



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា  
Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ  
Pre-Trial Chamber  
Chambre Preliminaire

D267/33

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC35)

Before: Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

Date: 3 November 2020

ឯកសារដើម  
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL  
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 03 / 11 / 2020  
ម៉ោង (Time/Heure) : 13:43  
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SANN BODA

**PUBLIC**

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

Co-Prosecutors

CHEA Leang  
Brenda HOLLIS

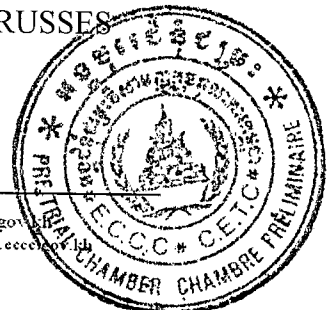
Meas Muth Defence

ANG Udom  
Michael G. KARNAVAS

Lawyers for the Civil Parties and Civil Party Applicants

HONG Kimsuon  
KIM Mengkhy  
MOCH Sovannary  
SAM Sokong  
TY Srinna  
VEN Pov  
Philippe CANONNE  
Laure DESFORGES  
Ferdinand DJAMMEN- NZEPA

Nicole DUMAS  
Isabelle DURAND  
Françoise GAUTRY  
Martine JACQUIN  
Christine MARTINEAU  
Barnabe NEKUI  
Lyma NGUYEN  
Nushin SARKARATI  
Fabienne TRUSSES



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “MEAS Muth’s Supplement to His Appeal against the International Co-Investigating Judge’s Indictment” (“Supplement”)<sup>1</sup> dated 7 May 2020.

## I. PROCEDURAL HISTORY

1. On 28 November 2018, the International Co-Investigating Judge issued his “Closing Order”, indicting MEAS Muth (“Indictment”),<sup>2</sup> while the National Co-Investigating Judge issued his “Order Dismissing the Case Against MEAS Muth” (“Dismissal Order”)<sup>3</sup> (collectively, “Closing Orders”). The Closing Orders were respectively filed in English and Khmer only, with translations to follow.
2. On 5 April 2019, the National Co-Prosecutor filed her Appeal against the Indictment<sup>4</sup> in Khmer. On 8 April 2019, the Co-Lawyers for MEAS Muth (“Co-Lawyers”) and the International Co-Prosecutor respectively filed appeals against the Indictment<sup>5</sup> and the Dismissal Order<sup>6</sup> in English.
3. On 19 December 2019, the Pre-Trial Chamber issued its “Considerations on the Appeals against the Closing Orders” (“Considerations”) in Case 004/2.<sup>7</sup>
4. On 12 March 2020, the International Judges of the Pre-Trial Chamber disseminated to the parties, copying the Pre-Trial Chamber, the Greffier of the Trial Chamber and the Acting Director and Deputy Director of the Office of Administration, an interoffice memorandum of the International Judges along with the

---

<sup>1</sup> Case No. 003/07-09-2009-ECCC/OCIJ (“Case 003”), MEAS Muth’s Supplement to His Appeal against the International Co-Investigating Judge’s Indictment, 5 May 2020, D267/27 (“Supplement (D267/27)”).

<sup>2</sup> Case 003, Closing Order, 28 November 2018, D267.

<sup>3</sup> Case 003, Order Dismissing the Case against MEAS Muth, 28 November 2018, D266.

<sup>4</sup> Case 003, National Co-Prosecutor’s Appeal against the International Co-Investigating Judge’s Closing Order in Case 003, 5 April 2019, D267/3 (“National Co-Prosecutor’s Appeal against the Indictment (D267/3)”).

<sup>5</sup> Case 003, MEAS Muth’s Appeal against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4 (“MEAS Muth’s Appeal against the Indictment (D267/4)”).

<sup>6</sup> Case 003, International Co-Prosecutor’s Appeal of the Order Dismissing the Case against MEAS Muth (D266), 8 April 2019, D266/2 (“International Co-Prosecutor’s Appeal against the Dismissal Order (D266/2)”).



appended Annexes related to the events within the Chamber since the issuance of the Considerations in Case 004/2, clarifying that the Pre-Trial Chamber has taken all the required administrative actions to transfer the Closing Order (Indictment) and the Case File 004/2 to the Trial Chamber.<sup>8</sup>

5. On 16 March 2020, the President of the Pre-Trial Chamber issued an interoffice memorandum asserting that only the unanimously decided portion of the Considerations shall have an applicable effect.<sup>9</sup>

6. On 26 March 2020, the Co-Lawyers filed “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”), pleading the Pre-Trial Chamber to (i) find the Request admissible and (ii) provide requested clarification concerning the Chamber’s Considerations.<sup>10</sup>

