

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

**FILING DETAILS**

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

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## I. INTRODUCTION

1. Meas Muth seeks leave to supplement his Response to the International Co-Prosecutor's ("ICP") Case 003 Final Submission ("Request").<sup>1</sup> For the reasons set out in further detail below, the ICP submits that the Request is ill-founded and untimely. The ICP submits that further submissions are neither necessary nor useful to the Co-Investigating Judges ("CIJs") in their preparation of the Case 003 Closing Order. Nor are the proposed submissions necessary to protect Meas Muth's fair trial rights.

## II. PROCEDURAL HISTORY

2. Regarding the earlier milestones of Case 003, the ICP concurs with and adopts paragraphs 1 to 3 of Meas Muth's Request.<sup>2</sup> The ICP summarises the most recent and pertinent events in Cases 003 and 004/1 as follows.
3. On 10 July 2017, the CIJs issued the Closing Order (Reasons) in Case 004/1, in which they provided full reasons for their decision to dismiss that case.<sup>3</sup> On 9 August 2017, the ICP appealed the Case 004/1 Closing Order (Reasons) to the Pre-Trial Chamber ("PTC").<sup>4</sup>
4. On 14 November 2017, the National Co-Prosecutor and the ICP submitted their respective Rule 66 Final Submissions in Case 003.<sup>5</sup> On 16 November 2017, Meas Muth submitted a request for extra time to file his response to the ICP's Final Submission,<sup>6</sup> which the International Co-Investigating Judge ("ICIJ") granted in part on 24 November 2017.<sup>7</sup> Meas Muth then filed his Response to the ICP's Final Submission ("Final Submission Response") on 12 April 2018.<sup>8</sup>
5. On 28 June 2018, the PTC issued its Considerations on the Case 004/1 Closing Order Appeal ("PTC Considerations").<sup>9</sup> On 6 August 2018, Meas Muth filed the Request in

<sup>1</sup> **D256/12** Meas Muth's Request for Leave to Supplement His Response to the International Co-Prosecutor's Final Submission, 6 August 2018 ("Request").

<sup>2</sup> **D256/12** Request, paras 1-3.

<sup>3</sup> **D261** Closing Order (Reasons) in Case 004/1, 10 July 2017 ("Closing Order (Reasons)").

<sup>4</sup> Case 004/1-**D308/3/1/1** International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017.

<sup>5</sup> **D256/6** Final Submission Concerning Meas Muth Pursuant to Internal Rule 66, 14 November 2017; **D256/7** International Co-Prosecutor's Rule 66 Final Submission, 14 November 2017.

<sup>6</sup> **D256/8** Meas Muth's Request for Extension of Deadline to Respond to International Co-Prosecutor's Rule 66 Final Submission, 16 November 2017.

<sup>7</sup> **D256/9** Decision on Meas Muth's Request for Extension of Deadline to Respond to International Co-Prosecutor's Final Submission, 24 November 2017.

<sup>8</sup> **D256/11** Meas Muth's Response to the International Co-Prosecutor's Final Submission, 12 April 2018 ("Final Submission Response").

<sup>9</sup> Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018 ("PTC Considerations").

English only “[d]ue to [its] urgency”, with the Khmer translation to follow.<sup>10</sup> A confidential version of the Request was notified to the Parties on the same day, with a public redacted version following on 7 August 2018.

### III. RESPONSE

6. Meas Muth seeks leave to supplement his Final Submission Response in light of the PTC Considerations in Case 004/1. His proposed submissions cover three topics discussed in the PTC Considerations: (i) the CIJs’ methodology for assessing evidence;<sup>11</sup> (ii) the standard of proof required for indictment;<sup>12</sup> and (iii) the CIJs’ assessment of personal jurisdiction, in particular whether uncharged crimes may be considered when assessing the ECCC’s personal jurisdiction over a charged person.<sup>13</sup> Meas Muth argues that these issues are new to him, arising for the first time out of alleged “errors” made by the PTC unanimously and/or the International Judges in their separate Opinion, and would have been addressed in his Final Submission Response if they had been known to him at that time.<sup>14</sup> In fact, as discussed below, Meas Muth has previously submitted legal arguments on each of these three topics, and also addresses them in significant detail in the current Request.
  
