

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**MEAS MUTH’S REQUEST FOR LEAVE TO SUPPLEMENT HIS RESPONSE  
TO THE INTERNATIONAL CO-PROSECUTOR’S FINAL SUBMISSION**

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Article 33 new of the Establishment Law,<sup>1</sup> Rules 21 and 39(4) of the ECCC Internal Rules (“Rules”), and the Co-Investigating Judges’ discretionary authority to apply the law as they see fit,<sup>2</sup> hereby requests leave to supplement his Response to the International Co-Prosecutor’s Final Submission (“Response to the Final Submission”).<sup>3</sup> This Request is made necessary because the errors in the assessment of evidence and personal jurisdiction in the Pre-Trial Chamber’s Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons) (“Considerations on the Case 004/1 Closing Order”)<sup>4</sup> constitute newly discovered information that would have been addressed had they been known to the Defence when responding to the Final Submission. Granting the requested leave would safeguard Mr. MEAS Muth’s rights to a fair trial and due process, be in keeping with the Defence’s due diligence obligations, and avoid manifest injustice. The Co-Prosecutors would not be prejudiced, nor would the Co-Investigating Judges’ timeframe for issuing a Closing Order in Case 003 be impacted.<sup>5</sup> Due to the urgency of this Request, the Defence requests to file it in English only, with the Khmer translation to follow.

## I. BACKGROUND

### A. Case 003

1. On 7 September 2009, the Case 003 judicial investigation was initiated based on the International Co-Prosecutor’s 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.<sup>6</sup> On 31 October 2014, the International Co-Prosecutor filed a Supplementary Submission.<sup>7</sup>
2. On 14 December 2015, Mr. MEAS Muth appeared before the International Co-Investigating Judge and was notified that he was being investigated for Genocide, Crimes Against Humanity, Grave Breaches of the Geneva Conventions, and National

<sup>1</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 (2004) (“Establishment Law”).

<sup>2</sup> This issue is further discussed *infra* in paragraph 15.

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<sup>4</sup> *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018 (“Considerations on the Case 004/1 Closing Order”), D308/3/1/20.

<sup>5</sup> See ECCC Completion Plan (rev. 17), 30 June 2018, para. 11(iv).

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Crimes related to 11 crime sites and events alleged in the Introductory and Supplementary Submissions.<sup>8</sup> The International Co-Investigating Judge rescinded charges that had been brought against Mr. MEAS Muth *in absentia*<sup>9</sup> and advised him that, before the end of the investigation, he may be charged with additional crimes.<sup>10</sup>

3. On 10 January 2017, the International Co-Investigating Judge notified the parties of the conclusion of the investigation<sup>11</sup> and its reduced scope.<sup>12</sup> On 24 May 2017, after resolving additional investigative requests, he issued a second notice to the parties.<sup>13</sup>
4. On 14 November 2017, the Co-Prosecutors filed separate Final Submissions.<sup>14</sup>
5. On 12 April 2018, the Defence filed its Response to the Final Submission.

## **B. Case 004/1**

### **1. Background to the Considerations on the Case 004/1 Closing Order**

6. On 10 July 2017, the Co-Investigating Judges issued the Closing Order (Reasons), in which they provided full reasons for their decision to dismiss Case 004/1 based on the ECCC's lack of personal jurisdiction over IM Chaem.<sup>15</sup>
7. On 9 August 2017, the International Co-Prosecutor appealed the Closing Order alleging that the Co-Investigating Judges: **a.** erred in law by finding that allegations in the Introductory Submissions must be charged to be part of a Closing Order;<sup>16</sup> **b.** erred in law by failing to address allegations with which they were seized but did not charge: (1) the Northwest Zone purge, (2) forced marriages, (3) persecution of Vietnamese in Sector 5, (4) persecution of Khmer Krom in Sector 13, and (5) certain Crimes Against Humanity at specified sites;<sup>17</sup> **c.** erred in law and fact in applying

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<sup>15</sup> *Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017 ("Case 004/1 Closing Order"), D261.

<sup>16</sup> *Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017, D308/3/1/1, paras. 11-22.