7. On 3 April 2020, the Judges of the Trial Chamber issued a joint public statement concerning Case 004/2 stating that it has no access to Case 004/2 without notification and transfer to the Trial Chamber (“Trial Chamber’s Statement”).<sup>11</sup> While the International Judges of the Trial Chamber considered that, under these unique circumstances, an argument could be made that their Chamber holds “inherent authority” to address certain matters, the National Judges stated that the matter was closed before the Pre-Trial Chamber and that “there will not be a trial of AO An now or in the future.”<sup>12</sup>

8. On 7 May 2020, the Co-Lawyers filed the Supplement, requesting the Pre-Trial Chamber to (i) find the Supplement admissible; (ii) declare the Closing Orders

---

<sup>7</sup> Case No. 004/2/07-09-2009-ECCC-OCIJ (“Case 004/2”) (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33 (“Case 004/2 Considerations on Closing Orders Appeals (D359/24 and D360/33)”).

<sup>8</sup> Case 004/2, Interoffice Memorandum of the International Judges Kang Jin BAIK and Olivier BEAUVALLLET, 12 March 2020, D359/36 and D360/45.

<sup>9</sup> Case 004/2, Interoffice Memorandum issued by Judge PRAK Kimsan, President of the Pre-Trial Chamber, 16 March 2020, D359/37 and D360/46.

<sup>10</sup> Case 003, 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, D266/19 and D267/24.

<sup>11</sup> ECCC Press Release, “Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An”, 3 April 2020 (“Trial Chamber’s Statement”).

<sup>12</sup> Trial Chamber’s Statement.



in Case 003 null and void; and (ii) permanently stay the proceedings in Case 003.<sup>13</sup> In addition, they asked the Chamber to hold a hearing in light of the importance and complexity of the issues raised in the Request.<sup>14</sup>

9. On 15 May 2020, the Pre-Trial Chamber, *via* email, notified the Parties in Case 003 that the Chamber grants the International Co-Prosecutor's "Request for an Extension of Time to Respond to MEAS Muth's Supplement to His Appeal against the International Co-Investigating Judge's Indictment", filed on 11 May 2020, and extends the deadline to file her response until 29 May 2020.<sup>15</sup>

10. On 29 May 2020, the International Co-Prosecutor filed the "International Co-Prosecutor's Response to MEAS Muth's Supplement to His Appeal against the International Co-Investigating Judge's Indictment", requesting the Pre-Trial Chamber to dismiss the Supplement as inadmissible.<sup>16</sup>

11. On 15 June 2020, the Co-Lawyers filed "MEAS Muth's Reply to International Co-Prosecutor's Response to MEAS Muth's Supplement to His Appeal against the International Co-Investigating Judge's Indictment".<sup>17</sup>

12. On 10 August 2020, the Supreme Court Chamber issued its "Decision on the International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2", dismissing on its merits the Immediate Appeal, which was filed on 4 May 2020,<sup>18</sup> and terminating Case 004/2.<sup>19</sup>

---

<sup>13</sup> Supplement (D267/27).

<sup>14</sup> Supplement (D267/27), p.1.

<sup>15</sup> Email from the Greffier of the Pre-Trial Chamber to the Parties regarding the International Co-Prosecutor's Request for an Extension of Time to Respond to MEAS Muth's Supplement to His Appeal against the International Co-Investigating Judge's Indictment, 15 May 2020, 2:59 pm. *See also* Case 003, International Co-Prosecutor's Request for an Extension of Time to Respond to MEAS Muth's Supplement to His Appeal against the International Co-Investigating Judge's Indictment, 11 May 2020, D267/28.

<sup>16</sup> Case 003, International Co-Prosecutor's Response to MEAS Muth's Supplement to His Appeal against the International Co-Investigating Judge's Indictment, 29 May 2020, D267/29 ("Response (D267/29)").

<sup>17</sup> Case 003, MEAS Muth's Reply to the International Co-Prosecutor's Response to MEAS Muth's Supplement to His Appeal against the International Co-Investigating Judge's Indictment, 15 June 2020, D267/31 ("Reply (D267/31)").

<sup>18</sup> Case 004/2, International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 4 May 2020, E004/2/1 ("Case 004/2 International Co-Prosecutor's Immediate Appeal (E004/2/1)").



