

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

**FILING DETAILS**

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

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## I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby responds to Meas Muth’s Supplement to his Appeal Against the International Co-Investigating Judge’s Indictment (“Supplementary Appeal”).<sup>1</sup> For the reasons set out in further detail below, the ICP submits that the Supplementary Appeal is inadmissible. It is ill-founded and untimely, and its admission is not required to protect Meas Muth’s fair trial rights. She similarly opposes Meas Muth’s request for an oral hearing.<sup>2</sup>
2. Its arguments on the merits are equally flawed. Meas Muth’s contention that the unlawful issuance of two conflicting closing orders renders both orders null and void is erroneous, since it, *inter alia*, misunderstands the Pre-Trial Chamber’s (“PTC”) Case 004/2 Considerations and misrepresents Rules<sup>3</sup> 67(2) and 76. In requesting a permanent stay of the Case 003 proceedings, Meas Muth seeks one of the most drastic remedies known to international criminal law on the basis of erroneous legal analysis compounded by layers of speculation.

## II. PROCEDURAL HISTORY AND APPLICABLE LAW

### *Case 003*

3. On 28 November 2018, the International Co-Investigating Judge (“ICIJ”) issued a closing order (“Indictment”) indicting Meas Muth for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code, and committing him for trial.<sup>4</sup> On the same day, the National Co-Investigating Judge (“NCIJ”) issued a closing order (“Dismissal Order”) dismissing all charges against Meas Muth on the basis that he does not fall within the personal jurisdiction of the ECCC.<sup>5</sup>
4. Three appeals were filed: The Indictment was appealed by the National Co-Prosecutor,<sup>6</sup> and Meas Muth filed an appeal requesting that the case be dismissed unless the PTC, by supermajority, both overturns the Dismissal Order and upholds the Indictment.<sup>7</sup> The then-

<sup>1</sup> **D267/27** Meas Muth’s Supplement to his Appeal Against the International Co-Investigating Judge’s Indictment, 5 May 2020 (“Supplementary Appeal”), notified in English and Khmer on 7 May 2020.

<sup>2</sup> **D267/27** Supplementary Appeal, p. 1.

<sup>3</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”).

<sup>4</sup> **D267** Closing Order, 28 November 2018 (“Indictment”), pp. 256-264.

<sup>5</sup> **D266** Order Dismissing the Case Against Meas Muth, 28 November 2018 (“Dismissal Order”), paras 427-430.

<sup>6</sup> **D267/3** National Co-Prosecutor’s Appeal Against the International Co-Investigating Judge’s Closing Order in Case 003, 5 April 2019.

<sup>7</sup> **D267/4** Meas Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019 (“Meas Muth Appeal”).

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ICP filed an appeal against the Dismissal Order.<sup>8</sup> The Parties filed their responses and replies by 19 August 2019.<sup>9</sup> Oral hearings were held between 27 and 29 November 2019.<sup>10</sup> Thereafter the PTC closed the proceedings for deliberation.

5. On 27 March 2020, Meas Muth filed a Request for Clarification<sup>11</sup> of the PTC's Considerations in Case 004/2,<sup>12</sup> to which the ICP responded on 13 April 2020.<sup>13</sup> Meas Muth replied on 20 April 2020.<sup>14</sup> On 22 April 2020, the ICIJ, Michael Bohlander, was reinstated to work alongside his Cambodian counterpart, Judge You Bunleng.<sup>15</sup> On 7 May 2020, the Parties were notified of Meas Muth's Supplementary Appeal, and on 15 May 2020, the PTC granted the ICP's request to file this Response no later than 29 May 2020.<sup>16</sup>
6. The PTC is expected to render its decision on the Parties' appeals in the third quarter of 2020.<sup>17</sup>

### *Case 004/2*

7. On 19 December 2019, the PTC issued its Considerations in Case 004/2.<sup>18</sup> After determining unanimously that the *issuance* of two conflicting Closing Orders was illegal,<sup>19</sup> the judges

<sup>8</sup> **D266/2** International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Meas Muth (D266), 8 April 2019 ("ICP Appeal").

<sup>9</sup> **Responses: D267/9** International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 003 Indictment, 14 June 2019; **D267/10** International Co-Prosecutor's Response to Meas Muth's Appeal Against the International Co-Investigating Judge's Indictment (D267), 28 June 2019 ("ICP Response to Meas Muth Appeal"); **D266/5** Meas Muth's Response to the International Co-Prosecutor's Appeal of the Dismissal Order, 24 June 2019; **Replies: D266/6 & D267/11** 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 ("ICP Appeal Reply"); **D266/7 & D267/12** 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.

<sup>10</sup> Draft Transcript of Case 003 Appeal Hearing, 27 November 2019; Draft Transcript of Case 003 Appeal Hearing, 28 November 2019; **D266/18.2 & D267/23.2** Transcript of Case 003 Appeal Hearing, 29 November 2019.

<sup>11</sup> **D266/19 & D267/24** Meas Muth's Request for Clarification of the Pre-Trial Chamber's Considerations on Appeals Against Closing Orders in Case 004/2, 26 March 2020 ("Request for Clarification").

<sup>12</sup> Case 004/2-**D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 ("Case 004/2 Considerations").

<sup>13</sup> **D266/20 & D267/25** International Co-Prosecutor's Response to Meas Muth's Request for Clarification of the Pre-Trial Chamber's Considerations on Appeals Against Closing Orders in Case 004/2, 13 April 2020 ("ICP Clarification Response").

<sup>14</sup> **D266/21 & D267/26** Meas Muth's Reply to International Co-Prosecutor's Response to Meas Muth's Request for Clarification of the Pre-Trial Chamber's Considerations on Appeals Against Closing Orders in Case 004/2, 20 April 2020.

<sup>15</sup> ECCC Statement: *International Co-Investigating Judge Reinstated*, 24 April 2020.

<sup>16</sup> Email from PTC Greffier, Hyuree Kim, entitled "PTC Notification in Response to the International Co-Prosecutor's Request for an Extension of Time to Respond to Meas Muth's Supplement to his Appeal against the Indictment", 15 May 2020 at 2.59 p.m.

<sup>17</sup> Completion Plan, Rev. 24, 31 March 2020, paras 11(a), 13(ii), 25(b).

<sup>18</sup> Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations.

