



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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
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Case File/Dossier N°. 004/23-09-2021-ECCC/SC(06)

Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
Judge Maureen Harding CLARK
Judge YA Narin

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DECISION ON INTERNATIONAL CO-PROSECUTOR’S APPEAL OF THE PRE-TRIAL CHAMBER’S FAILURE TO SEND CASE 004 TO TRIAL AS REQUIRED BY THE ECCC LEGAL FRAMEWORK

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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively) is seised of the “International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework” (“Appeal”).¹

A. PROCEDURAL HISTORY

2. On 20 November 2008, the International Co-Prosecutor filed a disagreement before the Pre-Trial Chamber, stating that the National Co-Prosecutor disagreed on prosecuting new crimes identified in additional submissions.² On the same day, the International Co-Prosecutor filed the Third Introductory Submission in Case 004, requesting the opening of judicial investigation into allegations of crimes against humanity and violations of the 1956 Penal Code.³

3. On 18 August 2009, the Pre-Trial Chamber issued its considerations declaring that it had not assembled an affirmative vote of at least four judges on a decision on the disagreement brought before it and that the action of the International Co-Prosecutor should be executed.⁴

4. On 7 September 2009, the acting International Co-Prosecutor filed the Third Introductory Submission and forwarded the Case File to the Co-Investigating Judges.⁵ Between 18 July 2011 and 20 November 2025, the International Co-Prosecutor subsequently filed four Supplementary Submissions to broaden the scope of the investigation.⁶

¹ International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, Doc. No. 2, 20 October 2021 (“International Co-Prosecutor’s Application”).

² International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1.

³ Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1.

⁴ Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3.

⁵ Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁶ Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65; Co-Prosecutors’ Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191; Response to Forwarding Order and Supplementary Submission

5. Confidential disagreements between the Co-Investigating Judges in this case were registered on 22 February 2013, 5 April 2013, 21 October 2015, and 16 January 2017.⁷

6. On 9 December 2015, the International Co-Investigating Judge charged YIM Tith with violations of Articles 501 and 506 (premeditated homicide) of the 1956 Penal Code, genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949.⁸ By judicial order on 29 March 2017, the International Co-Investigating Judge, revised the charges against YIM Tith and added modes of liability in relation to the previously charged crimes.⁹

7. On 13 June 2017, the Co-Investigating Judges notified the parties of the conclusion of the judicial investigation against YIM Tith pursuant to Rule 66(1).¹⁰ On the same day, the International Co-Investigating Judge reduced the scope of the investigation by excluding certain alleged facts pursuant to Rule 66*bis*.¹¹ On 5 September 2017, the Co-Investigating Judges issued a Second Notice of Conclusion of the Judicial Investigation against YIM Tith.¹²

8. On 18 September 2017, the Co-Investigating Judges informed the Parties to Case 004/2 that they considered separate and opposing closing orders were permitted under the applicable law.¹³ This decision was conveyed to the Parties in Case 004.¹⁴

9. On 1 March 2018, the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors, inviting them to file their final submissions pursuant to Rule 66(4).¹⁵ On 31 May 2018, the National Co-Prosecutor filed a final submission requesting that all allegations

regarding Wat Ta Meak, 4 August 2015, D254/1; Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1.

⁷ See Closing Order, 28 June 2019, D382 (“Indictment (D382)”), paras 3, 7, 21; Order Dismissing the Case against YIM Tith, 28 June 2019, D381 (“Dismissal (D381)”), para. 13.

⁸ Written Record of Initial Appearance of YIM Tith, 9 December 2015, D281.

⁹ Order Amending the Charges against YIM Tith, 29 March 2017, D350; Notification of Amended Charges against YIM Tith, Annex 1 to Order Amending the Charges, 29 March 2017, D350.1.

¹⁰ Notice of Conclusion of Judicial Investigation against YIM Tith, 13 June 2017, D358.

¹¹ Decision to Reduce the Scope of the Judicial Investigation pursuant to Internal Rule 66 *bis*, 13 June 2017, D359. See also Notice of Provisional Discontinuance regarding Individual Allegations, 25 August 2016, D302/3; Notice of Intention to Add Modes of Liability by Way of Judicial Order and of Provisional Discontinuance, 20 January 2017, D342; Notice of Provisional Discontinuance regarding Facts Relating to Six Crime Sites, 17 March 2017, D349; Notification pursuant to Internal Rule 66*bis* (2), 4 May 2017, D354.

¹² Second Notice of Conclusion of Judicial Investigation against YIM Tith, 5 September 2017, D368.

¹³ Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D355/1, paras 13-16.

¹⁴ See Indictment (D382), para. 13.

¹⁵ Forwarding Order Pursuant to Internal Rule 66(4), 1 March 2018, D378.

against YIM Tith be dismissed since he did not fall within the ECCC jurisdiction.¹⁶ On 4 June 2018, the International Co-Prosecutor filed a final submission requesting YIM Tith to be indicted and tried.¹⁷

10. The Co-Investigating Judges registered a disagreement regarding the issuance of separate and opposing closing orders on 21 January 2019.¹⁸ On 28 June 2019, the National Co-Investigating Judge issued the Dismissal Order, dismissing all charges against YIM Tith,¹⁹ while the International Co-Investigating Judge issued the Indictment, sending YIM Tith for trial.²⁰

11. Following YIM Tith's appeals to the Pre-Trial Chamber, as well as the International Co-Prosecutor's and the Co-Lawyers for Civil Parties' appeals against the Dismissal Order and the National Co-Prosecutor's appeal against the Indictment, the Pre-Trial Chamber issued its *Considerations* on the respective appeals on 17 September 2021, stating that it lacked the required majority to decide on the merits of the appeals on Closing Orders.²¹ The *Considerations* were officially notified on 20 September 2021, and on 23 September 2021, the International Co-Prosecutor submitted a request for an extension of time to file submissions to the Supreme Court Chamber.²² On the same day, YIM Tith responded to the request, disagreeing with the International Co-Prosecutor's claim that the *Considerations* is subject to appeal before the Supreme Court Chamber.²³ On 4 October 2021, the Supreme Court Chamber issued its Decision on the request, holding that it is unable to examine the International Co-Prosecutor's request until the nature of her application is clarified and permitting her to file her submission.²⁴

12. On 18 October 2021, YIM Tith filed a request to the Co-Investigating Judges,

¹⁶ Final Submission concerning YIM Tith pursuant to Internal Rule 66, 31 May 2018, D378/1.