## II. SUBMISSIONS

13. In their Supplement, the Co-Lawyers request the Pre-Trial Chamber to: (i) find the Supplement admissible;<sup>20</sup> (ii) declare the Closing Orders in Case 003 null and void;<sup>21</sup> and (iii) permanently stay the proceedings in Case 003.<sup>22</sup>

14. The Co-Lawyers submit that the Supplement is admissible as: (i) the Trial Chamber's Statement constitutes newly discovered information akin to newly discovered evidence under Internal Rule 87(4), which may be admitted and considered if conducive to ascertaining the truth and was unavailable or could not have been discovered through reasonable diligence;<sup>23</sup> (ii) the ECCC legal framework, specifically Article 33<sup>new</sup> of the ECCC Law and Internal Rules 21 and 39(4), favours the admissibility of the Supplement to protect MEAS Muth's constitutionally guaranteed rights to a fair trial and due process;<sup>24</sup> and (iii) it is made necessary by the imperative need to ensure good and fair administration of justice that the Pre-Trial Chamber exercises its inherent power to "determine incidental issues which arise as a direct consequence of the procedures of which [seised] by reason of the matter falling under [its] primary jurisdiction" when statutory provisions do not expressly or by necessary implication contemplate its power to pronounce on a matter.<sup>25</sup>

---

<sup>19</sup> Case 004/2, Decision on the International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2.

<sup>20</sup> Supplement (D267/27), paras 1-3, 52.

<sup>21</sup> Supplement (D267/27), paras 25-32, 51-52.

<sup>22</sup> Supplement (D267/27), paras 25, 33-49, 51-52.

<sup>23</sup> Supplement (D267/27), para. 1 referring to Case No. 002/19-09-2007-ECCC/TC, Decision concerning New Documents and Other Related Issues, 30 April 2012, E190, paras 22-23.

<sup>24</sup> Supplement (D267/27), para. 2 referring to *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976 ("ICCPR"), Arts. 14-15; *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 10 August 2001, NS/RKM/1004/006, as amended 27 October 2004 ("ECCC Law"), Art. 35<sup>new</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*, 6 June 2003, entered into force 29 April 2005 ("ECCC Agreement"), Arts. 12-13; *Constitution of Cambodia* (24 September 1993) ("1993 Constitution"), Art. 31.

<sup>25</sup> Supplement (D267/27), para. 3 referring to Case No. 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 Considerations on Closing Orders Appeals (D359/24 and D360/33), para. 51.



15. Turning to the merits, the Co-Lawyers firstly submit that the Closing Orders in Case 003 are null, void and beyond judicial review.<sup>26</sup> In support, the Co-Lawyers argue that MEAS Muth's constitutionally protected right to equal protection would be violated unless the Pre-Trial Chamber's unanimous finding in the Case 004/2 Considerations that the issuance of contradictory closing orders was "illegal, violating the legal framework of the ECCC" is also applied to Case 003, and that the legal effect of such finding is that the illegal Closing Orders in Case 003 are null, void and beyond judicial review on the merits.<sup>27</sup> They contend that the Closing Orders in Case 003 are procedurally defective since they were issued *ultra vires* in contravention of Internal Rule 67(1).<sup>28</sup> While, as the Pre-Trial Chamber held, Internal Rule 76 governing the annulment procedure excludes the filing of annulment applications after the issuance of a closing order and no other Rule in the ECCC legal framework contemplates the annulment of closing orders, the Co-Lawyers claim that a *lacuna* exists in Internal Rule 67(2) with respect to the closing orders that were issued non-compliant with the ECCC legal framework since the drafters could not have envisaged the simultaneous issuance of two conflicting closing orders.<sup>29</sup> Therefore, the Co-Lawyers assert that the ECCC legal framework, by interpreting Internal Rule 67(2) according to civil law rules of interpretation,<sup>30</sup> applicable Cambodian criminal procedure,<sup>31</sup> and procedural rules established at the international level,<sup>32</sup> dictates that the Closing Orders in Case 003, which are rendered null and void by the Pre-Trial Chamber's finding in Case 004/2, should be annulled and removed from the Case File.<sup>33</sup>

<sup>26</sup> Supplement (D267/27), paras 25-32, 51.

<sup>27</sup> Supplement (D267/27), para. 26.

<sup>28</sup> Supplement (D267/27), para. 27.

<sup>29</sup> Supplement (D267/27), paras 27-28.

<sup>30</sup> Supplement (D267/27), para. 29.

<sup>31</sup> Supplement (D267/27), para. 30.

<sup>32</sup> Supplement (D267/27), para. 31 referring to International Criminal Tribunal for the Former Yugoslavia ("ICTY"), *Prosecutor v. Kupreškić et al.*, IT-95-16, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, Appeals Chamber, 15 July 1999, para. 14; International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Declaration on a Point of Law, Trial Chamber, 22 April 1999, para. 17; Case No. 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC47&48), Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, Opinion of Judges PRAK and DOWNING, para. 13.

<sup>33</sup> Supplement (D267/27), para. 32.