7. Meas Muth submits that failure to allow him to submit on the PTC Considerations “could impact [his] rights to a fair trial and due process and cause manifest injustice.”<sup>15</sup> However, Meas Muth fails to explain how his rights could possibly be prejudiced when the CIJs have identical access to, and capacity to analyse, the new PTC jurisprudence, which according to his own argument the CIJs are not bound to follow.<sup>16</sup> New jurisprudence in another case is not, as Meas Muth argues,<sup>17</sup> akin to “newly discovered evidence” under Internal Rule<sup>18</sup> 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>19</sup> It is not to allow parties to make multiple submissions each time a new piece of

<sup>10</sup> **D256/12** Request, p. 1.

<sup>11</sup> **D256/12** Request, paras 11-12, 16-17.

<sup>12</sup> **D256/12** Request, paras 11-12, 18-19.

<sup>13</sup> **D256/12** Request, paras 11-12, 20-21.

<sup>14</sup> *See e.g.* **D256/12** Request, p. 1 [“errors in the assessment of evidence and personal jurisdiction in the Pre-Trial Chamber’s [Considerations on the Case 004/1 Closing Order] constitute newly discovered information that would have been addressed had they been known to the Defence when responding to the Final Submission.”], paras 11-13.

<sup>15</sup> **D256/12** Request, para. 11.

<sup>16</sup> **D256/12** Request, para. 15.

<sup>17</sup> **D256/12** Request, para. 13.

<sup>18</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 9, 16 January 2015.

<sup>19</sup> **D256/12** Request, para. 13.

potentially relevant jurisprudence is released. 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 either at the ECCC or another international(ised) tribunal. Unless the CIJs seek the parties' submissions on any particular issue(s) arising out of the PTC Considerations, it must be assumed that they do not require their assistance in analysing them and considering their impact on the Case 003 (or Case 004) Closing Orders.

8. This view was demonstrated in a 2013 decision of the Appeals Chamber at the Special Court for Sierra Leone. The Prosecution had made a similar request to supplement its appeal brief in the *Taylor* case to address the ICTY Appeal Judgment in *Perišić*, which had been delivered after the completion of the parties' submissions and directly related to a principal issue in the defence appeal, namely whether "specific direction" is required for aiding and abetting. The Appeals Chamber swiftly rejected the request, stating that it was "aware of current relevant jurisprudence including the *ICTY* Appeals Chamber decision in *Perišić*".<sup>20</sup>
9. Moreover, the ICP notes that Meas Muth's Request constitutes, in essence, an improper attempt to appeal a PTC decision in another ECCC case to the CIJs. Meas Muth's overriding objective to use this Request as a platform to express his displeasure at the PTC jurisprudence is clear from his dedication of space to complaints about the PTC's rulings "as a whole" which, on his own admission, are irrelevant to the current Request.<sup>21</sup> This is compounded by the fact that a closer inspection of Meas Muth's prior filings and the CIJs' previous decisions in Cases 003 and 004/1 reveals that none of the topics upon which Meas Muth seeks to file additional submissions is in fact "new" to him.
10. Meas Muth's proposed submissions on the first topic amount to nothing more than a lesson to the CIJs in their own methodology for assessing evidence in Case 004/1, an exercise which is neither useful to the CIJs nor necessary to protect Meas Muth's rights. Moreover, it is largely repetitious of his Final Submission Response, in which Meas Muth already supported and expressly relied on his interpretation of the CIJs' approach in Case 004/1, including (i) the presumption of relevance and reliability given to Written Records

<sup>20</sup> *Prosecutor v. Taylor*, SCSL-03-01-A, Decision on Prosecution Motion for Leave to File Additional Written Submissions Regarding the ICTY Appeals Judgment in *Perišić*, 20 March 2013, p. 2.