¹⁷ International Co-Prosecutor's Rule 66 Final Submission against YIM Tith, 4 June 2018, D378/2.

¹⁸ See Indictment (D382), para. 21; Dismissal (D381), para. 13.

¹⁹ Dismissal (D381).

²⁰ Indictment (D382) (In addition to the Indictment, the International Co-Investigating Judge formally terminated the judicial investigation into the facts excluded in the Rule 66*bis* Decision and issued a Partial Dismissal Order, dismissing certain charges against YIM Tith).

²¹ Considerations on Appeals against Closing Orders, 17 September 2021, D381/45 & D382/43, para. 116.

²² Email from the International Co-Prosecutor, 'ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

²³ Email from the Defence, 'RE: ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

²⁴ Decision on International Co-Prosecutor's Request for Extension of Time to File her Submission concerning the Pre-Trial Chamber's Closing Order Considerations in Case 004, 4 October 2021, Doc. No. 2/2.

requesting to immediately terminate, seal and archive Case 004.²⁵ On 22 November 2021, the Co-Investigating Judges notified the parties in Cases 003 and 004, *via* email, that they will not decide on whether to terminate, seal and archive the case files until the Supreme Court Chamber has issued its decision in the proceedings.²⁶

B. SUBMISSIONS

13. The International Co-Prosecutor contends that the appeal is admissible under Article 12(2) of the ECCC Agreement, Articles 33 new and 37 new of the ECCC Law, and Rule 21(1), and that the Supreme Court Chamber should exercise its inherent jurisdiction to safeguard the interests of justice and maintain the integrity of the proceedings.²⁷ Asserting that the failure by the Pre-Trial Chamber, the Trial Chamber, and the Co-Investigating Judges' to exercise their jurisdiction over the case perpetuates the procedural impasse and risks irreparable harm to the administration of justice in Case 004.²⁸ Without the Supreme Court Chamber's intervention, the proceedings will remain in limbo, which would be a denial of justice in violation of the ECCC mandate and fundamental principles.²⁹

14. According to YIM Tith's Defence, the appeal is inadmissible since the Co-Investigating Judges have exclusive jurisdiction over Case 004, and it seeks to relitigate issues from Case 004/2 and no cogent reasons or change of circumstances are provided for the Chamber to depart from its views.³⁰

15. The International Co-Prosecutor replies that the Co-Investigating Judges do not have exclusive jurisdiction of the Case, and that there are cogent reasons for the Supreme Court Chamber to depart from its Case 004/2 decision.³¹

16. In sum, the International Co-Prosecutor submits that the Supreme Court Chamber should order the case to proceed to trial because: (1) the opposing closing orders were not

²⁵ YIM Tith's Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004, 18 October 2021, D386.

²⁶ Email from the Co-Investigating Judges, 'Notification to the parties in case 003 and 004', 22 November 2021.

²⁷ International Co-Prosecutor's Appeal, paras 31-35.

²⁸ International Co-Prosecutor's Appeal, paras 32-34.

²⁹ International Co-Prosecutor's Appeal, para. 34.

³⁰ YIM Tith's Response to the International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, dated 1 November 2021, 2/1 ("YIM Tith's Response"), paras 20-31.

³¹ International Co-Prosecutor's Reply to YIM Tith's Response to her Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, dated 8 November 2021, 2/1/1 ("International Co-Prosecutor's Reply"), paras 1-11.

issued illegally; (2) the opposing closing orders are not null and void even if their simultaneous issuance was illegal; (3) the Indictment was not overturned by a supermajority; and (4) Case File 004 is not illegal.³²

C. APPLICABLE LAW

17. According to Article 9 new of the ECCC Law, the Supreme Court Chamber, serves as both appellate chamber and a final instance.

18. In accordance with the standard of appellate review against decisions set out in Rules 104 and 105 the Supreme Court Chamber shall decide an appeals against a judgment or decision of the Trial Chamber on the following grounds: a) an error on question of law invalidating the judgment or decision; b) an error of fact which has occasioned miscarriage of justice or discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

D. DISCUSSION

Admissibility of appeals under Internal Rules 104 and 105

19. In support of its application, the International Co-Prosecutor relies on Article 12(2) of the ECCC Agreement, Articles 33 new and 37 new of the ECCC Law, and Rule 21(1), which do not involve filing appeals before this Chamber. The Chamber has previously determined that "a distinct procedural mechanism exists in the Internal Rules that instructs the Parties on how to file appeals before this Chamber [...] the Internal Rules confine the Supreme Court Chamber's appellate competence to appeals against the Trial Chamber's decisions or judgments in conformity with Rules 104 and 105"³³.

20. The present application does not constitute an appeal against the Trial Chamber's decision or judgment pursuant to Rules 104 and 105 but is rather an appeal against "the Pre-Trial Chamber's failure to send Case 004 to Trial as required by the ECCC Legal framework".³⁴ Accordingly, the Chamber finds the International Co-Prosecutor's 'appeal' is

³² International Co-Prosecutor's Appeal, paras 36-71.

³³ Decision on the International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 17 December 2021, Doc. No. 3/1/1/1, ("Case 003 Decision"), para. 27.

³⁴ International Co-Prosecutor's Appeal, Doc. No. 2.

inadmissible. The Chamber will herewith refer to it as an application for the purposes of these deliberations.