<sup>19</sup> Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, paras 54, 89, 98, 102, 124, Disposition, EN 01634239 (unanimous).

did not then dismiss both Case 004/2 Closing Orders. Rather, they considered the legality of *each* Closing Order, arriving at differing conclusions on the individual legal status of those orders.<sup>20</sup> The PTC failed to reach a supermajority decision to overturn either the Dismissal Order or the Indictment in that case.

8. Since the issuance of those Considerations, the Case 004/2 Parties have submitted several motions to the PTC, Trial Chamber (“TC”)<sup>21</sup> and the Office of the Co-Investigating Judges (“OCIJ”). The ICP and Civil Party Lawyers are of the view that, since the Case 004/2 Indictment was not overturned by a supermajority of the PTC, that Indictment has automatically seised the TC under Rules 77(13)(b) and 79(1). The ICP, with the support of the Civil Party Lawyers, has therefore requested the PTC to perform the outstanding *administrative* task of sending the Case 004/2 case file to the TC for trial.<sup>22</sup> The Ao An Defence Team has sought to have the Case 004/2 case file archived on the basis that the case has been dismissed.<sup>23</sup>
9. On 21 January 2020 and 10 February 2020, the TC Greffier sent emails to the Case 004/2 Parties and PTC Judges stating that the PTC’s Considerations had not been formally notified to the TC and neither the Case File nor the Indictment had yet been forwarded. The second email concluded that the PTC had to initiate those actions.<sup>24</sup> On 12 March 2020, Judge

<sup>20</sup> Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 89, 124 (unanimous), Opinion of Judges Prak Kimsan, Ney Thol, and Huot Vuthy (“National Judges’ Opinion”) paras 170-302, Opinion of Judges Baik and Beauvallet (“International Judges’ Opinion”) paras 304-329, 681 .

<sup>21</sup> Case 004/2 Parties’ filings to the TC are detailed in Case 004/2-**E004/2/1** International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020 (“ICP’s Immediate Appeal to the SCC”), paras 7-11, 14, 19, 22-23, 28.

<sup>22</sup> **ICP**: Case 004/2-**D359/25** & **D360/34** 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; Case 004/2-**D359/28** & **D360/37** International Co-Prosecutor’s Reply to Ao An’s Response to the ICP’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (Ao An) to the Trial Chamber, 3 March 2020; Case 004/2-**D359/30** & **D360/39** International Co-Prosecutor’s Response to Ao An’s Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/2, 5 March 2020; Case 004/2-**D363/1** International Co-Prosecutor’s Response to Ao An’s Request to Seal and Archive Case File 004/02, 14 May 2020. **Civil Party Lawyers**: Case 004/2-**D359/33** & **D360/42** Civil Party Lawyers’ Request for Necessary Measures to be Taken by the Pre-Trial Chamber to Safeguard the Rights of Civil Parties to Case 004/2, 30 March 2020.

<sup>23</sup> Case 004/2-**D359/27** & **D360/36** [Ao An’s] Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02, 24 February 2020; Case 004/2-**D363** [Ao An’s] Request to Seal and Archive Case File 004/02, 17 March 2020. *See also* Case 004/2-**D359/26** & **D360/35** Response to 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, 18 February 2020; Case 004/2-**D359/31** & **D360/40** Reply to International Co-Prosecutor’s Response to Ao An’s Request for Confirmation that All Required Administrative Actions have been Taken to Archive Case File 004/02, 17 March 2020.

<sup>24</sup> Case 004/2-**D359/36.2** & **D360/45.2** Email from TC Greffier Suy-Hong Lim entitled “Information”, 21 January 2020 at 1.00 p.m.; Case 004/2-**D359/36.8** & **D360/45.8** Email from TC Greffier Suy-Hong Lim entitled “Concerning ICP request dated 4 February 2020”, 10 February 2020 at 11.44 a.m.

Olivier Beauvallet and Judge Kang Jin Baik issued an Interoffice Memorandum setting out the steps they had taken to forward the Case 004/2 case file to the TC, who, in their view, are already seised with the Case 004/2 Indictment.<sup>25</sup> On 16 March 2020, the PTC President, Judge Prak Kimsan, issued a Memorandum stating that the PTC's unanimous decision did not permit transfer of the case file to the TC.<sup>26</sup> As of the date of this filing, Case File 004/2 has not been transferred to the TC.

10. On 3 April 2020, the TC Judges issued a Statement ("TC Statement"), stating that, *inter alia*, issuing a formal decision was "not possible", it did not have the Case 004/2 Case File, and the relevant documents and requests served by the Parties to the TC would be returned.<sup>27</sup>
11. On 4 May 2020, the ICP filed an immediate appeal to the Supreme Court Chamber ("SCC"), submitting that the TC had legally erred and abused its discretion in effectively terminating Case 004/2, which prejudiced the ICP and the other Case 004/2 Parties.<sup>28</sup> The immediate appeal is currently before the SCC and has not been decided as of the date of this filing.
12. The applicable law is set out below where relevant.

### III. SUBMISSIONS

#### Admissibility

13. The ICP submits that Meas Muth's Supplementary Appeal is inadmissible and untimely. Following his recent Request for Clarification,<sup>29</sup> this Supplementary Appeal constitutes yet another illegitimate attempt to re-open proceedings in Case 003. As the ICP noted in her Response to that earlier Request for Clarification,<sup>30</sup> the PTC has already confirmed that the written briefing on appeal in this case is complete,<sup>31</sup> the oral hearings have taken place,<sup>32</sup> and the PTC has retired for deliberations.<sup>33</sup> The Rules do not provide for any additional

<sup>25</sup> **D266/20.1.10 & D267/25.1.10** Case 004/2-Interoffice Memorandum from PTC Judges Olivier Beauvallet and Kang Jin Baik entitled "Transfer of Case File 004/2", 12 March 2020.

<sup>26</sup> **D266/20.1.11 & D267/25.1.11** Case 004/2-Memorandum from PTC President Prak Kimsan entitled "Re-Confirmation of the Decision on Case File 004/2", 16 March 2020.

<sup>27</sup> Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving Ao An, 3 April 2020 ("TC Statement").

<sup>28</sup> Case 004/2-**E004/2/1** ICP's Immediate Appeal to the SCC.

<sup>29</sup> **D266/19 & D267/24** Request for Clarification.

<sup>30</sup> **D266/20 & D267/25** ICP Clarification Response, para. 11.

<sup>31</sup> **D266/12 & D267/17** Scheduling Order for the Pre-Trial Chamber's Hearing on Appeals Against Closing Orders, 24 October 2019, p. 1. When read together, Internal Rule 77 and arts 8.3 & 8.4 of the Practice Direction on the Filing of Documents before the ECCC envisage Responses and Replies to Appeals before the PTC. *See further* **D266/4 & D267/6** 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.