<sup>21</sup> **D256/12** Request, paras 9, 11 (quote at para. 11).

of Interview generated by the Office of the Co-Investigating Judges during the investigation, and trial transcripts from other ECCC proceedings placed on Case File 003;<sup>22</sup> (ii) the application of caution and corroboration to other evidence collected by persons or entities external to the ECCC and without judicial supervision, such as DC-Cam statements, interviews generated by the Office of the Co-Prosecutors, Civil Party applications, and hearsay evidence;<sup>23</sup> (iii) the assessment of Meas Muth's out-of-court statements in light of other evidence on the Case File;<sup>24</sup> (iv) a requirement for corroboration of all evidence;<sup>25</sup> and (v) the application of the principle of *in dubio pro reo* for estimating the number of victims.<sup>26</sup>

11. The second issue concerns the PTC and CIJs' reliance on the "probability standard" as the standard of proof for indictment.<sup>27</sup> As Meas Muth acknowledges in the Request,<sup>28</sup> he has been aware since the CIJs issued the Closing Order (Reasons) that they consider the "probability standard" to be the correct standard of proof.<sup>29</sup> This information is thus not "new", and indeed, Meas Muth provided detailed submissions on this very issue in his Final Submission Response, including proffering his own alternative standard as he does in the Request.<sup>30</sup> Meas Muth even cites to these prior submissions in support of his request to make a supplementary filing.<sup>31</sup>
12. As to the third topic, Meas Muth was fully aware, well before the PTC Considerations, of the CIJs' intention to consider uncharged crimes when assessing the ECCC's personal jurisdiction. The CIJs in Case 004/1 and the ICIJ in Case 003 had made this clear.<sup>32</sup> Moreover, Meas Muth acknowledged the need for his defence to address uncharged

<sup>22</sup> **D256/11** Final Submission Response, para. 138, *citing* **D261** Closing Order (Reasons), paras 103-104.

<sup>23</sup> **D256/11** Final Submission Response, paras 138-143, *citing* **D261** Closing Order (Reasons), paras 104-108, 139.

<sup>24</sup> **D256/11** Final Submission Response, para. 143 *citing* **D261** Closing Order (Reasons), para. 139.

<sup>25</sup> **D256/11** Final Submission Response, para. 145.

<sup>26</sup> **D256/11** Final Submission Response, paras 734-735, fns 2811-2812 *citing* **D261** Closing Order (Reasons), paras 218, 320. Meas Muth also referred, as in his current Request, fn. 70, to the CIJs' general discussion in the Case 004/1 Closing Order of the application of the *in dubio pro reo* principle. *See* **D256/11** Final Submission Response, fns 349, 402, *citing* **D261** Closing Order (Reasons), paras 26-36.

<sup>27</sup> **D256/12** Request, paras 18-19.

<sup>28</sup> **D256/12** Request, para. 19a-b.

<sup>29</sup> **D261** Closing Order (Reasons), para. 2.

<sup>30</sup> **D256/12** Request, para. 19b.

<sup>31</sup> **D256/12** Request, fn. 77, *citing* **D256/11** Final Submission Response, paras 82-108.

<sup>32</sup> *See e.g.* **D261** Closing Order (Reasons), paras 244-280, 321-322; **D256/9** Decision on Meas Muth's Request for Extension of Deadline to Respond to International Co-Prosecutor's Final Submission, 24 November 2017, para. 15 ["While evidence related to crimes that have not been charged may have a bearing on, amongst other things, the issue of personal jurisdiction, the Defence would have been aware of the need to address such evidence in their submissions on personal jurisdiction when they informed the CIJs of the length of time necessary to respond to the Final Submission."].

crimes for personal jurisdiction purposes before he filed his Final Submission Response, stating:

Moreover, even if the [CIJs] do not consider additional crimes and modes of liability that were not previously charged, any alleged evidence may still be considered, and must be thoroughly analyzed by the Defence, for personal jurisdiction purposes.<sup>33</sup>

Accordingly, although Meas Muth did not consider the purge of Sector 505 civilian cadres to form part of the charges against him,<sup>34</sup> he made detailed submissions in the Final Submission Response on his role in that purge and the replacement of Sector 505 cadres by Division 164 and Southwest Zone cadres.<sup>35</sup>

13. Meas Muth now wishes to plead that uncharged crimes and modes of responsibility should not be considered for personal jurisdiction purposes,<sup>36</sup> and regrets not taking the opportunity to do so in April 2018. He is impermissibly seeking to augment his Final Submission Response to redress this error and is attempting to use the PTC Considerations as a pretext for doing so.