Admissibility in the interests of justice

21. Whilst the Supreme Court Chamber has determined that the International Co-Prosecutor's application does not constitute an appeal under Rules 104 and 105, the Chamber is requested to exercise its inherent jurisdiction to safeguard the interests of justice and maintain the integrity of the proceedings.³⁵ Until the Supreme Court Chamber's intervenes, the proceedings will continue in limbo which would be a denial of justice, and in violation of the ECCC mandate and fundamental principles.³⁶

22. The Chamber recalls that on occasions, it has been seised of requests for legal clarifications and certainty by a Party.³⁷ Requests for clarification or legal guidance may emanate from another judicial body or from a party to proceedings.³⁸

23. In this regard, the Chamber agrees with the International Co-Prosecutor that the only way to resolve the uncertainty in this Case and prevent "a potential for endless litigation" is for the Supreme Court Chamber to act.³⁹ In its Case 004/2 Decision, this Chamber recalled the maxim "*ubi jus, ibi remedium* – where there is a right, there is a remedy; where law has established a right, there should be a corresponding remedy for its breach"⁴⁰, that "the unique circumstances of Case 004/2 demand that the International Co-Prosecutor, AO An, the Civil Parties and the public have a right to expect and receive legal certainty and clarity [...]. Maintaining a judicial limbo fundamentally breaches those legitimate expectations. It is for the courts of final instance to provide clarity".⁴¹

³⁵ International Co-Prosecutor's Appeal, paras 31-35.

³⁶ International Co-Prosecutor's Appeal, para. 34.

³⁷ Decision on Co-Prosecutors' Request for Clarification, 26 June 2013, E284/2/1/2; Case 004/2 Decision (E004/2/1/1/2); Decision on the Civil Party lawyers' request for necessary measures to be taken by the Supreme Court Chamber to safeguard the Civil Parties fundamental right to legal representation before the Chamber in Case 004/2, 11 August 2020, E004/2/6.

³⁸ Decision on Requests by the Trial Chamber and the Defence for IENG Thirith for Guidance and Clarification, 31 May 2013, E138/1/10/1/5/8/2, para. 12.

³⁹ International Co-Prosecutor's Reply, para. 15.

⁴⁰ Decision on 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 ("Case 004/2 Decision (E004/2/1/1/2)"), para. 59.

⁴¹ Case 004/2 Decision (E004/2/1/1/2), para. 60.

24. In the interests of justice therefore, the Chamber will exercise its discretion and offer legal clarity and certainty on a single issue, the status of Case 004, in accordance with its precedent in Cases 004/2 and 003, and as a chamber of last instance.⁴²

Preliminary Remarks

25. The Chamber recalls that analogous considerations were issued by the Pre-Trial Chamber in a litany of cases including Cases 004/2, 003 and 004. Due to the same deadlock that befell these cases, the International Co-Prosecutor has repeatedly sought legal clarification and certainty following the issuance of the various considerations, proffering similar grounds in support. Here, the International Co-Prosecutor's asserts that the Supreme Court Chamber should order the Case 004 to proceed to trial contending that (1) the opposing Closing Orders were not issued illegally; (2) the opposing Closing Orders are not null and void even if their simultaneous issuance was illegal; (3) the Indictment was not overturned by a supermajority.⁴³

26. The Chamber iterates that legal clarity and certainty have been plainly provided in its Decisions in Cases 004/2 and 003, in terms of the legitimacy of the opposing Closing Orders, whether they are null and void and whether the indictment was not overturned by a supermajority. The Chamber will not relitigate these issues except to reinforce its prior findings.

27. In Case 004/2 Decision, the Supreme Court Chamber noted that “notwithstanding the unanimous declaration that the actions of the Co-Investigating Judges in producing two separate and conflicting Closing Orders was a nullity, the Judges of the Pre-Trial Chamber provided their Considerations on the validity of the separate and conflicting closing orders. This was undoubtedly a redundant exercise. It became irrelevant that the Pre-Trial Chamber did not attain the supermajority required in the adjudication of the parties' appeals against the conflicting closing orders as this part of the Considerations was now superfluous”.⁴⁴ This Chamber determined that the Pre-Trial Chamber having affirmed its investigatory powers, “should have gone beyond declaring the illegality of the situation relating to the issuance of the two conflicting Closing Orders and to issue its own valid closing orders. However, it elected not to take that route [...] it should have gone a step further and provided an actual

⁴² Article 9 of the ECCC Law.

⁴³ International Co-Prosecutor's Appeal, paras 36-71.

⁴⁴ Case 004/2 Decision (E004/2/1/1/2), para. 53.

final ruling”.⁴⁵ Having assessed the impact of the issuance of the two conflicting closing orders, the Chamber addressed the issue of Case 004/2 proceeding to trial in the absence of a valid closing order, indictment. “The answer is an unequivocal no”.⁴⁶

28. Turning to Case 003, the Chamber took cognizance of the publicly filed Considerations and declared them complete.⁴⁷ The Chamber determined that “the unambiguous consequence of the Pre-Trial Chamber’s unanimous declaration that its *Considerations* in Case 003 are not subject to appeal pursuant to Rule 77(13) undoubtedly concluded the case. This unanimous declaration by all five Pre-Trial Chamber judges solidified their decision that the International Co-Prosecutor’s appeal on the Closing Orders in Case 003 was unsuccessful, thereby closing the appeals and putting an end to the case”.⁴⁸

29. Equally, the Pre-Trial Chamber’s Considerations in Case 004 were made public on 17 September 2021.⁴⁹ The Pre-Trial Chamber, unanimously “declare[d] that the Co-Investigating Judges’ issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC [...]” adding that “[i]n accordance with Internal Rule 77(13), the present Decision is not subject to appeal.”⁵⁰ Following that, the Pre-Trial Chamber Judges appended their signatures. Similarly, the Chamber finds the Pre-Trial Chamber’s Consideration of Case 004 to be complete. Similar arguments offered in support of forwarding Case 004 to trial must be dismissed because the international Co-Prosecutor fails to articulate reasons that would allow the Chamber to change its previous rulings, in Cases 004/2 and 003 under equivalent circumstances.

Status of Case 004

30. This Chamber has previously held that “it is a general rule of law that it is undesirable for legal issues to remain unresolved”.⁵¹ The Chamber deems that it is the responsibility of courts and specifically, judges to adjudicate matters before them until they are concluded. Making decisions is inextricably linked to the delivery of justice in the courts. The Chamber notes that this is not a discussion on whether or not a decision is good or bad but rather that a final actionable decision is made since the justice scale requires it. It is the Chamber’s view

⁴⁵ Case 004/2 Decision (E004/2/1/1/2), para. 61.