16. The Co-Lawyers secondly submit that the Pre-Trial Chamber must issue a permanent stay unless the Judges of the Chamber can reach a common reasoning on the progress of Case 003.<sup>34</sup> In this regard, the Co-Lawyers claim that standard remedies following annulment are impracticable or impossible given the impossibility for the Pre-Trial Chamber Judges to collegially investigate Case 003 and issue a revised closing order,<sup>35</sup> and the impracticability and injudiciousness of remitting Case File 003 to the Co-Investigating Judges, which would cause undue delay and violate MEAS Muth's fair trial rights.<sup>36</sup> To support the latter argument, the Co-Lawyers emphasise (i) the expected delays arising from the revision of the whole Case File conducted by a newly staffed Office of Co-Investigating Judges following the reappointment of the International Co-Investigating Judge<sup>37</sup> and by the National Co-Investigating Judge who concluded his investigation six years before the International Co-Investigating Judge,<sup>38</sup> (ii) the unlikelihood of the Co-Investigating Judges agreeing on a common outcome during their deliberation for the issuance of a new closing order<sup>39</sup> as well as their inability to render justice and issue a closing order in conformity with the ECCC legal framework;<sup>40</sup> and (iii) the likelihood of a delayed trial after the inevitable appeals of the Parties against the revised closing order.<sup>41</sup>

17. The Co-Lawyers further argue that there is no possibility for the Trial Chamber or the Supreme Court Chamber's review to resolve the procedural stalemate.<sup>42</sup> In support, they claim that (i) given the divergent views expressed by the National and the International Judges of the Pre-Trial Chamber in and subsequent to the Considerations in Case 004/2, the Pre-Trial Chamber will not be able to reach a

---

<sup>34</sup> Supplement (D267/27), paras 25, 33-49, 51-52.

<sup>35</sup> Supplement (D267/27), para. 41.

<sup>36</sup> Supplement (D267/27), para. 34 *referring to* 1993 Constitution, Art. 31; ECCC Agreement, Arts. 12(1), 13(1); ECCC Law, Arts. 33<sup>new</sup>, 35<sup>new</sup> (C); *Internal Rules of the Extraordinary Chambers in the Court of Cambodia* (Rev.9), as revised 16 January 2015, Rule 21(4); ICCPR, Art. 14(3)(C).

<sup>37</sup> Supplement (D267/27), para. 35.

<sup>38</sup> Supplement (D267/27), para. 36 *referring to* Case 003, Notice of Conclusion of Judicial Investigation, 29 April 2011, D13; Case 003, Notice of Conclusion of Judicial Investigation against MEAS Muth, 10 January 2017, D225.

<sup>39</sup> Supplement (D267/27), para. 37.

<sup>40</sup> Supplement (D267/27), para. 39 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 and D360/33), paras 35-36, 54, 89, 99-100, 121-124.

<sup>41</sup> Supplement (D267/27), para. 38.

<sup>42</sup> Supplement (D267/27), para. 40.



consensus on whether to transfer Case File 003 to the Trial Chamber;<sup>43</sup> (ii) 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 the Pre-Trial Chamber's split on the cross-appeals;<sup>44</sup> (iii) the Supreme Court Chamber has no jurisdiction under Internal Rule 104(4) to rule on the matter as the Trial Chamber is unable to issue a formal decision<sup>45</sup> and even if the Supreme Court Chamber finds it in the interests of justice to provide "legal guidance [...] emanat[ing] from another judicial body," not only is there no indication that the Supreme Court Chamber will not split between the national and the international judges,<sup>46</sup> but more importantly, the common law principle of *stare decisis* does not apply and therefore, any legal formulations from the Supreme Court Chamber will not, as a rule, bind the Pre-Trial Chamber in its interpretation of the law.<sup>47</sup>

18. The Co-Lawyers lastly argue that in light of the above, if the Pre-Trial Chamber is unable to reach common reasoning on the progress of Case File 003, the Chamber should rely on its inherent power to issue a permanent stay of the proceedings with prejudice to avoid a miscarriage of justice.<sup>48</sup> Accordingly, the Chamber should exercise its discretionary power to invoke the abuse of process doctrine to prevent serious and egregious violations of fair trial rights.<sup>49</sup> They claim that without a permanent stay of the proceedings, MEAS Muth would have an indictment hanging over him in perpetuity should proceedings cease, which would irreparably harm and permanently deprive him of his constitutionally guaranteed rights.<sup>50</sup> While there is no explicit provision in the ECCC framework foreseeing a stay of proceedings,<sup>51</sup> the Co-Lawyers point to the Supreme Court Chamber's recognition that proceedings may be stayed at the ECCC in limited circumstances and to Article 28 of the ECCC Agreement which implicitly provides for permanent stays of the

---

<sup>43</sup> Supplement (D267/27), paras 40-41.

<sup>44</sup> Supplement (D267/27), para. 41 *referring to* Trial Chamber's Statement, para. 2.

<sup>45</sup> Supplement (D267/27), para. 42.

<sup>46</sup> Supplement (D267/27), para. 43.