<sup>32</sup> *See supra*, para. 4.

<sup>33</sup> Internal Rule 77(12).

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argument from the Parties at this stage in the proceedings. Therefore, unless the PTC *seeks* the Case 003 Parties' submissions on any further issue(s), the ICP submits that the Parties are precluded from making further submissions, including supplementary appeals.

14. Meas Muth's reliance on the issuance of the TC Statement to justify admissibility on an exceptional basis is misplaced for two reasons. First, the TC Statement is not "newly discovered information".<sup>34</sup> New jurisprudence and/or procedural developments in another case are not, as Meas Muth argues, akin to "newly discovered evidence" under Rule 87(4). As he recalls himself, the purpose of that rule is to allow for the admission of evidence at trial that is "conducive to ascertaining the truth".<sup>35</sup> It is not to allow parties to make multiple submissions each time a purportedly relevant development occurs in another case. Complex cases such as these, in which there are hundreds of relevant procedural and substantive legal issues, would never be completed, contrary to the interests of justice and Meas Muth's own right to expeditious proceedings, if it were common practice to allow the parties to file supplementary submissions each time new jurisprudence appeared, or other procedural developments occurred, at the ECCC or another international(ised) tribunal.
15. Meas Muth submits without merit that the Supplementary Appeal should be admitted to protect his "constitutionally guaranteed rights to a fair trial and due process."<sup>36</sup> However, Meas Muth fails to explain how his rights could possibly be prejudiced when the PTC has access to, and the capacity to analyse, the relevant developments in Case 004/2, including the TC's Statement which the TC Greffier emailed to the parties<sup>37</sup> and publicly posted on the ECCC website.<sup>38</sup>
16. Moreover, the submissions at the heart of Meas Muth's Supplementary Appeal do not flow directly from the TC Statement, and a closer inspection of Meas Muth's prior filings reveals that they are not in fact "new" to him since it was issued on 3 April 2020. As Meas Muth concedes,<sup>39</sup> his contention that both Case 003 Closing Orders would be "null, void, and beyond judicial review on the merits",<sup>40</sup> arises from the PTC's holdings in the Case 004/2 Considerations, not the TC's Statement, and indeed featured prominently in Meas Muth's

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<sup>34</sup> **D267/27** Supplementary Appeal, p. 1, para. 1.

<sup>35</sup> **D267/27** Supplementary Appeal, para. 1.

<sup>36</sup> **D267/27** Supplementary Appeal, para. 2.

<sup>37</sup> The TC Statement was attached to the email from TC Greffier Suy-Hong Lim entitled "Statement of the Judges of the Trial Chamber", 3 April 2020, 1:49 p.m., sent to the Case 004/2 Parties and all five PTC Judges.

<sup>38</sup> Available in English at <https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> (last accessed on the date of this filing).

<sup>39</sup> **D267/27** Supplementary Appeal, para. 25.

<sup>40</sup> **D267/27** Supplementary Appeal, paras 25-32.

recent Request for Clarification.<sup>41</sup> Similarly, whilst he has now redirected his position since his Request for Clarification for reasons unconnected to the TC Statement,<sup>42</sup> the essence of Meas Muth's argument regarding the ensuing remedies again flows from the Case 004/2 Considerations. Reference to the TC's Statement therefore appears to be an attempt to distract the Chamber from Meas Muth's failure to file his Supplementary Appeal until over four months after publication of the Case 004/2 Considerations.

17. Meas Muth has previously admitted that he has already been afforded, and has taken—through written submission to and oral argument before the PTC in Case 003<sup>43</sup>—the opportunity to argue the essence of the issues underpinning the Supplementary Appeal, which revolve around the propriety of the issuance of two Closing Orders and its consequence on the legal effect of those Closing Orders and the future of Case 003. His fair trial rights, including the rights to be heard on those issues and to an effective appeal, as guaranteed under the ECCC Agreement,<sup>44</sup> ECCC Law<sup>45</sup> and Internal Rules,<sup>46</sup> particularly Rule 21, have therefore been protected. If the Chamber determines that it is necessary to expand on the issuance and legal effect of two Closing Orders in Case 003, it will surely do so.
18. Meas Muth's contention that the TC Statement now “raises the prospect of having an unchallengeable indictment hanging over [him] in perpetuity”,<sup>47</sup> thereby necessitating a permanent stay of Case 003 unless the PTC judges can reach unanimity,<sup>48</sup> is both legally incorrect and profoundly speculative. All permutations of future outcomes in Case 003 are, as Meas Muth terms it, “prospects”.<sup>49</sup> Case 004/2 proceedings have *not* concluded, and are currently before the SCC.<sup>50</sup> It is therefore premature for Meas Muth's categorical statements

<sup>41</sup> **D266/19 & D267/24** Request for Clarification, p. 1, paras 1, 18-21, 34-35.

<sup>42</sup> In his Request for Clarification, Meas Muth argued that the PTC should declare both Closing Orders null and void, and then either remit the case file to the CIJs or, preferably, review the case file itself (*see* **D266/19 & D267/24** Request for Clarification, paras 12, 22-33, 45-47), whereas he now argues that both these options are “either impracticable or impossible” (*see* **D267/27** Supplementary Appeal, paras 33-39, 51).

<sup>43</sup> **D266/19 & D267/24** Request for Clarification, paras 11-12 *citing* **D266/18.2 & D267/23.2** Transcript of Case 003 Appeal Hearing, 29 November 2019, 11.26.26-11.40.55, 11.59.14-12.03.17; **D267/4** Meas Muth Appeal, paras 8, 10, 32-72.

<sup>44</sup> 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, Phnom Penh, 6 June 2003 (“ECCC Agreement”).

<sup>45</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended 27 October 2004 (NS/RKM/1004/006).

<sup>46</sup> *See* ECCC Agreement, arts 12(2), 13(1); ECCC Law, arts 33 new, 35 new; Internal Rule 21(1).

<sup>47</sup> **D267/27** Supplementary Appeal, p. 1.

<sup>48</sup> **D267/27** Supplementary Appeal, paras 46, 52.

<sup>49</sup> *See further, infra*, paras 27-31.