<sup>17</sup> *Id.*, paras. 23-37.

extermination;<sup>18</sup> **d.** erred in law and fact in applying enforced disappearances;<sup>19</sup> **e.** erred in fact in finding IM Chaem was not Koh Andet District Secretary,<sup>20</sup> and **f.** erred in fact in finding IM Chaem was not the Sector 13 Committee Member.<sup>21</sup>

8. On 28 June 2018, the Pre-Trial Chamber issued its Considerations on the Case 004/1 Closing Order. The Pre-Trial Chamber concurred on some issues<sup>22</sup> but was unable to attain a majority vote on the merits of the International Co-Prosecutor's Appeal.<sup>23</sup> The majority National Judges found that IM Chaem did not fall within the ECCC's personal jurisdiction and upheld the Co-Investigating Judges' decision.<sup>24</sup> The minority International Judges reviewed the Case File *de novo* and found that IM Chaem fell within the ECCC's personal jurisdiction.<sup>25</sup>

## 2. The Pre-Trial Chamber's unanimous rulings

9. The Pre-Trial Chamber held: **a.** the length of time the Co-Investigating Judges took to issue the Case 004/1 Closing Order was disproportionate;<sup>26</sup> **b.** the issuance of a twofold Closing Order did not expedite Case 004/1's outcome;<sup>27</sup> **c.** the severance of IM Chaem from Case 004 impacted the allegations remaining in Case 004;<sup>28</sup> **d.** the position of the ECCC within Cambodia's legal system<sup>29</sup> does not mean ordinary courts have no jurisdiction over Democratic Kampuchea-era crimes;<sup>30</sup> **e.** the Co-Investigating Judges improperly created a hierarchy of the evidence in considering its probative value;<sup>31</sup> and **f.** the Co-Investigating Judges applied the incorrect standard of evidence.<sup>32</sup>

<sup>18</sup> *Id.*, paras. 38-46.

<sup>19</sup> *Id.*, paras. 47-57.

<sup>20</sup> *Id.*, paras. 58-69.

<sup>21</sup> *Id.*, paras. 70-81.

<sup>22</sup> *See infra* para. 9.

<sup>23</sup> Considerations on the Case 004/1 Closing Order, para. 81.

<sup>24</sup> *Id.*, Opinion of Judges PRAK Kimsan, NEY Thol and HUOT Vuthy, para. 92.

<sup>25</sup> *Id.*, Opinion of Judges Baik and Beauvallet, para. 339.

<sup>26</sup> *Id.*, paras. 28-31.

<sup>27</sup> *Id.*, paras. 32-35.

<sup>28</sup> Considerations on the Case 004/1 Closing Order, paras. 36-40.

<sup>29</sup> The National Co-Lawyer for the Civil Party Applicants raised this issue and the Pre-Trial Chamber requested submissions. *Id.*, paras. 16-17, 64-80.

<sup>30</sup> *Id.*, para. 80.

<sup>31</sup> *Id.*, paras. 41-59.

<sup>32</sup> *Id.*, paras. 60-63. *See also id.*, Opinion of Judges Baik and Beauvallet, paras. 106-12 (regarding charging and indictment).

### 3. The International Pre-Trial Chamber Judges' minority opinion

10. On the merits of the Appeal, the International Pre-Trial Chamber Judges: **a.** dismissed Grounds 1, 2(2), and 2(4),<sup>33</sup> upheld Grounds 2(1), 2(3), and 3-6,<sup>34</sup> and upheld parts of Ground 2(5) and dismissed others;<sup>35</sup> **b.** reviewed the Case File *de novo* and addressed factual allegations related to five uncharged crime sites that were not raised in the Appeal, finding that these allegations should have been charged and considered for personal jurisdiction purposes;<sup>36</sup> and **c.** concluded that the full magnitude of the crimes alleged or charged against IM Chaem and her roles and responsibilities during the Democratic Kampuchea period rendered her one of those “most responsible.”<sup>37</sup>

## II. ADMISSIBILITY OF THE REQUEST

11. In its Considerations on the Case 004/1 Closing Order – issued on 28 June 2018, after the Defence filed its Response to the Final Submission – the Pre-Trial Chamber committed multiple errors which, if not addressed, could impact Mr. MEAS Muth's rights to a fair trial and due process and cause manifest injustice. While the Pre-Trial Chamber's rulings as a whole<sup>38</sup> lacked rationale, logic, and most notably, consequence,<sup>39</sup> this Request is limited to the Pre-Trial Chamber's errors regarding: **a.**

<sup>33</sup> Considerations on the Case 004/1 Closing Order, paras. 118, 146, 168.

