¹⁶¹ *Prosecutor v. NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(26), Decision on Co-Prosecutor's Request for Clarification, 26 June 2013, E284/2/1/2, para. 5: "Requests for clarification or legal guidance may emanate from another judicial body or from a party to proceedings."

international lines. And even then, in civil law systems, “judges are bound only by the law; the common law principle of *stare decisis* does not apply.”¹⁶² Legal principles formulated by the Supreme Court Chamber “do not, as a rule, bind the [PTC] in [its] interpretation of the law.”¹⁶³

D. The PTC has the power to issue a permanent stay of the proceedings to avoid manifest injustice

44. The PTC has inherent power to issue a permanent stay of the proceedings when it becomes necessary to avoid a miscarriage of justice resulting from the CIJs’ and Chambers’ inability to reach a consensus on a final, binding decision on whether to indict or dismiss the case.¹⁶⁴ When necessary, the PTC may invoke the abuse of process doctrine to prevent serious and egregious violations of the Charged Persons’ fair trial rights.¹⁶⁵ This is such an instance.
45. The standard remedies following annulment – remitting the Case File to the CIJs for reconsideration or investigating and issuing a Closing Order – are impracticable if not impossible, with no possibility of Trial Chamber or Supreme Court Chamber review to resolve the procedural stalemate. Resultantly, Mr. MEAS Muth is left with the prospect of an indictment hanging over him in perpetuity should proceedings cease.¹⁶⁶ Were this to occur, Mr. MEAS Muth would be irreparably harmed and permanently deprived of his constitutionally guaranteed fair trial rights to be presumed innocent,¹⁶⁷ to defend himself,¹⁶⁸ to have proceedings against him brought to a conclusion within a reasonable time,¹⁶⁹ and to have equal protection before the ECCC.¹⁷⁰ This is not an unfounded scenario or a

¹⁶² See Decision on MEAS Muth’s Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 April 2016, D87/2/1.7/1, para. 13.

¹⁶³ See Decision on MEAS Muth’s Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 April 2016, D87/2/1.7/1, para. 13.

¹⁶⁴ See *infra* paras. 47-48.

¹⁶⁵ See *infra* paras. 49.

¹⁶⁶ The PTC’s failure to uphold one Closing Order over the other on appeal would be analogous to the situation in which no appeal against a Closing Order is filed under Rule 69(2)(b), which provides that the “case file shall be archived after the expiry of the time limit for appeal.”

¹⁶⁷ Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 new; Rule 21(1)(d); ICCPR, Art. 14(2).

¹⁶⁸ Cambodian Constitution, Art. 38; Agreement, Arts. 12(2), 13(1); Establishment Law, Arts. 33 new, 35 new (b), (d), (e); ICCPR, Art. 14(3)(b), (d), (e).

¹⁶⁹ Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1), Establishment Law, Arts. 33 new, 35 new (c); Rule 21(4); ICCPR, Art. 14(3)(c).

¹⁷⁰ 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.

hyperbolic suspicion: both CIJs acknowledged that leaving an unchallengeable indictment hanging in perpetuity is incompatible with the basic demands of the rule of law.¹⁷¹

46. The PTC “is responsible for ensuring, at the investigation stage, that the fundamental principles underlying the criminal procedure applicable before the ECCC are respected,”¹⁷² and may thus exercise its discretion to take measures to ensure that the proceedings are fair and conducted according to international standards of due process.¹⁷³ If the PTC is unable to come to a consensus and issue a final, binding decision disposing of the cross-appeals against the Closing Orders (either indicting Mr. MEAS Muth and sending him to trial, or dismissing the case) and fulfill its overriding duty to ensure Mr. MEAS Muth’s fair trial rights, it has the authority to take all necessary and reasonable measures to avoid a miscarriage of justice. This includes the issuance of a permanent stay of the proceedings with prejudice.
47. Even though there is nothing in the Agreement, Establishment Law, Rules, or Cambodian Code of Criminal Procedure that explicitly provides for staying the proceedings, the Supreme Court Chamber has recognized that proceedings may be stayed at the ECCC. Stating that criminal action may not be “extinguished” except in situations involving the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*, it explained: “On the other hand, the [Cambodian Code of Criminal Procedure] provides for the power to ‘suspend’ or ‘stay’ proceedings in certain circumstances of a *lasting impediment* in the conduct of the proceedings....”¹⁷⁴
48. The Agreement implicitly provides for permanent stays of the proceedings by explicitly envisioning the UN withdrawing from the Agreement and ceasing its assistance to the

¹⁷¹ 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. 54.