<sup>50</sup> *See supra*, para. 11.

that “there is no possibility of [TC] or [SCC] review to resolve the procedural stalemate” in either case.<sup>51</sup> In fact, the speculation required to reach this conclusion is two-fold: it requires the PTC to hypothesise not only as to the outcome of Case 004/2 but also as to the progress of Case 003 after it has rendered its decision. The PTC has reiterated on many occasions that it does not rule on hypothetical questions.<sup>52</sup>

19. The ICP does not intend to litigate her Case 004/2 Appeal to the SCC in the context of this Response; its ultimate determination is a matter for the SCC to decide, not for Meas Muth to pre-empt. However, briefly put, it is simply incorrect that the SCC “has no jurisdiction to rule” because the TC Statement is not a “decision[] which [has] the effect of terminating the proceedings” for the purposes of Rule 104(4).<sup>53</sup> The TC’s inaction after being seised on 19 December 2019, culminating in the TC Statement and the physical return of the Parties’ pleadings,<sup>54</sup> constitutes a “decision” capable of being appealed to the SCC. SCC and PTC jurisprudence, including decisions on Meas Muth’s own appeals against “constructive denial” of his applications,<sup>55</sup> makes clear that judicial inaction having the effect of a decision may be appealed.<sup>56</sup> In Case 004/2, the TC has effectively terminated the proceedings against Ao An without arriving at a judgment, rendering the matter subject to immediate appeal

<sup>51</sup> **D267/27** Supplementary Appeal, Heading III.C. *See also* paras 40-43, 51.

<sup>52</sup> *See e.g.* **D158/1** 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 Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, para. 14; Case 004/2-**D208/1/1/2** Decision on Ta An’s Appeal Against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, 22 January 2015, para. 8 and citations therein.

<sup>53</sup> **D267/27** Supplementary Appeal, para. 42.

<sup>54</sup> *See* Case 004/2-**E004/2/1** ICP’s Immediate Appeal to the SCC, paras 9, 12, 21-22, 29-30.

<sup>55</sup> *See e.g.* **D87/2/2** Decision on Meas Muth’s Appeal Against the Co-Investigating Judges’ Constructive Denial of Fourteen of Meas Muth’s Submissions to the [Office of the Co-Investigating Judges], 23 April 2014, paras 10-11; **D120/1/1/2** Decision on Meas Muth’s Appeal Against the Co-Investigating Judges’ Constructive Denial of Meas Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 17 June 2015, paras 7-8 (Recalling that pursuant to Rules 73 and 74, the PTC has jurisdiction to hear appeals against a “decision” or “orders” issued by the CIJs, but that in certain circumstances, the CIJs’ inaction would be construed as constructive refusal requiring the PTC’s intervention to prevent prejudice to the appellant.)

<sup>56</sup> *See e.g.* Case 002-**E284/4/8** Decision on Immediate Appeals Against the Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013 (“SCC Second Severance Decision”), paras 21-26 (The SCC noted that the TC had failed to provide a tangible plan or any information regarding subsequent cases to be tried in the course of Case 002 and had also abstained from resolving any issues as to how any subsequent trials might be conducted. The SCC held that this resulted in a *de facto* stay of proceedings that did not carry a sufficiently tangible promise of resumption to permit arriving at a judgment on the merits for part of the remaining charges in the Closing Order. The appeal was found admissible under Rule 104(4)(a).). *See also* Case 002-**A189/1/8** Decision on Ieng Sary’s Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, paras 22-24 (finding that the failure of the CIJs to rule on a Defence Request as soon as possible in circumstances where a delay in making a decision deprived the Charged Person of the possibility of obtaining the benefit he sought, amounted to a constructive refusal of the application, which was appealable); Case 004/2-**A117/2/2** Decision on Appeal Against Constructive Dismissal of Ta An’s Fourth Request for Investigative Action, 22 October 2014, para. 8.



under Rule 104(4)(a).<sup>57</sup> Meas Muth's assertions that the SCC will split along national and international lines<sup>58</sup> is mere conjecture.

20. Meas Muth's request that the PTC fashion its decision in Case 003 based upon the actions of (an)other Chamber(s) in another case is an illegitimate attempt to fetter the PTC's judicial independence guaranteed by the ECCC legal framework<sup>59</sup> and Cambodian Constitution.<sup>60</sup> As such, admission of his Supplementary Appeal on this basis is unwarranted. Meas Muth's request for unanimity among the PTC judges<sup>61</sup> is equally flawed. Whilst Judges are *encouraged* to work toward unanimity by the ECCC Agreement<sup>62</sup> and ECCC Law,<sup>63</sup> these same provisions recognise that unanimity is not required and may not be possible.
21. Finally, admitting Meas Muth's Supplementary Appeal, on top of the Request for Clarification, risks *significant* delay to the PTC's disposition of Case 003. Meas Muth baldly asserts that this "will not prejudice any Party nor unduly impact the [PTC's] timeframe for disposing of the cross-appeals in Case 003"<sup>64</sup> since the PTC is not expected to render its decision until the third quarter of 2020. Given the multiple stages of litigation foreseen by the Request for Clarification,<sup>65</sup> and now this Supplementary Appeal, which includes yet another request for an oral hearing,<sup>66</sup> Meas Muth's assertion remains untenable.

### Merits

#### **A. The PTC is not required to dismiss both Case 003 Closing Orders as null and void**

22. Meas Muth's claim that the Case 003 Indictment and Dismissal Order must both be null and

<sup>57</sup> Case 002-E284/4/8 SCC Second Severance Decision, para. 21. *See also* Case 002-E138/1/7 Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011 ("SCC First IT Release Decision"), para. 15; Case 002-E163/5/1/13 Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, para. 22 ("The [SCC] recalls that the right of appeal exists where the proceedings are terminated without arriving at a judgment and therefore without an opportunity to appeal against it"); Case 002-E301/9/1/1/3 Decision on Khieu Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, para. 17.

<sup>58</sup> D267/27 Supplementary Appeal, para. 43.

<sup>59</sup> ECCC Agreement, art. 3(3); ECCC Law, arts 10 new, 12.

<sup>60</sup> The Constitution of the Kingdom of Cambodia, adopted 21 September 1993, arts 51 ("[t]he legislative, executive, and judicial powers shall be separate."), 128 ("[t]he judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens"), 129 ("[o]nly judges shall have the right to adjudicate"), 130 ("[j]udicial power shall not be granted to the legislative or executive branches.").

<sup>61</sup> D267/27 Supplementary Appeal, paras 46, 52.

<sup>62</sup> ECCC Agreement, art. 4.