<sup>34</sup> *Id.*, paras. 142, 160, 263, 282, 320.

<sup>35</sup> *Id.*, paras. 172, 179, 183, 186, 194, 201, 206, 211.

<sup>36</sup> *Id.*, paras. 225, 232, 241, 248.

<sup>37</sup> *Id.*, para. 339.

<sup>38</sup> *See supra* paras. 9-10.

<sup>39</sup> Although Judges can raise errors *sua sponte*, the Pre-Trial Chamber – with more than a dash of acidity – ruled upon issues that were neither determinative of nor essential to the Appeal. Seemingly, the Pre-Trial Chamber's intent was to malign the Co-Investigating Judges, perhaps owing to residual discontent harbored against them for seeking submissions on whether it would be in the interests of justice to suspend in perpetuity their investigation due to the ECCC's unstable budgetary situation [REDACTED]

[REDACTED] Gratuitously (and absurdly), the Pre-Trial Chamber sought to impugn the Co-Investigating Judges' reasoning in the Case 004/1 Closing Order by *sua sponte* raising four innocuous matters, regarding which their rulings are replete with errors and misapprehensions. **First**, the Pre-Trial Chamber found the length of time it took the Co-Investigating Judges to issue the Case 004/1 Closing Order disproportionate and that a twofold Closing Order did not expedite the proceedings (Considerations on the Case 004/1 Closing Order, paras. 28-35). Neither issue was determinative of the Appeal. The Pre-Trial Chamber failed to thoroughly analyze the issues: **a.** failing to consider existing budgetary and human resources constraints (*see, e.g.*, ECCC Completion Plan (rev.7), 31 December 2015, paras. 16-27); **b.** ignoring the fact that the Co-Investigating Judges were seized with four cases at once; and **c.** erroneously assessing the complexity of Case 004/1 based on the number of charges, contradicting its own holding that the Co-Investigating Judges must assess all evidence of crimes charged and alleged before issuing a Closing Order (Considerations on the Case 004/1 Closing Order, paras. 30, 37). A twofold Closing Order was reasonable: **1.** to provide the parties notice of the outcome of the case, and, **2.** to provide a *reasoned* Closing Order as required by Rule 67(4). The Pre-Trial Chamber's condemnation of the twofold Closing Order is absurd. The Pre-Trial Chamber itself has issued twofold decisions, as has the Supreme Court Chamber. *See, e.g.*, *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary's Appeal

the Co-Investigating Judges' method of assessing evidence;<sup>40</sup> **b.** the standard of evidence for indictment;<sup>41</sup> and **c.** the assessment of personal jurisdiction.<sup>42</sup>

12. Had these errors been known prior to its Response to the Final Submission, the Defence would have argued: **a.** the Co-Investigating Judges applied the appropriate methodology in assessing the evidence on Case File 004/1; **b.** the Pre-Trial Chamber and Co-Investigating Judges incorrectly relied on the Case 002 Closing Order to establish the standard of evidence for indictment, the correct standard being *whether a reasonable Trial Chamber could convict the Charged Person beyond a reasonable doubt based on the evidence in the Case File*; and **c.** the Co-Investigating Judges should determine personal jurisdiction based on the gravity of charged crimes only.
13. Considering that these errors surfaced after the filing of the Response to the Final Submission but before the issuance of the Case 003 Closing Order, they constitute newly discovered information meriting submissions from the Defence in keeping with its duty of due diligence.<sup>43</sup> The new developments give rise to new information akin