¹⁷² Case 004/2 PTC Considerations, para. 52

¹⁷³ See Case 004/2 PTC Considerations, para. 52. See also Cambodian Constitution, Art. 31; Agreement, Art. 12(2); Establishment Law, Art. 33 new.

¹⁷⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC (16), Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith, 14 December 2012, E138/1/10/1/5/7, para. 38 (emphasis added). Noting that the Cambodian Code of Criminal Procedure does not contemplate an autonomous legal category of a “permanent stay” or another situation other than termination of the proceedings where the Court’s jurisdiction over the case before it would cease, the Supreme Court Chamber considered that it “would be more systematically consistent that the scarcity of regulation pertinent to obstacles to criminal proceedings in Cambodian law be remedied by analogy [by] broadening the instances of ‘suspension’ rather than broadening the instances of termination of proceedings.” *Id.*

ECCC in certain circumstances – such as when the ECCC ceases to function in a manner that conforms to the Agreement.¹⁷⁵

49. The PTC should invoke the doctrine of “abuse of process” – an internationally recognized doctrine which, discernibly, has been applied at the ECCC to stay proceedings.¹⁷⁶ Under the doctrine of abuse of process, “Judges may decline to exercise the court’s jurisdiction in cases where to exercise that discretion in light of *serious* and *egregious* violations of the accused’s rights would prove detrimental to the court’s integrity.”¹⁷⁷ Invoking the abuse of process doctrine is a matter of discretion: the PTC “may find there has been an abuse of process and decline to exercise their jurisdiction by permanently staying, thus effectively terminating, the proceedings without adjudication.”¹⁷⁸

¹⁷⁵ Agreement, Art. 28.

¹⁷⁶ Abuse of process is a doctrine “is now accepted as part of international law and practice in order to ensure that the most serious violations of conduct or procedures, being entirely improper or illegal, are not permitted to negate the fair trial rights given to charged person or accused before a court.” *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 10.

¹⁷⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 22, quoting *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, Decision, 3 November 1999, paras. 74-75. The PTC further explained: “In the case of *The Prosecutor v. Radovan Karadžić*, the Appeals Chamber referred to its previous jurisprudence in the *Barayagwiza* case and found that only two situations may be considered as constituting a serious and egregious violation of the accused’s rights: (i) where a fair trial for the accused is impossible, usually for reasons of delay; and (ii) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court’s sense of justice, due to pre-trial impropriety or misconduct. The Appeals Chamber then stated that ‘[t]he applicable standard was further clarified by stating that a court may discretionally decline to exercise jurisdiction ‘where to exercise that jurisdiction in light of *serious* and *egregious violations of the accused’s rights* would prove detrimental to the court’s integrity’.” *Id.*, para. 23, quoting *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement, 12 October 2009, para. 45. *See also Prosecutor v. El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, para. 46.

¹⁷⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 22.

IV. CONCLUSION AND RELIEF SOUGHT

50. The PTC Judges, in accordance with their oath of office and responsibility to ensure the fairness of proceedings, appreciate that they cannot leave proceedings in “legal limbo.” They appreciate that they cannot leave an unchallengeable indictment hanging over Mr. MEAS Muth in perpetuity, for they themselves would bear responsibility for egregious violations of his fair trial rights if proceedings cease. The PTC has the power to prevent this.
51. The Closing Orders are null and void. The standard remedies following annulment are impracticable if not impossible. There is no possibility of Trial Chamber or Supreme Court Chamber review to resolve the inevitable procedural stalemate. Hence, in the interests of justice, legal certainty, and indispensable finality, the PTC, exercising its discretion, should invoke the doctrine of abuse of process and permanently stay the proceedings to prevent serious and egregious violations of Mr. MEAS Muth’s fair trial rights. The procedural impasse facing the Chambers is neither fleeting nor resolvable but a “lasting impediment” to the conduct of the proceedings.
52. The PTC *must* issue a permanent stay *unless* the PTC Judges can reach common reasoning on the progress of Case 003. The PTC must not countenance judicial abdication where the human rights of the Charged Persons hang in the balance.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the PTC to:

- (1) Find this Supplement admissible;
- (2) Declare the Closing Orders in Case 003 null and void; and
- (3) Permanently stay the proceedings in Case 003.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth
 Signed in Phnom Penh, Kingdom of Cambodia on this **5th** day of **May, 2020**