<sup>47</sup> Supplement (D267/27), para. 43 *referring to* Case 003, 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.

<sup>48</sup> Supplement (D267/27), paras 44-46.

<sup>49</sup> Supplement (D267/27), paras 44, 49.

<sup>50</sup> Supplement (D267/27), para. 45.

<sup>51</sup> Supplement (D267/27), para. 47.





proceedings in case the United Nations withdraws from the ECCC Agreement and ceases assistance to the ECCC when the Court fails to function in a manner that conforms to the Agreement.<sup>52</sup> In light of the importance and complexity of the issues raised in their Request, the Co-Lawyers plead with the Pre-Trial Chamber to hold an oral hearing.<sup>53</sup>

19. In her Response, the International Co-Prosecutor requests the Pre-Trial Chamber to dismiss the Supplement because (i) the Supplement is inadmissible;<sup>54</sup> (ii) the Pre-Trial Chamber is not required to dismiss both Case 003 Closing Orders as null and void;<sup>55</sup> (iii) the procedural stalemate in Case 003 is not inevitable;<sup>56</sup> and (iv) a permanent stay of proceedings in Case 003 is not warranted.<sup>57</sup>

20. Concerning the admissibility of the Supplement, the International Co-Prosecutor submits that the Supplement is inadmissible as it is untimely and ill-founded.<sup>58</sup> At the outset, she argues that the Supplement constitutes an illegitimate attempt to re-open proceedings in Case 003 as the Internal Rules do not provide for any additional argument from the Parties at this stage in the proceedings where the written briefing on appeal is complete, the oral hearings have taken place and the Pre-Trial Chamber has retired for deliberations.<sup>59</sup> The International Co-Prosecutor, therefore, submits that the Parties are precluded from making further submissions, including supplementary appeals unless the Pre-Trial Chamber seeks the Parties' submissions on any further issues.<sup>60</sup>

21. With respect to the Co-Lawyers' misplaced reliance on the Trial Chamber's Statement, the International Co-Prosecutor firstly argues that the Statement does not constitute newly discovered information akin to newly discovered evidence under Internal Rule 87(4) as the purpose of that Rule is to allow for the admission of

---

<sup>52</sup> Supplement (D267/27), para. 47 referring to Case 002, 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.

<sup>53</sup> Supplement (D267/27), p.1.

<sup>54</sup> Response (D267/29), paras 13-21.

<sup>55</sup> Response (D267/29), paras 22-26.

<sup>56</sup> Response (D267/29), paras 27-31.

<sup>57</sup> Response (D267/29), paras 32-37.

<sup>58</sup> Response (D267/29), paras 1, 13.

<sup>59</sup> Response (D267/29), para. 13.



evidence at trial that is “conducive to ascertaining the truth”, not to allow parties to make multiple submissions each time a purportedly relevant development occurs in another case.<sup>61</sup> She contends that considering the complexity and the volume of the cases at the ECCC, permitting the parties to file supplementary submissions each time new jurisprudence appeared or other procedural developments occurred at the Court or another international(ised) tribunal would be contrary to the interests of justice and MEAS Muth’s right to expeditious proceedings.<sup>62</sup> She further avers that the Co-Lawyers’ reference to the Trial Chamber’s Statement appears to be an attempt to distract the Pre-Trial Chamber from their failure to file their Supplement until over four months after the Pre-Trial Chamber’s issuance of the Considerations in Case 004/2 as the submissions raised in the Supplement do not arise directly from the Trial Chamber’s Statement, but from the Considerations.<sup>63</sup>

22. Regarding MEAS Muth’s fair trial rights, the International Co-Prosecutor argues that the Co-Lawyers fail to substantiate their claim in this regard since the Pre-Trial Chamber has access to and the capacity to analyse the relevant developments in Case 004/2 and MEAS Muth’s rights have been protected, as the Co-Lawyers have argued the essence of the issues underpinning the Supplement through written submission to and oral argument before the Pre-Trial Chamber in Case 003.<sup>64</sup>

23. Concerning the Co-Lawyers’ assertion that the Trial Chamber’s Statement necessitates a permanent stay of Case 003 unless the Pre-Trial Chamber Judges can reach unanimity, the International Co-Prosecutor argues that their contention in this respect is profoundly speculative, requiring the Pre-Trial Chamber to hypothesise not only the outcome of Case 004/2, but also the progress of Case 003 after it would have rendered its decision.<sup>65</sup> She further avers that it is legally incorrect to conclude that the Supreme Court Chamber has no jurisdiction to rule on the matter on the basis that the Trial Chamber’s Statement is not a decision pursuant to Internal Rule 104(4).<sup>66</sup>

---

<sup>60</sup> Response (D267/29), para. 13.

<sup>61</sup> Response (D267/29), para. 14.

<sup>62</sup> Response (D267/29), para. 14.