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Against the Closing Order, 13 January 2011, D427/1/26 and *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30. See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Decision on Objections to Document Lists Summary, 1 July 2015, F26/11 and *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Decision on Objections to Document Lists Full Reasons, 31 December 2015, F26/12. **Second**, the Pre-Trial Chamber considered it necessary to clarify the impact of IM Chaem's severance from Case 004 (Considerations on the Case 004/1 Closing Order, paras. 36-40). This issue was not determinative of the Appeal. The Pre-Trial Chamber did not identify any errors or abuses of discretion by the Co-Investigating Judges. As no Closing Orders have been issued in Cases 004 and 004/2, the Pre-Trial Chamber had no need to issue a pre-emptory ruling. **Third**, the Pre-Trial Chamber found the Co-Investigating Judges overstepped their mandate in holding that ECCC law strips ordinary Cambodian courts of their jurisdiction over Khmer Rouge-era cases (*Id.*, paras. 64-80). Not only was this issue not determinative of the Appeal, but the Pre-Trial Chamber misinterpreted the Co-Investigating Judges' reasoning. The Co-Investigating Judges simply considered the hypothetical impact of dismissing a case based solely on a lack of personal jurisdiction and whether an "impunity gap" should impact their decision, ultimately concluding that it should not (Case 004/1 Closing Order, paras. 11-25). The Pre-Trial Chamber's finding was superfluous. It identified no error or abuse of discretion and ultimately agreed with the Co-Investigating Judges that the ECCC was designed to try "a limited category of high-level perpetrators." (Considerations on the Case 004/1 Closing Order, para. 78). The International Pre-Trial Chamber Judges further erroneously concluded that the Pre-Trial Chamber's inability to reach a consensus on Case 004/1 must not preclude a trial before a national court (*Id.*, para. 340). There is no basis for this determination since "the ECCC has no jurisdiction to judge the activities of other bodies" (*Id.*, paras. 72, 79).

<sup>40</sup> Considerations on the Case 004/1 Closing Order, paras. 41-59.

<sup>41</sup> *Id.*, paras. 60-63, 106-12 (regarding charging and indictment).

<sup>42</sup> *Id.*, paras. 321-22.

<sup>43</sup> ALASKA RULES OF PROF'L CONDUCT (2017-2018 ed.), Rule 1.3. *Id.*, Comment to Rule 1.3: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." See also Code of Ethics for Lawyers Licensed with the Bar

to newly discovered evidence under Rule 87(4). Such evidence may be admitted and considered if it is conducive to ascertaining the truth and was not available prior to the start of trial or could not have been discovered through reasonable diligence.<sup>44</sup>

14. The errors regarding the assessment of evidence and personal jurisdiction could significantly impact Mr. MEAS Muth's Closing Order. Granting this Request would be consistent with the ECCC's governing laws, which require the Co-Investigating Judges to ensure fair proceedings and protect Mr. MEAS Muth's fair trial rights. Under Article 33 new of the Establishment Law, ECCC Judges must exercise jurisdiction in accordance with international standards of justice, fairness, and due process of law, as set out in the International Covenant on Civil and Political Rights,<sup>45</sup> which is enshrined in the Cambodian Constitution.<sup>46</sup> Rule 21 requires the Co-Investigating Judges to interpret the applicable ECCC laws and rules to always safeguard Mr. MEAS Muth's interests.<sup>47</sup> Rule 39(4) permits the Co-Investigating Judges to validate any action executed by a party after the expiration of a time limit. This legal framework favors granting this Request to protect Mr. MEAS Muth's rights to a fair trial and due process.

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Association of the Kingdom of Cambodia, Art. 7; Law on the Statutes of the Bar (1995), Art. 58; Rule 22(4).

<sup>44</sup> Rule 87(4); *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Decision Concerning New Documents and Other Related Issues, 30 April 2012, E190, paras. 22-23. *See also* Rule 112(1)(a) regarding revising a final judgement when there is newly discovered evidence.

<sup>45</sup> International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Arts. 14-15. *See also* Establishment Law, Art. 35 new; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (2003) ("Agreement"), Arts. 12-13.

<sup>46</sup> Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4<sup>th</sup> of March 1999, Art. 31.

<sup>47</sup> Rule 21(1); [REDACTED]; Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2, 11 August 2017, D249/6, para. 18; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC71), Decision on IENG Sary's Appeal against the Co-Investigating Judges' Decision Refusing to Accept the Filings of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, paras. 13, 23.