<sup>63</sup> ECCC Law, art. 14 new.

<sup>64</sup> D267/27 Supplementary Appeal, p. 1.

<sup>65</sup> *See* D266/20 & D267/25 ICP Clarification Response, para. 10.

<sup>66</sup> D267/27 Supplementary Appeal, p. 1.

void if the PTC finds, as it did in Case 004/2,<sup>67</sup> that the *issuance* of contradictory closing orders was unlawful is belied by the Case 004/2 Considerations themselves. The fact that all five judges of the PTC considered the merits of the closing orders after determining that the *issuance* of two conflicting orders was illegal is a *unanimous* and unambiguous PTC decision that the Co-Investigating Judges' ("CIJs") error does *not* automatically render the Closing Orders null and void.<sup>68</sup>

23. Were both closing orders automatically invalid under the ECCC framework, the five Judges would not have (i) invoked "exceptional review powers"<sup>69</sup> and "exercise[d] [those] broad review powers to *restore the legality and remedy the distortion of procedures* caused by the [CIJs'] unlawful actions in this case",<sup>70</sup> (ii) expressly stated that the "impact" of their finding on the *issuance* of split closing orders is addressed in their separate opinions,<sup>71</sup> or (iii) considered the merits of the closing orders.<sup>72</sup> Indeed, neither the national nor international Judges found *both* closing orders were invalid.<sup>73</sup>
24. Meas Muth's attempt to expand Rule 67(2) beyond its plain meaning and purpose to claim that it renders two opposing closing orders automatically void<sup>74</sup> is misleading for several reasons. First, the unambiguous language of Rule 67(2), reflected in article 247 of the Cambodian Code of Criminal Procedure,<sup>75</sup> makes clear that it is inapplicable in this instance: it applies *exclusively* to indictments and provides that an indictment is void *only* when its content omits "the identity of the Accused, a description of the material facts and their legal characterisation [...], including the relevant criminal provisions and the nature of the criminal responsibility." Moreover, the "civil law rules of interpretation" whose aid Meas

<sup>67</sup> See *supra*, para. 7.

<sup>68</sup> *Contra* D267/27 Supplementary Appeal, paras 26-32.

<sup>69</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, para. 124 (unanimous).

<sup>70</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, fn. 59 (emphasis added) (unanimous). See also para. 47 (unanimous) ("the Pre-Trial Chamber notes that its power of review as a second-instance investigative chamber may comprise of (i) the Investigation Chamber's powers to purge any irregularities in the procedures it is seised of before sending the Case to trial").

<sup>71</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, paras 89, 124 (unanimous).

<sup>72</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, National Judges' Opinion, paras 204-294 and International Judges' Opinion, paras 303-684.

<sup>73</sup> The national Judges said that the impact was that the "Closing Order (Dismissal) [...] shall be upheld". The international Judges said that the impact was that the "Closing Order (Indictment) stands". See Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, EN 01634276 (National Judges' Opinion) and para. 326 (International Judges' Opinion).

<sup>74</sup> D267/27 Supplementary Appeal, paras 27-29, 32.

<sup>75</sup> Code of Criminal Procedure of the Kingdom of Cambodia, 7 June 2007 ("CCCP"), art. 247 ("If the judge considers that the facts constitute a felony, a misdemeanor or a petty offense, he shall decide to indict the charged person before the trial court. The order shall state the facts being charged and their legal qualification.").

Muth seeks,<sup>76</sup> serve only to confirm its inapplicability. Rule 67(2) deals with the *content* of indictments, not the circumstances of their issuance, and its “underlying principle[] and objective”<sup>77</sup> is to ensure that an indictment puts the accused on notice of the nature and cause of the charges against him.<sup>78</sup> Given the fundamental importance of this notice, the rules include the requirement on pain of nullity. It thus serves a very specific purpose only relevant to indictments and neither states nor intends, as Meas Muth avers, that every procedural defect renders a Closing Order void. Had the drafters intended to include any other criteria, they would have done so. There is simply no *lacuna* in Rule 67(2), as Meas Muth erroneously claims.<sup>79</sup>

25. Similarly, Rule 76(5) does *not* demonstrate that “[t]he ECCC framework dictates that the procedurally defective Closing Orders in Case 003 should be annulled and removed from the Case File.”<sup>80</sup> First, as Meas Muth notes,<sup>81</sup> the PTC has already decided that Rule 76—which governs the annulment procedure for acts undertaken during the investigation—does not apply to Closing Orders. Rule 76(2) precludes the filing of annulment applications after the issuance of Closing Orders, and under Rule 76(4), the PTC may not admit annulment applications that “relate[] to an order that is open to appeal”.<sup>82</sup> In any event, Meas Muth misinterprets the provision,<sup>83</sup> confusing alleged procedural defects with instances where the Chamber has already reviewed a reasoned application for annulment<sup>84</sup> and “decide[d] to annul an investigative action.”<sup>85</sup> In doing so, he also overlooks Rule 48,<sup>86</sup> demonstrating that the ECCC legal framework does not anticipate all procedural defects rendering the resulting decision or action void *ab initio*. The SCC has held that “not all procedural errors will lead to a reversal of the judgement, but only procedural errors that resulted in a ‘grossly unfair

<sup>76</sup> D267/27 Supplementary Appeal, para. 29.

<sup>77</sup> D267/27 Supplementary Appeal, para. 29 *citing* E50/3/1/4 Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, para. 31.

<sup>78</sup> *See e.g.* Case 001-D99/3/42 Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias “Duch”, 5 December 2008 (“Decision on Duch Closing Order Appeal”), paras 46-47, 50; Case 002-D97/14/15 & D97/15/9 & D97/16/10 & D97/17/6 Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 31-32; ECCC Law, art. 35 new.

<sup>79</sup> D267/27 Supplementary Appeal, para. 28.

<sup>80</sup> D267/27 Supplementary Appeal, para. 32, fn. 130.

<sup>81</sup> D267/27 Supplementary Appeal, para. 27.

<sup>82</sup> D158/1 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 Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, paras 17-18.

<sup>83</sup> D267/27 Supplementary Appeal, fn. 130.

<sup>84</sup> Internal Rules 76(1)-(2).

<sup>85</sup> Internal Rule 76(5).