<sup>63</sup> Response (D267/29), para. 16.

<sup>64</sup> Response (D267/29), paras 15, 17.

<sup>65</sup> Response (D267/29), para. 18.

<sup>66</sup> Response (D267/29), para. 19.



Equally flawed is, in the International Co-Prosecutor's view, the Co-Lawyers' request that the Pre-Trial Chamber Judges, in unanimity, fashion their decision in Case 003 based upon the actions of (an)other Chamber(s) in another case since the ECCC Agreement and the ECCC Law recognise that unanimity is not required and may not be possible.<sup>67</sup> The International Co-Prosecutor adds that admitting the Supplement, which includes a request for an oral hearing, risks creating significant delays to the Pre-Trial Chamber's disposition of Case 003.<sup>68</sup>

24. Turning to the merits, the International Co-Prosecutor firstly submits that the Pre-Trial Chamber is not required to dismiss the Case 003 Closing Orders as null and void.<sup>69</sup> In support, she argues that contrary to the Co-Lawyers' contention, the ECCC legal framework does not dictate that the Pre-Trial Chamber's finding of the Co-Investigating Judges' unlawful issuance of two conflicting closing orders in Case 004/2 automatically renders the Closing Orders in Case 003 null and void since all five Judges of the Chamber invoked and exercised the exceptional review powers of the Pre-Trial Chamber to restore the legality and remedy the resulting distortion of procedures,<sup>70</sup> addressed the impact of their finding on the issuance of split closing orders in their separate opinions<sup>71</sup> and considered the merits of the closing orders in Case 004/2 after such finding.<sup>72</sup> She further avers that the ECCC legal framework does not dictate that procedurally defective Closing Orders should be annulled and removed from the Case File because (i) there is no *lacuna* in Internal Rule 67(2) which, based on its plain meaning and relevant rules of interpretation, is inapplicable in this instance as it governs exclusively indictments and their content, not the circumstances of their issuance;<sup>73</sup> and (ii) the annulment procedure provided by Internal Rule 76, as the Pre-Trial Chamber has noted, does not apply to closing orders, Internal Rule 76(2) precludes the filing of annulment applications after the issuance of closing orders and such applications may not be admitted when the order

---

<sup>67</sup> Response (D267/29), para. 20.

<sup>68</sup> Response (D267/29), para. 21.

<sup>69</sup> Response (D267/29), paras 22-26.

<sup>70</sup> Response (D267/29), para. 22.

<sup>71</sup> Response (D267/29), para. 22.

<sup>72</sup> Response (D267/29), paras 22-23.

<sup>73</sup> Response (D267/29), para. 24.



they purport to annul is open to appeal pursuant to Internal Rule 76(4).<sup>74</sup> In this regard, she adds that the Co-Lawyers confuse the alleged procedural defects with the Chamber's decision to annul an investigation action upon its review of a reasoned application for annulment, and overlook Internal Rule 48 as well as the jurisprudence of the Supreme Court Chamber which demonstrate that the ECCC legal framework does not anticipate all procedural defects rendering the resulting decision or action void *ab initio*, but only the procedural errors that resulted in a grossly unfair outcome in judicial proceedings.<sup>75</sup>

25. The International Co-Prosecutor secondly submits that a procedural stalemate in Case 003 is not unavoidable.<sup>76</sup> In support, she firstly argues that contrary to the Co-Lawyers' unfounded predictions, a procedural impasse in Case 003 is not inevitable and, thus, there is no requirement for the Pre-Trial Chamber to remit the matter to the Co-Investigating Judges or conduct a *de novo* review itself.<sup>77</sup> In this respect, she contends that not only the Co-Lawyers' claim on the nullity of the separate Closing Orders in Case 004/2 is erroneous, but their analysis of the practical implications of these two options are replete with conjecture.<sup>78</sup> The International Co-Prosecutor further argues that in light of the Pre-Trial Chamber's obligations, *inter alia*, to safeguard the interests of a Charged Person and adopt the appropriate remedy, the Co-Lawyers' assertion regarding the Chamber's inability to act in the absence of guaranteed unanimity is fundamentally flawed.<sup>79</sup>

26. The International Co-Prosecutor further contends that no legal uncertainty remains from the Pre-Trial Chamber's Considerations in Case 004/2 as any uncertainty was removed when the Chamber considered the legal effect of each closing order upon its finding on the illegal issuance of the two closing orders.<sup>80</sup> She reiterates that the default position, in light of the policy decision demonstrated in the ECCC Agreement, ECCC Law and Internal Rules as well as the Pre-Trial Chamber's

---

<sup>74</sup> Response (D267/29), para. 25.

<sup>75</sup> Response (D267/29), para. 25.

<sup>76</sup> Response (D267/29), paras 27-31.