### III. REQUEST

15. Although the International Co-Investigating Judge has held that applying the Pre-Trial Chamber's legal principles and interpretations may foster legal certainty and judicial economy,<sup>48</sup> *stare decisis* does not apply in civil law systems where "judges are only bound by the law."<sup>49</sup> The International Co-Investigating Judge further held that "legal principles formulated by the PTC do not, as a rule, bind the CIJs in their interpretation of the law."<sup>50</sup> Should this Request be granted, the Defence would submit that the Co-Investigating Judges depart from the legal principles and interpretations the Pre-Trial Chamber set out in its Considerations on the Case 004/1 Closing Order.

#### **A. The Pre-Trial Chamber erroneously found that the Co-Investigating Judges improperly assessed the evidence in Case 004/1**

##### **1. The Co-Investigating Judges assessed the evidence on a case-by-case basis**

16. The Pre-Trial Chamber found the Co-Investigating Judges erred in: **a.** assessing the evidence in Case 004/1, because the principle of freedom of evidence means all evidence is admissible and generally has the same probative value;<sup>51</sup> **b.** creating a hierarchy of the evidence in the Case File based on provenance rather than substance;<sup>52</sup> **c.** affording higher probative value to evidence produced by their Office than to other evidence;<sup>53</sup> and **d.** stating the methodology by which they assessed the evidence.<sup>54</sup>

17. Should this Request be granted, the Defence would submit:

- a. The Pre-Trial Chamber misinterpreted the Co-Investigating Judges' actions. The Co-Investigating Judges first assessed all the evidence on the Case File and then stated their methodology for doing so. They did not create a hierarchy or exclude

<sup>48</sup> 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, paras. 13-15.

<sup>49</sup> *Id.*, para. 13.

<sup>50</sup> *Id.*

<sup>51</sup> Considerations on the Case 004/1 Closing Order, para. 44. *See id.*, paras. 41-59 for the entire ruling.

<sup>52</sup> *Id.*, para. 52.

<sup>53</sup> *Id.*, para. 49.

<sup>54</sup> *Id.*, paras. 41-42.



categories of evidence based on provenance. They freely evaluated the probative value of the evidence on a case-by-case basis<sup>55</sup> and reasonably considered well-established ECCC jurisprudence regarding different types of evidence.<sup>56</sup>

- b. The Co-Investigating Judges can evaluate the evidence in any order they choose and assess probative value as they see fit, as they did in Case 004/1:
- **Written Records of Interview:** The Co-Investigating Judges assessed whether a statement was corroborated,<sup>57</sup> consistent<sup>58</sup> and credible,<sup>59</sup> and whether the witness had direct reliable knowledge<sup>60</sup> or ulterior motives.<sup>61</sup>
  - **Statements by IM Chaem to non-ECCC entities:** The Co-Investigating Judges assessed these statements in light of other evidence<sup>62</sup> and confirmed whether they were corroborated.<sup>63</sup>
  - **Civil Party applications:** The Co-Investigating Judges relied on Civil Party evidence obtained by their Office.<sup>64</sup> Civil Party applications are filed to assist the prosecution<sup>65</sup> and warrant cautious consideration, given the Co-Investigating Judges' duty to investigate impartially.<sup>66</sup>
  - **DC-Cam reports:** The Co-Investigating Judges assessed DC-Cam reports for content, credibility, and discrepancies.<sup>67</sup> They concluded the reports had little probative value,<sup>68</sup> as did the International Pre-Trial Chamber Judges.<sup>69</sup>

<sup>55</sup> *Id.*, para. 51. *See* Rules 55(5), 67; Code of Criminal Procedure of the Kingdom of Cambodia (2007), Arts. 127, 247; French Code of Criminal Procedure (2018), Arts. 81, 176-77. *See also* CHRISTIAN GUÉRY, RÉPERTOIRE DE DROIT PÉNAL ET DE PROCÉDURE PÉNALE, INSTRUCTION PRÉPARATOIRE (Dalloz, June 2013), para. 799: "Le juge d'instruction ... décide en toute indépendance sur le règlement de l'information." (Unofficial translation: "The investigating judge ... decides independently on the outcome of the proceedings").