*Meas Muth's Request is Untimely and Risks Delay to the Case 003 Closing Order*

14. Meas Muth baldly asserts that “the Co-Investigating Judges’ timeframe for issuing a Closing Order in Case 003 would [not] be impacted.”<sup>37</sup> Yet, he gives no indication of the parameters necessary for the CIJs to assess the likely impact of further pleadings, such as the length of the proposed submissions, or the dates upon which he anticipates filing them in English and Khmer, and disregards the time needed for a prosecution response. Moreover, despite labelling it as “urgent”,<sup>38</sup> Meas Muth provides no explanation for filing this straightforward Request almost six weeks after publication of the PTC Considerations, particularly in view of the late stage of the Case 003 investigation.

<sup>33</sup> **D256/8** Meas Muth’s Request for Extension of Deadline to Respond to International Co-Prosecutor’s Rule 66 Final Submission, 16 November 2017, para. 15, *citing* **D261** Closing Order (Reasons), paras 244-280, 321-322.

<sup>34</sup> **D256/8** Meas Muth’s Request for Extension of Deadline to Respond to International Co-Prosecutor’s Rule 66 Final Submission, 16 November 2017, para. 14.

<sup>35</sup> *See e.g.* **D256/11** Final Submission Response, paras 479-505, 550. [REDACTED]

<sup>36</sup> **D256/12** Request, paras 12, 21b.

<sup>37</sup> **D256/12** Request, p. 1.

<sup>38</sup> **D256/12** Request, p. 1.

15. Meas Muth avers that the “Co-Prosecutors would not be prejudiced” without making any allowance for them to respond to his submissions. The ICP submits that, if the CIJs grant Meas Muth’s Request, it is in the interest of equality of arms that he should be given the opportunity to respond in full, and should be granted a reasonable period of time to do so.
16. Therefore, despite Meas Muth’s claims, the filing of additional submissions does create a risk of delay in the issuance of the Closing Order, impacting upon the expediture of this Court’s time and resources, and further postponing the justice for which victims have been waiting for over four decades.

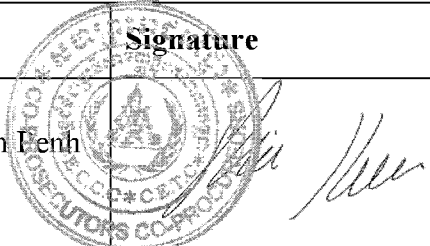
*Public Classification of this Response*

17. Pursuant to Article 3.12 of the ECCC’s Practice Direction on the Filing of Documents,<sup>39</sup> and Articles 4a and 9.2 of the Practice Direction on Classification and Management of Case-Related Information,<sup>40</sup> the ICP hereby submits that this response, redacted as necessary, should be classified as public in the same manner as the Request. This request is made in recognition of the principle of equality of arms, and in the interests of presenting the public with a balanced understanding of the parties’ respective positions on the issues raised in Meas Muth’s Request.

**IV. RELIEF REQUESTED**

18. For the foregoing reasons, the Co-Prosecutor requests that the Co-Investigating Judges:
- a. **DISMISS** the Request; and
  - b. Classify this Response as Public, subject to necessary redaction.

Respectfully submitted,

Date	Name	Place	Signature
20 August 2018	Nicholas KOUMJIAN Co-Prosecutor	Phnom Penh	

<sup>39</sup> Practice Direction on Filing of Documents before the ECCC, *Practice Direction ECCC/01/2007/Rev.8*.

<sup>40</sup> Practice Direction on Classification and Management of Case-Related Information, *Practice Direction ECCC/004/2009/Rev.2*.