⁴⁶ Case 004/2 Decision (E004/2/1/1/2), para. 68.

⁴⁷ Case 003 Decision, para. 34.

⁴⁸ Case 003 Decision, para. 35.

⁴⁹ Considerations on Appeals against Closing Orders, 17 September 2021, D381/45 & D382/43.

⁵⁰ Considerations on Appeals against Closing Orders, 17 September 2021, D381/45 & D382/43, Disposition.

⁵¹ Case 004/2 Decision (E004/2/1/1/2), para. 64.

that judicial purgatory is not an option in any legal system. It is unappetizing for legal practitioners, and carries dispiriting implications for the parties, suspects and victims. Justice must be delivered swiftly and conclusively.

31. Thus, in deciding the status of Case 004, the Chamber observes that the case cannot continue to languish. Notably, while the International Co-Prosecutor proposes that Case 004 be sent to trial, the Co-Investigating Judges and the Pre-Trial Chamber did not issue an indictment in compliance with Rule 79(1). The Chamber recalls that Cases 004/2 and 003 were terminated “in the absence of a definitive and enforceable indictment”.⁵² In Case 004, the same issue exists, with no definitive and enforceable indictment to move the case further. Consequently, the International Co-Prosecutor’s request to proceed to trial in Case 004 is denied.

⁵² Case 004/2 Decision (E004/2/1/1/2), paras. 69-71, Case 003 Decision, para. 44.

E. DISPOSITION

32. For the foregoing reasons, the Supreme Court Chamber:

CLARIFIES that in the absence of a definitive and enforceable indictment, Case 004 is terminated.


DISMISSES the International Co-Prosecutor's Application.

Judge Maureen HARDING CLARK appends a Dissenting Opinion.

Phnom Penh, 28 December 2021




Judge KONG Srim
President


Judge Chandra Nihal JAYASINGHE


Judge SOM Sereyvuth


Judge Florence Ndepele MWACHANDE-MUMBA


Judge MONG Monichariya


Judge YA Narin

I. PROCEDURAL HISTORY

1. This Case bears striking similarities to Case 003 against MEAS Muth⁵³ and to the earlier Case 004/2 against AO An.⁵⁴ As in Case 003, this Application relates to the consequence of a bizarre decision of the Pre-Trial Chamber where the Judges of that Chamber divided on the validity of two conflicting Closing Orders made by the Co-Investigating Judges. All three Cases have the same history. They originated in conflicting approaches to further investigations between the International Co-Prosecutor and his National Co-Prosecutor. The International Co-Prosecutor wished to issue the Third Introductory Submission against a second group of second rank provincial Communist Party leaders of Democratic Kampuchea (“DK”) while such further investigations were and remain vehemently opposed by the National Co-Prosecutor on policy grounds.

2. On 20 November 2008, the International Co-Prosecutor brought this disagreement before the Pre-Trial Chamber pursuant to Internal Rule 71(2).⁵⁵ On the same day, the International Co-Prosecutor issued the Third Introductory Submission, seeking to open a judicial investigation against YIM Tith as part of Case 004, involving allegations of crimes against humanity and violations of the 1956 Penal Code.⁵⁶

3. The details of this disagreement are described fully in the decision of the Supreme Court Chamber on the International Co-Prosecutor’s Application in Case 003 dated 17 December 2021.⁵⁷ Very briefly, on 18 August 2009, the Pre-Trial Chamber who were unable to reach a supermajority of votes on the decision concerning the Disagreement, directed the International Co-Prosecutor to forward the New Introductory Submissions to the Co-Investigating Judges pursuant to Internal Rule 53(1).⁵⁸ As outlined in my Dissenting Opinion in Case 003, this decision of the Pre-Trial Chamber dictated the trajectory of the

⁵³ See Case 003/08-10-2021-ECCC/SC (05), Decision on International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 17 December 2021, 3/1/1/1 (“SCC Case 003 Decision (3/1/1/1)”).

⁵⁴ See Case 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, E004/2/1/1/2, 10 August 2020 (“SCC Case 004/2 Decision (E004/2/1/1/2)”).

⁵⁵ Disagreement 001/18-11-2008-ECCC/PTC, International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1 (forwarded by the Office of Administration to the Pre-Trial Chamber on 3 December 2008).

⁵⁶ Case 004/20-11-2008/ECCC/OIJ, Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1 (“Third Introductory Submission (D1)”).

⁵⁷ SCC Case 003 Decision (3/1/1/1), paras 10-23.

⁵⁸ Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3 (“Considerations regarding the Co-Prosecutors’ Disagreement (D1/1.3)”), para. 45.

continuing disagreements between the National and International Judges of the Office of the Co-Investigating Judges, the Pre-Trial Chamber and the Trial Chamber that exist to this day. Case 004 and its fellow travellers, Cases 003 and 004/2 progressed by the default mechanism until they reached an impasse in the Pre-Trial Chamber. This brought the case before the Supreme Court Chamber. The further operation of the default mechanism permitting the case to proceed to trial was frustrated by the obfuscation of the decision. This is the third occasion when incomprehensible opinions of the Pre-Trial Chamber have caused the International Co-Prosecutor to seek the intervention of this Supreme Court Chamber to rescue yet another case suspended in a legally nebulous situation or a legal limbo. She seeks our intervention to send Case 004 to trial in accordance with the default mechanism and in any event to provide legal certainty.

4. To return to the contextual background: on 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, requesting the Co-Investigating Judges to initiate the judicial investigation against YIM Tith as part of Case 004.⁵⁹

5. That Third Introductory Submission described that the International Co-Prosecutor had reason to believe that YIM Tith (referred to as Ta Tith) “*in his capacity as Acting Secretary of the Northwest Zone and Secretary of Section 1 is responsible for the crimes occurring in the Southwest Zone as described in paragraphs 80 and 81.*” Those crimes included “*purging of the entire Northwest Zone cadres during mid-1977 and mid-1978 by Southwest cadres led by Ta Tith and IM Chaem.*” It was estimated that 400,000 deaths occurred in the central Zone and 360,000 deaths occurred in the Northwest Zone.