<sup>77</sup> Response (D267/29), para. 27.

<sup>78</sup> Response (D267/29), para. 27.

<sup>79</sup> Response (D267/29), para. 27.

<sup>80</sup> Response (D267/29), paras 28-31.



unanimous finding in the Case 004/2 Considerations, is that Case 004/2 shall proceed to trial based on the Closing Order (Indictment) since the Chamber did not reach the necessary supermajority to overturn the Indictment.<sup>81</sup>

27. Finally, in support of her submission that a permanent stay of proceedings in Case 003 is not warranted,<sup>82</sup> the International Co-Prosecutor argues that the Co-Lawyers' invocation of the abuse of process doctrine is erroneous because the Co-Lawyers (i) misrepresent the jurisprudence of the ECCC where the doctrine has never been applied as a permanent stay of proceedings amounting to an effective termination of proceedings may not be invoked other than for the reasons stated in Article 7 of the Cambodian Code of Criminal Procedure;<sup>83</sup> (ii) fail to meet the particularly high threshold, established by the ECCC Chambers and other international criminal tribunals, for a permanent stay based on abuse of process.<sup>84</sup> She lastly adds that given the crimes MEAS Muth has been indicted of, which are of the most serious concern to the international community, permanently staying Case 003 would be profoundly disproportionate.<sup>85</sup> In this respect, the Co-Lawyers fail to demonstrate that a permanent stay of proceedings is the only suitable remedy to address MEAS Muth's alleged harm of having an unchallengeable indictment hanging over him in perpetuity since the most logical solution would be to accept the clear decision in the Internal Rules, ECCC Agreement and ECCC Law to progress the Case to trial.<sup>86</sup>

28. In their Reply, the Co-Lawyers reiterate their arguments on the admissibility from the Supplement<sup>87</sup> and clarify that the Supplement is a supplement to their Appeal with a request for a permanent stay of proceedings in Case 003 in light of the Trial Chamber's Statement, not an additional Appeal, as the International Co-Prosecutor misleadingly represents.<sup>88</sup> They further contend that the admission of the Supplement will not risk a significant delay to the Pre-Trial Chamber's disposition of

---

<sup>81</sup> Response (D267/29), paras 28-29.

<sup>82</sup> Response (D267/29), paras 32-37.

<sup>83</sup> Response (D267/29), paras 32-33.

<sup>84</sup> Response (D267/29), paras 32, 34-35.

<sup>85</sup> Response (D267/29), paras 36-37.

<sup>86</sup> Response (D267/29), para. 37.

<sup>87</sup> Response (D267/29), paras 2-4, 6-10.

<sup>88</sup> Reply (D267/31), paras 1, 5.



Case 003 as the Chamber will be fully briefed with their Reply and hearings could be held expeditiously *via* video-link.<sup>89</sup>

29. Concerning their submission that the Closing Orders in Case 003 are null and void,<sup>90</sup> the Co-Lawyers restate their arguments from the Supplement with respect to Internal Rule 67(2),<sup>91</sup> MEAS Muth's fair trial rights<sup>92</sup> and their reference to the examples of the *ad hoc* tribunals' decisions that were rendered *ultra vires* and found void<sup>93</sup> as well as how the ECCC legal framework dictates that the procedurally defective acts of the Co-Investigating Judges are annulled and removed from the Case File.<sup>94</sup> The Co-Lawyers further claim that the only legally binding decision of the Pre-Trial Chamber in its Considerations in Case 004/2 is its unanimous finding on the unlawful issuance of the closing orders,<sup>95</sup> and that the Chamber did not exercise its broad review powers by reviewing the Case File to "holistically address all the acts related to the case that the prosecution or the investigating judge has or should have done for the instruction to be complete and legal."<sup>96</sup> Contrary to the International Co-Prosecutor's claim that the Supplement avers that every procedural defect renders a closing order void, the Co-Lawyers clarify that the Supplement only argues that the illegal issuance of contradictory closing orders renders them null and void because they were issued without legal authority.<sup>97</sup>

30. Regarding their submission that a permanent stay of the proceedings is warranted in Case 003, the Co-Lawyers reiterate that a procedural stalemate in Case 003 is inevitable considering (i) the International Co-Prosecutor's contradictory claims in her Appeal against the Dismissal Order in Case 004/2 with respect to the Pre-Trial Chamber's obligation to remit the closing orders to the Co-Investigating

---

<sup>89</sup> Reply (D267/31), para. 9.

<sup>90</sup> Reply (D267/31), paras 10-15.

<sup>91</sup> Reply (D267/31), para. 12.

<sup>92</sup> Reply (D267/31), para. 14.

<sup>93</sup> Reply (D267/31), para. 15.

<sup>94</sup> Reply (D267/31), para. 14.