<sup>86</sup> Internal Rule 48 (“Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”).

outcome in judicial proceedings’.”<sup>87</sup>

26. In sum, Meas Muth has failed to identify any ECCC law that supports his assertion that the unlawful issuance of two conflicting closing orders renders them both invalid. His references to two instances at the *ad hoc* Tribunals when decisions were found to be void because they had been rendered *ultra vires* (i.e. without legal authority) are inapposite.<sup>88</sup> Clearly, the issuance of at least one closing order is not only within the powers of the CIJs, it is *required* of them,<sup>89</sup> a point the Case 004/2 Considerations made unambiguously.<sup>90</sup>

### B. Procedural Stalemate in Case 003 is not Inevitable

27. Meas Muth’s predictions of an inevitable stalemate in Case 003 are unfounded. To the extent they are based on the premise that an indictment and dismissal order are necessarily void following a determination that their simultaneous issuance was unlawful, they are, as already discussed,<sup>91</sup> erroneous. There is therefore no requirement for the PTC to remit the matter to the CIJs or conduct a *de novo* review itself.<sup>92</sup> In any event, Meas Muth’s analysis of the practical implications of these two options are replete with conjecture, and his assertion that the PTC is unable to act in the absence of guaranteed unanimity<sup>93</sup> is fundamentally flawed.<sup>94</sup> The PTC is fully aware of its obligation to “safeguard the interests of a Charged Person and ensure legal certainty and ‘fair and adversarial’ proceedings”,<sup>95</sup> and to “ensure good and fair administration of justice”<sup>96</sup> when fashioning an appropriate remedy, including the need to survey all practical implications.<sup>97</sup>

<sup>87</sup> Case 002-F36 Appeal Judgement, 23 November 2016, para. 100.

<sup>88</sup> D267/27 Supplementary Appeal, para. 31 *citing Kupreškić et al.*, IT-95-16-AR73.3, Appeals Chamber, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 14; *Ntuyahaga*, ICTR-98-40-T, Judges Laïty Kama, Lennart Aspegren and Navanathem Pillay, Declaration on a Point of Law, 22 April 1999, para. 17.

<sup>89</sup> Internal Rule 67(1); CCCP, art. 247; Case 001-D99/3/42 Decision on Duch Closing Order Appeal, paras 29, 33, 37-38; Case 002-D198/1 Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, 20 November 2009, para. 10; Cass. Crim., 24 March 1977, No. 76-91.442 [“Le juge d’instruction avait l’obligation d’instruire, puis de statuer par une ordonnance de règlement sur l’ensemble des faits” [...] “Le juge est tenu de statuer par ordonnance du règlement sur tous les faits dont il a été régulièrement saisi” Unofficial translation: “The investigating judge has the obligation to investigate and then to render an order covering all the facts. [...] The judge is obliged to pronounce on all the facts of which he has been regularly seised”]; Cass. Crim., 4 March 2004, No. 03-85.983.

<sup>90</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, paras 105, 121-124 (unanimous).

<sup>91</sup> *See supra*, paras 22-26.

<sup>92</sup> D267/27 Supplementary Appeal, paras 33-39.

<sup>93</sup> D267/27 Supplementary Appeal, para. 34.

<sup>94</sup> *See paras* 20, 28-31.

<sup>95</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, paras 46, 51, 54, 68 (quote at para. 46) (unanimous).

<sup>96</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, para. 51 (unanimous).

<sup>97</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, para. 100 (unanimous).

28. Moreover, there is no legal uncertainty arising from the PTC's Considerations in Case 004/2. Once the PTC determined that the *issuance* of two Closing Orders was illegal, and considered the legal effect of each Closing Order, any uncertainty was removed. Then, as set out in the ICP's previous written pleadings,<sup>98</sup> since the PTC did not reach the necessary supermajority to overturn the Indictment, the "fundamental and determinative" default position that the "investigation shall proceed",<sup>99</sup> set out in the ECCC Agreement, ECCC Law and Internal Rules, required the case to proceed to trial on the basis of the Indictment. This result is mandated even where the PTC, as in Case 004/2, also fails to reach a supermajority decision on the validity of the Dismissal Order.
29. This is because the default position described by the PTC judges must be respected throughout ECCC proceedings, including after the completion of the appeals process before the PTC. In this respect, this Chamber stressed unanimously in Case 004/2 that:

a principle as fundamental and determinative as the default position cannot be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions, taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless. Concluding otherwise would lead to a manifestly unreasonable legal result, violating both Cambodian law and international law.<sup>100</sup>

30. As the PTC explained,<sup>101</sup> this default position derives from articles 5(4) and 7(4) of the ECCC Agreement,<sup>102</sup> accepted by both the RGC and the UN, and reflected in article 23 new of the ECCC Law.<sup>103</sup> These provisions demonstrate the clear policy decision that, in the event of a disagreement, the CIJs and Co-Prosecutors can act independently to advance proceedings, which can *only* be halted by a supermajority of the PTC judges. This interpretation is fully supported by the evidence of the expressed intentions of the UN and RGC at the time they concluded the ECCC Agreement.<sup>104</sup> It has also been consistently

<sup>98</sup> See **D266/2** ICP Appeal, paras 191-198; **D267/10** ICP Response to Meas Muth Appeal, paras 19-50; **D266/6** & **D267/11** ICP Appeal Reply, paras 67-71.

<sup>99</sup> Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 106-107, 111-112, 116-117 (unanimous).

<sup>100</sup> Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, para. 112 (unanimous). See also para. 111, explaining that the purpose of the default position was to "secure[] effective justice" and to "avoid procedural stalemates that would, *inter alia*, hamper the effectiveness of proceedings".

<sup>101</sup> Case 004/2-**D359/24** & **D360/33** Case 004/2 Considerations, paras 93, 107, 111, 116-117 (unanimous).

<sup>102</sup> ECCC Agreement, arts 5(4) (requiring that the investigation *shall* proceed unless Article 7 is invoked. (emphasis added), 7(4) (requiring that if the PTC is unable to resolve the disagreement by a supermajority, the investigation or prosecution *shall* proceed (emphasis added)).

<sup>103</sup> ECCC Law, art. 23 new, which requires that, in case of disagreement between CIJs, absent a PTC supermajority blocking its progress, the investigation *shall* proceed (emphasis added).