<sup>56</sup> Case 004/1 Closing Order, fns. 179-89, 249-50.

<sup>57</sup> *See, e.g., id.*, paras. 143-50, 158, 190-91, 248-51, 276.

<sup>58</sup> *See, e.g., id.*, paras. 165, 211-12.

<sup>59</sup> *See, e.g., id.* paras. 193-94, 213-15, 279-80.

<sup>60</sup> *See, e.g., id.*, para. 176.

<sup>61</sup> *See, e.g.,* Case 004/1 Closing Order, paras. 203, 210-12, 232.

<sup>62</sup> *Id.*, para. 139.

<sup>63</sup> *See, e.g., id.*, paras. 155, 222-23. *See also id.*, paras. 145-49.

<sup>64</sup> *See, e.g., id.*, paras. 215, 230, 277.

<sup>65</sup> Rule 23(1)(a). The Pre-Trial Chamber erroneously held that Civil Party applications are filed with the aim of assisting the judicial investigation. Considerations on the Case 004/1 Closing Order, para. 54.

<sup>66</sup> Rule 55(5).

<sup>67</sup> Case 004/1 Closing Order, paras. 113-35.

- **Estimates of numbers of victims:** The Co-Investigating Judges relied on the principle of *in dubio pro reo* to estimate numbers of victims,<sup>70</sup> the proper approach when there is doubt regarding evidence.<sup>71</sup> By contrast, the International Pre-Trial Chamber Judges relied on highly circumstantial evidence to establish the number of victims at a worksite.<sup>72</sup>

**2. The Co-Investigating Judges did not use the beyond a reasonable doubt standard of evidence for indictment**

18. The Pre-Trial Chamber: **a.** found that the Co-Investigating Judges' reliance on Trial and Supreme Court Chamber jurisprudence indicated that they used the beyond a reasonable doubt standard of evidence, rather than the probability standard,<sup>73</sup> and **b.** held that the applicable standard of evidence for indictment is the probability standard.<sup>74</sup>

19. Should this Request be granted, the Defence would submit:

- a. The Pre-Trial Chamber misinterpreted the Co-Investigating Judges' reliance on Trial and Supreme Court Chamber jurisprudence. The Co-Investigating Judges expressly stated that their factual findings were based on a probability standard.<sup>75</sup> The Co-Investigating Judges did not use the Chambers' jurisprudence to apply a different standard of evidence, only to support their evidentiary assessments.
- b. The Pre-Trial Chamber and Co-Investigating Judges incorrectly relied upon the probability standard.<sup>76</sup> Given the crimes prosecuted at the ECCC, the standard of evidence for charging Suspects, the length of the judicial investigation, and the likelihood of insufficient funding for Case 003, the appropriate standard of

<sup>68</sup> *Id.*, para. 135.

<sup>69</sup> Considerations on the Case 004/1 Closing Order, paras. 228, 239 (assessing a 1997 DC-Cam report).

<sup>70</sup> *See, e.g.*, Case 004/1 Closing Order, paras. 218, 282, 320. *See also id.*, paras. 26-36.

<sup>71</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.

<sup>72</sup> Considerations on the Case 004/1 Closing Order, paras. 219-20.

<sup>73</sup> *Id.*, para. 60.

<sup>74</sup> *Id.*, para. 61. *See also id.*, paras. 106-12 (regarding the differences between charging and indictment).

<sup>75</sup> Case 004/1 Closing Order, para. 2.

<sup>76</sup> *Id.*, para. 2, fn. 2; Considerations on the Case 004/1 Closing Order, para. 61, quoting *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427 ("Case 002 Closing Order"), para. 1323. The Case 002 Co-Investigating Judges cited inapposite French and international jurisprudence and commentary. *See* Case 002 Closing Order, paras. 1323-25. The Pre-Trial Chamber cited Rule 55(4) and French commentary, which are inapplicable. *See* Considerations on the Case 004/1 Closing Order, para. 62.

evidence is *whether a reasonable Trial Chamber could convict the Charged Person beyond a reasonable doubt based on the evidence in the Case File.*<sup>77</sup>