6. The International Co-Prosecutor subsequently filed four Supplementary Submissions to broaden the scope of the investigation pursuant to Internal Rule 55(3), adding new crimes sites in Sector 1 of the Northwest Zone and crimes committed against the Khmer Krom in the Southwest and Northwest Zones,⁶⁰ presenting evidence of forced marriage and sexual or gender-based violence in districts under the control or authority of YIM Tith, IM Chaem and

⁵⁹ Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁶⁰ Case 004, Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65.

AO An,⁶¹ supplementing evidence of crimes that may have been committed at the Wat Ta Meak site during the time that AO An served as Secretary of Sector 41 of the Central Zone,⁶² and clarifying which locations the Co-Investigating Judges should investigate forced marriages that may have been committed under the authority of YIM Tith.⁶³

7. As in Case 003 against MEAS Muth and Case 004/2 against AO An, the present Case 004 against YIM Tith was subject to a series of confidential disagreements between the Co-Investigating Judges (registered on 22 February 2013, 5 April 2013, 21 October 2015 and 16 January 2017).⁶⁴ None of these disagreements were brought before the Pre-Trial Chamber and remain confidential.

8. On 9 December 2015, the International Co-Investigating Judge charged YIM Tith with violations of Articles 501 and 506 (premeditated homicide) of the 1956 Penal Code, genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949.⁶⁵ Neither YIM Tith nor his Co-Lawyers elected to make a statement during the Initial Appearance.⁶⁶

9. Without repeating the long procedural history, let us fast forward to the relevant decisions and disagreements between the National Co-Investigating Judge YOU Bunleng and Judge BOHLANDER, the fourth International Judge to serve in the Office of the Co-Investigating Judges. Suffice to say that all disagreements between them remained confidential and were never referred to the Pre-Trial Chamber.

10. Over the course of the judicial investigations, several allegations were dismissed⁶⁷ and charges and modes of liability were amended by Judge BOHLANDER.⁶⁸

⁶¹ Case 004, Co-Prosecutors' Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.

⁶² Case 004, Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak, 4 August 2015, D254/1.

⁶³ Case 004, Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1.

⁶⁴ See Case 004, Closing Order, D382, 28 June 2019 ("Indictment (D382)"), paras 3, 7, 21; Case 004, Order Dismissing the Case against YIM Tith, D381, 28 June 2019 ("Dismissal Order (D381)"), para. 13.

⁶⁵ Case 004, Written Record of Initial Appearance of YIM Tith, 9 December 2015, D281 ("Written Record of Initial Appearance of YIM Tith (D281)").

⁶⁶ Written Record of Initial Appearance of YIM Tith (D281).

⁶⁷ Case 004, Notice of Intention to Add Modes of Liability by Way of Judicial Order and of Provisional Discontinuance, 20 January 2017, D342 ("Case 004 Notice of Intention and Provisional Discontinuance (D342)"); Case 004, Notice of Provisional Discontinuance regarding Facts Relating to Six Crime Sites, 17 March 2017, D349 ("Case 004 Notice of Provisional Discontinuance (Six Crime Sites) (D349)"); Case 004, Notification pursuant to Internal Rule 66*bis* (2), 4 May 2017, D354 ("Case 004 Internal Rule 66*bis* (2) (D354)").

11. Ultimately on 13 June 2017, the Co-Investigating Judges notified the Parties of the conclusion of the judicial investigation against YIM Tith pursuant to Internal Rule 66(1).⁶⁹ On the same day, Judge BOHLANDER further reduced the scope of the investigation by excluding certain alleged facts pursuant to Internal Rule 66*bis*.⁷⁰
12. On 5 September 2017, the Co-Investigating Judges issued a Second Notice of Conclusion of the Judicial Investigation against YIM Tith.⁷¹
13. On 18 September 2017, the Co-Investigating Judges informed the parties to Case 004/2 that they considered separate and opposing closing orders to be generally permitted under the applicable law.⁷² The parties to Case 004 were notified of this decision, which was later re-classified as public.⁷³
14. On 1 March 2018, the Co-Investigating Judges forwarded the Case File 004 to the Co-Prosecutors pursuant to Internal Rule 66(4), inviting them to file their final submissions within three months.⁷⁴
15. On 31 May 2018, the National Co-Prosecutor filed a final submission, requesting dismissal of all allegations against YIM Tith;⁷⁵ the International Co-Prosecutor in his Final Submissions of 4 June 2018 requested YIM Tith to be indicted and committed to trial.⁷⁶ On 26 November 2018, the Defence Co-Lawyers for YIM Tith filed a Response to the Co-Prosecutors' Final Submissions requesting a dismissal of the case against YIM Tith.⁷⁷
16. The Co-Investigating Judges registered a disagreement regarding the issuance of

⁶⁸ Case 004, Order Amending the Charges against YIM Tith, 29 March 2017, D350 ("Order Amending the Charges (D350)"); Case 004, Notification of Amended Charges against YIM Tith, Annex 1 to Order Amending the Charges, 29 March 2017, D350.1. *See also* Case 004 Notice of Intention and Provisional Discontinuance (D342).

⁶⁹ Case 004, Notice of Conclusion of Judicial Investigation against YIM Tith, 13 June 2017, D358.

⁷⁰ Case 004, Decision to Reduce the Scope of the Judicial Investigation pursuant to Internal Rule 66 *bis*, 13 June 2017, D359. *See also* Case 004, Notice of Provisional Discontinuance regarding Individual Allegations, 25 August 2016, D302/3; Case 004 Notice of Intention and Provisional Discontinuance (D342); Case 004 Notice of Provisional Discontinuance (Six Crime Sites) (D349); Case 004 Internal Rule 66*bis* (2) (D354).

⁷¹ Case 004, Second Notice of Conclusion of Judicial Investigation against YIM Tith, 5 September 2017, D368 ("Second Notice of Conclusion of Investigation (D368)").