<sup>104</sup> **D267/4.1.5** Letter from UN Secretary General to Prime Minister H.E. Hun Sen, 19 April 2000, Annexed Note from Hans Corell to Secretary General, Subject: Urgent call from Cambodia – Options to settle differences

applied unanimously by the SCC<sup>105</sup> and PTC<sup>106</sup> judges. In particular, the PTC recently confirmed that:

In cases where the [PTC] cannot achieve the supermajority vote to conclusively settle the disagreement, the ECCC legal framework provides that the matter is then resolved by the default position stipulating that the investigation must proceed.<sup>107</sup>

31. Thus, in this situation, the TC must be seised under Rules 77(13)(b) and 79(1),<sup>108</sup> and the case brought to trial, even where the Dismissal Order has not been reversed. In line with the default position, Rule 77(13)(b) reflects the intent to implement the clear mandate of the ECCC Agreement and ECCC Law where the Co-Prosecutors or CIJs disagree on a case progressing: absent a supermajority of the PTC overturning an indictment, the case moves on to the next stage of proceedings. As explained above,<sup>109</sup> the failure of the TC to act after being seised with Case 004/2 in this way is still the subject of litigation before the SCC, and any predictions about an outcome are premature.

### C. A permanent stay of proceedings in Case 003 is not warranted

32. Meas Muth's contention that, "unless the PTC Judges can reach common reasoning on the progress of Case 003",<sup>110</sup> an abuse of process<sup>111</sup> will warrant a permanent stay of proceedings,<sup>112</sup> is erroneous. It (i) fails to appreciate the legal test to be met to establish grounds for implementing a permanent stay based on abuse of process; (ii) relies on

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between investigating judges/prosecutors, 19 April 2000, EN 01614369; **D181/2.36** Statement by Under Secretary General Hans Corell Upon Leaving Phnom Penh on 17 March 2003, 17 March 2003, EN 01326112. See also **D267/10.1.50** David Scheffer in M. Cherif Bassiouni (ed), "The Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law*, Third Edition, Vol III, 2008, p. 246.

<sup>105</sup> Case 001-F28 Appeal Judgement, 3 February 2012 ("Duch AJ"), para. 65.

<sup>106</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, paras 105-106, 114-117 (unanimous); Case 002-D427/1/30 Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 274; **D128/1/9** Considerations on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *In Absentia*, 30 March 2016, para. 34; Case 004/1-D236/1/1/8 Decision on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision on her Motion to Reconsider and Vacate her Summons Dated 29 July 2014, 9 December 2015, para. 30; Case 004/1-A122/6.1/3 Decision on Im Chaem's Urgent Request to Stay the Execution of her Summons to an Initial Appearance, 15 August 2014, para. 14; **D1/1.3** Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, paras 17, 45 (as corrected in **D1/1.2** Corrigendum to the Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71 and Annex II, 31 August 2009).

<sup>107</sup> Case 004/2-D359/24 & D360/33 Case 004/2 Considerations, para. 117 (unanimous).

<sup>108</sup> Internal Rule 77(13)(b), which establishes that the default position where an appeal against an indictment is not upheld on appeal shall be that the TC be seised on the basis of the Closing Order (Indictment); Internal Rule 79(1) providing that the TC shall be seised by an Indictment from the CIJs or the PTC, in conjunction with Internal Rule 1(2) defining CIJs as both acting jointly or one acting individually.

<sup>109</sup> See *supra*, paras 11, 18-19.

<sup>110</sup> **D267/27** Supplementary Appeal, para. 52 (emphasis removed). See also paras 41, 46.

<sup>111</sup> **D267/27** Supplementary Appeal, paras 44, 49, 51.

<sup>112</sup> **D267/27** Supplementary Appeal, p. 1, paras 44-52.

speculation unsupported by any concrete legal or factual argument; and moreover (iii) is founded on glaring misrepresentations of ECCC jurisprudence. It is clear that Meas Muth invokes the “abuse of process” doctrine since he is aware that the ECCC framework does not allow a permanent stay of proceedings on any other basis. Contrary to Meas Muth’s contention,<sup>113</sup> SCC and PTC jurisprudence is clear that “permanent” or “irreversible” stays amount to an effective termination of proceedings,<sup>114</sup> and as such, may not be invoked other than for the explicit reasons in article 7 of the Cambodian Code of Criminal Procedure: death of the accused, the expiry of statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*.<sup>115</sup> The only “stays” sanctioned under Cambodian law<sup>116</sup> are “impermanent” or “conditional” stays<sup>117</sup> that will be lifted once the obstacle to proceedings has been removed.<sup>118</sup>

33. As a preliminary matter, whilst the SCC,<sup>119</sup> PTC,<sup>120</sup> TC<sup>121</sup> and OCIJ<sup>122</sup> have all acknowledged that the abuse of process doctrine could, *in very limited circumstances*, be applicable at the ECCC, it has *never* “been applied at the ECCC to stay proceedings”, as Meas Muth alleges.<sup>123</sup> Indeed, Meas Muth misrepresents the one case he cites in support. In that instance, the PTC Judges found “no question of egregious violations of the Charged Person’s rights such that the abuse of process doctrine could be invoked to stay the proceedings.”<sup>124</sup>
34. In any event, Meas Muth fails to either appreciate or meet the “particularly high threshold”<sup>125</sup> for determining whether any violation of a charged person’s or accused’s rights may be

<sup>113</sup> D267/27 Supplementary Appeal, para. 47.

<sup>114</sup> Case 002-E138/1/10/1/5/7 Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith, 14 December 2012 (“SCC Second IT Release Decision”), paras 36, 38; Case 002-D264/2/6 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 (“Decision on IT Abuse of Process Request”), para. 22.

<sup>115</sup> Case 002-E138/1/10/1/5/7 SCC Second IT Release Decision, para. 38; Case 002-E116 Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011, paras 16-17. *See also* art. 6 of the French Code of Criminal Procedure.

<sup>116</sup> *Contra* D267/27 Supplementary Appeal, para. 47.

<sup>117</sup> Case 002-E138/1/10/1/5/7 SCC Second IT Release Decision, paras 36, 38.

<sup>118</sup> Case 002-E138/1/10/1/5/7 SCC Second IT Release Decision, para. 38; Case 002-E138/1/7 SCC First IT Release Decision, para. 17 *citing* CCCP, arts 310, 343, 345.

<sup>119</sup> *See e.g.* Case 001-F28 *Duch* AJ, paras 389-399.

<sup>120</sup> *See e.g.* Case 002-D264/2/6 Decision on IT Abuse of Process Request, paras 10, 20-28.

<sup>121</sup> *See e.g.* Case 001-E39/5 Decision on Request for Release, 15 June 2009, paras 16, 31-37.

<sup>122</sup> *See e.g.* Case 001-C3 Order of Provisional Detention, 31 July 2007, paras 12-21.