### B. The Co-Investigating Judges' assessment of personal jurisdiction

20. The International Pre-Trial Chamber Judges cited the Case 001 Trial Judgement to hold that, to determine whether someone is “most responsible,” the gravity of the “crimes alleged or charged” must be assessed.<sup>78</sup>

21. Should this Request be granted, the Defence would submit:

- a. The International Pre-Trial Chamber Judges misstated the Case 001 Trial Judgement<sup>79</sup> and cited inapposite international jurisprudence.<sup>80</sup> Despite misstating the Case 001 Trial Chamber jurisprudence, the International Pre-Trial Chamber Judges correctly applied it in some instances.<sup>81</sup>
- b. The Co-Investigating Judges should follow the Case 001 Trial Chamber jurisprudence and consider only charged crimes in assessing personal jurisdiction.<sup>82</sup> The Agreement,<sup>83</sup> Establishment Law,<sup>84</sup> and Rules<sup>85</sup> support this

<sup>77</sup> [REDACTED]

<sup>78</sup> Considerations on the Case 004/1 Closing Order, para. 321.

<sup>79</sup> *Case of KAING Guek Eav*, 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010 (“Case 001 Trial Judgement”), E188, para. 22, which refers to assessing the “gravity of the crimes charged.”

<sup>80</sup> Considerations on the Case 004/1 Closing Order, fn. 906, citing *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction on Behalf of Accused Fofana, 3 March 2004, para. 38 (reviewing an indictment under the SCSL’s “reasonable grounds to believe” indictment confirmation standard); *Prosecutor v. Ntaganda*, ICC-01/04-169-US-Exp, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” 13 July 2006, para. 76 (*see id.*, paras. 78-79, discussing the Rome Statute’s limits on personal jurisdiction); *Prosecutor v. Lukić & Lukić*, IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, 5 April 2007, para. 26 (*see also id.*, para. 3, regarding when to refer an indicted person to the State authorities for prosecution under ICTY Rule 11 *bis*). [REDACTED]

<sup>81</sup> *See* Considerations on the Case 004/1 Closing Order, paras. 165-68, 205-06.

<sup>82</sup> Case 001 Trial Judgement, para. 22.

<sup>83</sup> Agreement, Arts. 1: “The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in **bringing to trial** senior leaders of Democratic Kampuchea and those who were most responsible...”; 5(3): “[T]he scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations ... that were **committed** during the period...” (emphasis added).

<sup>84</sup> Establishment Law, Arts. 1: “The purpose of this law is to **bring to trial** senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations ... that were **committed** during the period...”; 2 new: “Extraordinary Chambers shall be established in the existing court structure ... **to bring to trial** senior leaders of Democratic Kampuchea and those who were most responsible...” (emphasis added).

<sup>85</sup> Rules, 55(4), 67(3). *See also id.*, Glossary, definitions of a Suspect and a Charged Person.



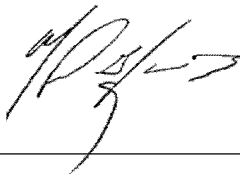
position. To use an insufficiently established crime<sup>86</sup> to assess personal jurisdiction – to send a case to trial – means a Charged Person is prosecuted partly based on allegations he or she cannot challenge at trial, in violation of his or her rights to be informed of the charges and prepare a defence.<sup>87</sup>

#### IV. CONCLUSION

22. The Pre-Trial Chamber Judges erred regarding the Co-Investigating Judges' assessment of the evidence, the standard of evidence for indictment, and personal jurisdiction. Their rulings are newly discovered information, regarding which the Defence must be duly diligent in protecting Mr. MEAS Muth's fair trial rights. To ensure that the Co-Investigating Judges assess the evidence in Case 003 as they did in Case 004/1, apply the correct standard of evidence for indictment, and correctly assess personal jurisdiction, the Defence should be permitted to supplement its Response to the Final Submission.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to GRANT the Defence leave to supplement MEAS Muth's Response to the International Co-Prosecutor's Final Submission.

Respectfully submitted,


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ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 6<sup>th</sup> day of **August, 2018**

<sup>86</sup> See Rule 55(4) regarding the charging of a Suspect.

<sup>87</sup> Agreement, Art. 13(1); Establishment Law, Art. 35 new (a), (d); Rule 21(1)(d).