⁷² Case 004/2/07-09-2009-ECCC/OCIJ ("Case 004/2"), Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D355/1 ("Decision on Disclosure Concerning Disagreements (D355/1)", paras 13-16).

⁷³ *See* Indictment (D382), para. 13.

⁷⁴ Case 004, Forwarding Order pursuant to Internal Rule 66(4), 1 March 2018, D378.

⁷⁵ Case 004, Final Submission concerning YIM Tith pursuant to Internal Rule 66, 31 May 2018, D378/1.

⁷⁶ Case 004, International Co-Prosecutor's Rule 66 Final Submission against YIM Tith, 4 June 2018, D378/2.

⁷⁷ Case 004, YIM Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions, 26 November 2018, D378/5.

separate and opposing Closing Orders on 21 January 2019.⁷⁸ This disagreement was not brought before the Pre-Trial Chamber. This identical course of action occurred in the cases involving AO An and MEAS Muth.

17. Of importance to this dissenting opinion is that on 28 June 2019, the Co-Investigating Judges issued two conflicting Closing Orders. The National Co-Investigating Judge issued the Dismissal Order dismissing the Case against YIM Tith and all charges against him on the ground that he is not subject to the ECCC's personal jurisdiction as a "senior leader" or among those "most responsible".⁷⁹ Judge YOU Bunleng explained that:

YIM Tith may have held similar positions to those of AO An and MEAS Muth and positions senior to Duch's positions, but some cadres who held high-ranking positions did not have much power. [...] YIM Tith [...] did not have specific subordinates, which was different from Duch, who was managing the Central Security Office (S-21), having a clear leadership structure under his supervision which enabled him to participate actively in criminal acts causing over 12,000 deaths as a result of his direct or indirect acts through his effective leadership, organisation and management of the security office almost throughout the DK Period.

In conclusion, his participation in the above-mentioned sites was only his knowledge of those sites; it was not active participation; he made no initiative, and the level of his participation was the same as that of any other sector or zone cadres. Participation in the implementation in the Party's policies had to be respected and followed. YIM Tith did not have specific subordinates who participated in the implementation effectively and broadly. In particular, he held a position in the Northwest zone for only a short period of time. Such participation does not fall within the criterion for "most responsible person", which mainly focuses on actual and direct participation regardless of positions.

I have found no evidence showing that YIM Tith was a senior leader or one of the most responsible persons in the DK period. Therefore, the ECCC does not have personal jurisdiction over him.⁸⁰

18. The International Co-Investigating Judge, in contrast, found YIM Tith to fall within the ECCC's personal jurisdiction as one of the most responsible person for Khmer Rouge-era crimes and issued a Closing Order indicting him for the genocide of the Khmer Krom, crimes against humanity, war crimes and domestic offences under the 1956 Cambodian Penal Code.⁸¹ In addition the International Co-Investigating Judge found that certain charges could

⁷⁸ See Indictment (D382), para. 21; Dismissal Order (D381), para. 13.

⁷⁹ Dismissal Order (D381).

⁸⁰ Dismissal Order (D381), paras 682-684.

⁸¹ Indictment (D382), paras 455-463.

not be substantiated and were accordingly dismissed.⁸² Judge BOHLANDER explained that:

As far as his official rank is concerned, he rose very quickly from the position of a deputy district secretary in the Southwest Zone to that of a deputy zone secretary and, towards the end of DK, possibly even full zone secretary in the Northwest Zone. He was moreover sector secretary for a number of sectors in the Northwest Zone. His authority under CPK law thus stretched very far, both geographically and hierarchically.

His official position - and his meteoric rise - were supported by his close family ties to a cadre at the apex of the CPK hierarchy, Ta Mok, whose brother-in-law he was. Even before his formal installation in the Northwest Zone, he could be seen travelling all over the Zone with Ta Mok, attending meetings etc. He was the de facto second-in-command of Ta Mok, and, as the evidence has shown, he also retained de facto authority over his previous area of activity in the Southwest Zone, even after moving to the Northwest Zone.

Even after reducing the crime sites resulting from the original list based on the Introductory Submission by nearly half under Internal Rule 66 bis, he still is being held responsible for crimes at over 20 sites.

Prominent in this respect is his participation in, and orchestration of, the genocide of the Khmer Krom in his areas of responsibility [where the] death toll, which even at a conservative estimate based on the evidence unearthed in the investigation ran well into the thousands [...] As in Cases 004/2 and 003, this fact alone places him solidly within the bracket of personal jurisdiction.

Apart from the genocidal targeting of the Khmer Krom, other civilians and former CPK cadres were victimised under and by Yim Tith in their tens of thousands, based on the CPK's misguided and delusional political vision, through serial and well-organised mass killings, as well as cruel and inhuman treatment through imprisonment and hard labour in unspeakable conditions, in security centres and at worksites. The level of disdain for human dignity shown in these facilities and the degree of inhumanity of those operating them is comparable to the horror of the concentration camps in Nazi Germany.

The same level of contempt for individual life choices and especially sexual self determination was implemented through the policy on forced marriages. Men and women were subjected by Yim Tith, and those he collaborated with, to the CPK's abhorrent social experiment of reducing the institution of marriage to a mere instrument in the propagation of the species and to increasing the Khmer population, devoid of any human emotion but fear, revulsion, anger and lingering resentment.⁸³

19. On 19 July 2019, the Pre-Trial Chamber ordered the parties to file any notices of appeal against the Closing Orders in Case 004 within fourteen days after notification of the

⁸² The International Co-Investigating Judge formally terminated the judicial investigation into the facts excluded in the Rule 66bis Decision and issued a Partial Dismissal Order, dismissing certain charges against YIM Tith.