<sup>123</sup> D267/27 Supplementary Appeal, para. 49 *citing* Case 002-D264/2/6 Decision on IT Abuse of Process Request, para. 10.

<sup>124</sup> Case 002-D264/2/6 Decision on IT Abuse of Process Request, para. 39.

<sup>125</sup> Case 002-D264/2/6 Decision on IT Abuse of Process Request, para. 24 *citing* Šešelj, IT-03-67-T, Trial Chamber, Decision on Oral Request of the Accused for Abuse of Process, 10 February 2010, para. 22.

considered sufficiently serious to allow a Chamber to use its discretionary power to permanently stay proceedings. The doctrine of abuse of process exists 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 a charged person or accused before a court.”<sup>126</sup> A permanent stay of proceedings is “a drastic remedy”,<sup>127</sup> warranted only when it would be “odious” or “repugnant” to the administration of justice to allow the proceedings to continue, or where the rights of the accused have been breached to the extent that a fair trial has been rendered impossible.<sup>128</sup> For this reason, not every infraction of the law or breach of the accused’s rights will justify a permanent stay of proceedings.<sup>129</sup> The ECCC Chambers and other international criminal tribunals have all made clear that *only* where the charged person has suffered a serious mistreatment, such as inhuman, cruel or degrading treatment, or torture, or where there was another *egregious* violation of his rights, could this test be met.<sup>130</sup>

35. In this case, Meas Muth’s unsubstantiated assertion of the mere “prospect”<sup>131</sup> of unresolved proceedings if the PTC Judges fail to reach a unanimous decision in Case 003 patently fails to establish that his fair trial rights will be breached at all, and certainly not to the level required to warrant a permanent stay of Case 003. As explained above, judicial unanimity is not required under the ECCC framework,<sup>132</sup> and the PTC’s failure to achieve unanimity on

<sup>126</sup> Case 002-D264/2/6 Decision on IT Abuse of Process Request, para. 10, *citing Barayagwiza*, ICTR-97-19-AR72, Appeals Chamber, Decision, 3 November 1999, para. 4.

<sup>127</sup> *Lubanga*, ICC-01/04-01/06-2690-Red2, Trial Chamber I, Public: Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011 (“*Lubanga* 7 March 2011 Stay Decision”), para. 165, *citing Lubanga*, ICC-01/04-01/06-2582, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010 (“*Lubanga* Appeals Chamber Stay Decision”), para. 55.

<sup>128</sup> *See e.g. Lubanga* 7 March 2011 Stay Decision, para. 203; *Ntaganda*, ICC-01/04-02/06-1883, Trial Chamber VI, Public: Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017 (“*Ntaganda* Stay Decision”), para. 20; *Kenyatta*, ICC-01/09-02/11-868-Red, Trial Chamber V(B), Public redacted version: Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013 (“*Kenyatta* Stay Decision”), para. 14. *See also Kallon & Kamara*, SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 79.

<sup>129</sup> *Lubanga* 7 March 2011 Stay Decision, para. 162, *citing Lubanga* Appeals Chamber Stay Decision, para. 30; *Ntaganda* Stay Decision, para. 22; *Kenyatta* Stay Decision, para. 14; *Hartmann*, IT-02-54-R77.5, Specially Appointed Chamber, Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, 3 February 2009, paras 4-13.

<sup>130</sup> *See e.g. Case 001-F28 Duch* AJ, para. 394; Case 002-D264/2/6 Decision on IT Abuse of Process Request, paras 22-24, 27-28; *Nikolić*, IT-94-2-AR73, Appeals Chamber, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 (“*Nikolić* Appeal Decision”), paras 28-33.

<sup>131</sup> **D267/27** Supplementary Appeal, p. 1, para. 45.

<sup>132</sup> *See supra*, para. 20.



the merits of individual closing orders does not jeopardise legal certainty.<sup>133</sup> Meas Muth's assertions that procedural stalemate in Case 003 is inevitable are both legally incorrect and speculative.<sup>134</sup>

36. Moreover, permanently staying proceedings will “usually be disproportionate”,<sup>135</sup> and Meas Muth fails to demonstrate that it would be the only suitable remedy here. He overlooks the PTC's previous holding that, in fashioning an appropriate remedy, the correct balance must be maintained between the fundamental rights of the accused and the essential interests of the Cambodian and international community in the prosecution of persons charged with the most serious international crimes,<sup>136</sup> promoting national reconciliation by ensuring that victims of crimes have a meaningful voice.<sup>137</sup> In his original Appeal, Meas Muth acknowledged that the crimes for which he is indicted—including genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions<sup>138</sup> are “of the most serious concern to the international community”.<sup>139</sup>
37. In the circumstances of this case, permanently staying Case 003 would be profoundly disproportionate. In fact, it is arguably not suitable at all to address Meas Muth's alleged harm, since a dismissal unrelated to the merits of Case 003 does nothing to protect Meas Muth's reputation or allow him to challenge the Indictment. The most logical solution to Meas Muth's concerns about having “an unchallengeable indictment hanging over [him] in perpetuity”<sup>140</sup> would be to accept the clear decision in the Internal Rules, ECCC Agreement and ECCC Law<sup>141</sup> to progress the case to trial.

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<sup>133</sup> See *supra*, paras 28-31.

<sup>134</sup> See *supra*, paras 18-19, 22-31.

<sup>135</sup> Case 002-D264/2/6 Decision on IT Abuse of Process Request, fn. 52; *Nikolić* Appeal Decision, para. 30.

<sup>136</sup> Case 002-D264/2/6 Decision on IT Abuse of Process Request, para. 27, citing *Nikolić* Appeal Decision, para. 30.

<sup>137</sup> Case 002-D411/3/6 Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, paras 64-65; ECCC Agreement, preamble.

<sup>138</sup> See *supra*, para. 3.

<sup>139</sup> D267/4 Meas Muth Appeal, para. 44.


<sup>140</sup> D267/27 Supplementary Appeal, p. 1, para. 50. See also paras 24, 45.

<sup>141</sup> See *supra*, paras 28-31.

#### IV. RELIEF REQUESTED

38. For the reasons outlined above, the International Co-Prosecutor respectfully requests that the Pre-Trial Chamber dismiss the Supplementary Appeal in its entirety.

Respectfully submitted,

Date	Name	Place	Signature
29 May 2020	Brenda J. HOLLIS International Co-Prosecutor	 Phnom Penh	