<sup>95</sup> Reply (D267/31), para. 10 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 and D360/33), para. 61.

<sup>96</sup> Reply (D267/31), para. 11.

<sup>97</sup> Reply (D267/31), para. 13.



Judges or review the Case File itself,<sup>98</sup> and in her Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2 concerning the predictions of an inevitable judicial impasse in Case 003;<sup>99</sup> and that (ii) there is no default position, as argued by the International Co-Prosecutor, in the ECCC legal framework that can seize the Trial Chamber of a procedurally defective, illegally issued Indictment.<sup>100</sup> The Co-Lawyers reiterate their arguments from the Supplement regarding the applicability of the abuse of process doctrine,<sup>101</sup> and clarify that they refer to the jurisprudence of the Pre-Trial Chamber for the proposition that the Chamber has, and may exercise, discretion to invoke the abuse of process doctrine, not that the Chamber actually did so in the cited decision.<sup>102</sup> They conclude that given the procedural stalemate in Case 003, permanently staying the proceedings is the only suitable remedy to prevent serious and egregious violations of MEAS Muth's fair trial rights, thereby meeting the high threshold.<sup>103</sup>

### III. DISCUSSION

31. The Pre-Trial Chamber is seised with the Appeals against the two conflicting Closing Orders in Case 003.<sup>104</sup> The proceedings, in this Case, are now closed, and the Pre-Trial Chamber examines the arguments of the Parties and deliberates on the Appeals pursuant to Internal Rule 77.

32. The Pre-Trial Chamber considers that the Trial Chamber's Statement, a document deprived of judicial force, in a different proceeding has neither immediate nor direct impact on the pending Case.

33. The Pre-Trial Chamber notes that the Appeals, in this Case, have been extensively briefed by written submissions and orally argued by the Parties during a

---

<sup>98</sup> Reply (D267/31), para. 16 *referring to* International Co-Prosecutor's Appeal against the Dimissal Order (D266/2), para. 7.

<sup>99</sup> Reply (D267/31), para. 17 *referring to* Case 004/2 International Co-Prosecutor's Immediate Appeal (E004/2/1), para. 48.

<sup>100</sup> Reply (D267/31), para. 19.

<sup>101</sup> Reply (D267/31), para. 20.

<sup>102</sup> Reply (D267/31), para. 21.

<sup>103</sup> Reply (D267/31), paras 22-24.

<sup>104</sup> National Co-Prosecutor's Appeal against the Indictment (D267/3); MEAS Muth's Appeal against the Indictment (D267/4); International Co-Prosecutor's Appeal against the Dismissal Order(D266/2).



three-day Hearing.<sup>105</sup> The right to a fair trial under Internal Rule 21 has been duly safeguarded.

34. With regard to the argument raised in the Supplement that the Pre-Trial Chamber needs to invoke its inherent power to determine issues incidental to the present case in view of safeguarding good and fair administration of justice,<sup>106</sup> the Pre-Trial Chamber, while reaffirming its ability to exercise such power,<sup>107</sup> finds that the circumstances in the present instance, where another ECCC Chamber competent on the trial phase issued a public statement in another case, do not warrant that such power be exercised.

35. The Pre-Trial Chamber finds that the Supplement is in fact calling for the Chamber's final disposition in the current proceedings, which will be issued in due time. There is no reason for the Pre-Trial Chamber to rule prematurely on a matter falling within the scope of ongoing Appeals.

36. Therefore, the Pre-Trial Chamber finds that the Supplement is inadmissible.

**FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:**

- **DENIES** the Supplement as inadmissible;
- **DISMISSES** the Co-Lawyers' request for a hearing accordingly.

---

<sup>105</sup> Case 003, Scheduling Order for the Pre-Trial Chamber's Hearing on Appeals against Closing Orders, 24 October 2019, D266/12.

<sup>106</sup> Supplement (D267/27), para. 3.

<sup>107</sup> See, e.g., Case 004/2 Considerations (D359/24 and D360/33), para. 32; Case 002 (PTC73), Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 106, 115; Case 002 (PTC03), Decision on Application for Reconsideration of Civil Party's Right to Address the Pre-Trial Chamber in Person, 28 August 2008, C22/1/68, paras 25-26; Case 003 (PTC03), Order Suspending the Enforcement of the "Order on International Co-Prosecutor's Public Statement regarding Case File 003", 13 June 2011, D14/1/2, paras 4-5; Case 004/2, Decision on AO An's Urgent Request for Redaction and Interim Measures, 5 September 2018, D360/3, paras 6-7, 12; Case 003 (PTC11), Decision on Requests for Interim Measures, 31 January 2014, D56/19/8, paras 15-16.





In accordance with Internal Rule 77(13), this decision is not subject to appeal.

Phnom Penh, 3 November 2020



Pre-Trial Chamber

Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