⁸³ Indictment (D382), paras 993-998.

translation of both Closing Orders.⁸⁴

20. Between 23 August 2019 and 5 March 2020 all parties filed their appeals and replies to the conflicting closing orders. The National Co-Prosecutor's reasoning for opposing the indictment remained unchanged since 2008/2009. She reasoned that generally, the power of the CPK was centralised in the hands of the Standing Committee who led the State. Ta Mok who was a key player in the North Western and Central Zones was a member of the Standing Committee. YIM Tith was not a member nor was he Zone leader or even a member of the Central Committee. He was clearly not a person intended for prosecution in the negotiations leading to the passing of the Law or the Agreement between the UN and Royal Government of Cambodia. He was clearly not a senior leader or one of those most responsible for the crimes. The prosecution of the senior leaders in Case 002 sufficed to bring justice to the victims. She requested the Pre-Trial Chamber to dismiss the Case against YIM Tith for lack of personal jurisdiction.⁸⁵

21. The Defence Co-Lawyers for YIM Tith in their appeal against the Closing Orders submitted that the separate and conflicting Closing Orders should both be dismissed⁸⁶ and disputed the International Co-Investigating Judge's finding that YIM Tith was among the "most responsible" for DK-era crimes.⁸⁷

22. The International Co-Prosecutor's Appeal against the Dismissal Order argued that the Dismissal Order contained numerous legal and factual errors resulting in the "manifestly" erroneous finding that YIM Tith is not subject to the ECCC's personal jurisdiction. She requested the Pre-Trial Chamber to reverse the Dismissal Order and send YIM Tith for trial on the basis of the Indictment.⁸⁸

⁸⁴ Case 004, Decision on YIM Tith's Request for Extension of Deadline for Notice of Appeal of Closing Orders in Case 004, 19 July 2019, D381/3 & D382/3. *See also* Case 004, YIM Tith's Request for Extension of Deadline for Notice of Appeal of Closing Orders, 8 July 2019, D381/1 & D382/1; Case 004, Co-Prosecutors' Response to YIM Tith's Request for Extension of Deadline for Notice of Appeal of Closing Orders D381 & D382 (D381/1 & D382/1), 17 July 2019, D381/2 & D382/2.

⁸⁵ National Co-Prosecutor's Appeal (D382/4/1). *See also* Case 004, National Co-Prosecutor's Request for Filing her Appeal Brief against the International Co-Investigating Judge's Closing Order (Indictment) in Khmer First, 12 September 2019, D382/7; Case 004, International Co-Prosecutor's Response to the National Co-Prosecutor's Request to File her Appeal against the [International Co-Investigating Judge's] Indictment in Khmer First, 13 September 2019, D382/8.

⁸⁶ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21).

⁸⁷ YIM Tith's Appeal (Indictment) (D382/22).

⁸⁸ International Co-Prosecutor's Appeal (D381/19).

23. The Civil Parties filed their submissions on the Appeal against the Dismissal Order⁸⁹ submitting that the National Co-Investigating Judge erred in law and fact in concluding that YIM Tith does not fall within the ECCC's personal jurisdiction, and in the alternative, if the Pre-Trial Chamber is unable to reach a supermajority decision, that the ECCC legal framework requires that the Indictment be advanced to the Trial Chamber.⁹⁰

24. On 17 September 2021, the Pre-Trial Chamber issued its Considerations on the Appeals against the Closing Orders.⁹¹ All five Judges expressed their strong disapproval of the actions of the Co-Investigating Judges in issuing the two conflicting Closing Orders which they considered undermined the very foundations of the ECCC and were unlawful. Nevertheless they went on to determine which Closing Order was valid. The National Judges adopted the arguments of the National Co-Prosecutor and supported the validity of the Dismissal Order. They held that the Co-Investigating Judges were of equal status. They upheld the validity of the Dismissal Order and unlike in the case against MEAS Muth where they found both Closing Orders equally valid, they made no mention of the status of the Indictment. Much of their reasoning contained in a 7 page consideration is taken up with the same argument used in Case 003 and 004/2 that this was an unlawful investigation from 2008 and further that SOK An assured the National Assembly that only five persons would be charged as senior leaders.⁹² They did not consider any of the appeal grounds from the other parties and made no findings on the validity of the Closing Order confirming the Indictment.

25. The International Judges considered each ground of appeal and upheld the Indictment and rejected the validity of the Dismissal Order "on account of the impermissible manner through which it was issued".⁹³ As this Chamber has previously found, this perplexing examination of the substance of the Closing Orders was a redundant exercise following the unanimous finding that the actions of the Co-Investigating Judges was unlawful, there is little need to examine this internally inconsistent consideration further.⁹⁴

26. On 23 September 2021, the International Co-Prosecutor began the process of bringing this unusual decision before the Supreme Court Chamber. On 20 October 2021, the

⁸⁹ Civil Parties' Appeal (D381/20).

⁹⁰ Civil Parties' Appeal (D381/20).

⁹¹ Considerations on Appeals against Closing Orders, D381/45 and D382/43, 17 September 2021.

⁹² For discussion on these points *see* SCC Case 003 Decision (3/1/1/1), dissenting opinion of Judge Maureen Harding Clark, paras 93-109.

⁹³ Case 004 Considerations, paras 173, 175-176.

⁹⁴ SCC Case 004/2 Decision (004/2/1/1/2), para. 53.

International Co-Prosecutor filed this “Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as required by the ECCC Legal Framework”.⁹⁵

27. On 18 October 2021, the Defence Co-Lawyers submitted “YIM Tith’s Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case File 004”.⁹⁶

28. On 1 November 2021, the Co-Lawyers for YIM Tith filed their Response to the Application.⁹⁷ On 8 November 2021, the International Co-Prosecutor filed her Reply to the Co-Lawyers’ Response.⁹⁸

29. On 22 November 2021, the Co-Investigating Judges, *via* email, notified the Parties in Cases 003 and 004 that:

The Co-Investigating Judges (CIJs), in accordance with their stated views on the subsidiary nature of any jurisdiction they may have, wish to notify the parties to cases 003 and 004 that they will not proceed to a decision as to whether to terminate, seal and archive the case files until the Supreme Court Chamber (SCC) has decided in the proceedings currently pending before it.

Furthermore, should the SCC not decide on the merits and the case return to the CIJs, the recent statement by the International Co-Prosecutor (ICP) in case 004 that she considers them to be biased would seem to imply that she intends to file a recusal motion under Internal Rule 34 before the Pre-Trial Chamber in that scenario. The same would by definition apply *mutatis mutandis* to case 003.⁹⁹

II. PRELIMINARY REMARKS

30. It is a legal principle that like cases should be treated alike. The facts in this case may differ in detail to the Cases 003 and 004/2 but the procedural history and the legal principles remain the same. All three cases suffer from unsustainable and incomprehensible Pre-Trial Chamber decisions which failed to resolve the disagreement between the Co-Investigative Judges and failed to provide a clear pathway to trial or termination. In other words, the Pre-

⁹⁵ International Co-Prosecutor’s Application.

⁹⁶ YIM Tith’s Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case File 004, D386, 18 October 2021.

⁹⁷ YIM Tith’s Response to International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, Doc. No. 2/1, 1 November 2021 (“YIM Tith’s Response”).

⁹⁸ International Co-Prosecutor’s Reply to YIM Tith’s Response to International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, Doc. No. 2/1/1, 8 November 2021.

⁹⁹ Co-Investigating Judges’ Notification to the Parties in Cases 003 and 004, 22 November 2021.

Trial Chamber failed to provide a legally sound decision where either the case would be dismissed or the default position could operate. Their failure to decide has created a legal stalemate.¹⁰⁰ In ordinary circumstances, the decision would be quashed for failing to address the relevant issues which led to the deadlock; for issuing reasons that are irrational and for producing a decision incapable of concluding or progressing the Case. In such circumstances, this Court would then order a reconsideration by the Pre-Trial Chamber of the disagreement between the two Co-Investigating Judges. The other side of this irrational decision is YIM Tith who was born at the end of 1936 and who has been under investigation for at least 12 years and, as with his associated fellow traveller cases, has been subject to prosecutorial disagreement since 2009. While YIM Tith has never been deprived of his personal liberty during this extended period he is now 85 years old. That is also a consideration. The same argument applies to the large number of witnesses, civil parties (and civil party applicants) and victims who are now forty and more years down a road with no end in sight.

31. This jurisdictional disagreement on whether YIM Tith's position as a Khmer Rouge official made him one who was "most responsible" for the crimes committed and whether the Agreement between the UN and the Royal Government of Cambodia was confined to conducting trials solely in Cases 001 and 002 are the essential differences between the National and International office holders at the ECCC. The progress of all three Cases (003, 004, 004/2) ended in the Pre-Trial Chamber where on the information now available, they hit an inevitable impasse. The full analysis of the seeming irreconcilable differences between national and international office holders is outlined in my Dissenting Opinion in Case 003.¹⁰¹ The fact remains that the Pre-Trial Chamber is the forum where disputes between the Co-Prosecutors or the Co-Investigating Judges are supposed to be resolved but no decision has provided the required clarity or direction to enable Cases 003, 004 and 004/2 to proceed to trial or end in dismissal. Further, no decision provided a finding which permitted the default mechanism to operate.

III. APPLICABLE LAW

32. Articles 1 and 2^{new} of the ECCC Law and Article 1 of the ECCC Agreement state that the primary purpose of the Court *is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible* during the period from 17 April 1975 to 6

¹⁰⁰ SCC Case 003 Decision (3/1/1/1), Dissenting Opinion of Judge Maureen Clark, para 83.

¹⁰¹ SCC Case 003 Decision (3/1/1/1), Dissenting Opinion of Judge Maureen Clark.

January 1979. There are clearly two types of persons included in those Articles.

33. Article 9^{new} of the ECCC Law provides that the Supreme Court Chamber shall serve as both appellate and final instance chamber.

34. Article 12(2) of the ECCC Agreement states that:

The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. [...]

35. Internal Rule 21(1) provides that:

The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.

36. The dissenting opinion in Case 003 fully outlines the disagreement procedure.¹⁰² Suffice to say, those procedures were simply not applied and the legal clarity expected from the Pre-Trial Chamber on the basic disagreement on fundamental jurisdiction, was not forthcoming. The decision is not subject to any appeal.

IV. SUBMISSIONS

37. The International Co-Prosecutor submits that given the failure of either the Pre-Trial Chamber and the Co-Investigating Judges to forward the Case for trial and the failure of the Trial Chamber to exercise its jurisdiction over the Case, it is necessary that the Supreme Court Chamber exercises its inherent jurisdiction to avoid irremediable damage to both the fairness of the proceedings and the fundamental fair trial rights of the Parties.¹⁰³ She argues that without the Supreme Court Chamber's intervention, the proceedings will remain in limbo, which would be a denial of justice in violation of the ECCC mandate and fundamental principles.¹⁰⁴

38. In what seems to be an attempt to overcome these almost insurmountable difficulties and differences in interpretation of Articles 1 and 2 of the Law and Agreement and to rescue

¹⁰² SCC Case 003 Decision (3/1/1/1), Dissenting Opinion of Judge Maureen Clark, paras 10-23.

¹⁰³ International Co-Prosecutor's Application, paras 32-34.

¹⁰⁴ International Co-Prosecutor's Application, para. 34.

some sense out of the fundamentally defective Pre-Trial decision, the International Co-Prosecutor submits that the Supreme Court Chamber should order the Case to proceed to trial because: (1) the opposing Closing Orders were not issued illegally;¹⁰⁵ (2) the opposing Closing Orders are not null and void even if their simultaneous issuance was illegal;¹⁰⁶ (3) the Indictment was not overturned by a supermajority;¹⁰⁷ and (4) Case File 004 is not illegal.¹⁰⁸

39. First, she argues that given the equal and independent status of the Co-Investigating Judges as envisaged by the disagreement resolution mechanism this must mean that conflicting closing orders are permissible and anticipated and by inference are for the Pre-Trial Chamber to resolve.¹⁰⁹

40. Second, even if the simultaneous issuance of Closing Orders was in fact illegal, the acts constituted a procedural error that did not cause gross unfairness, material prejudice, or abuse of process, requiring the termination of the proceedings.¹¹⁰ Termination of the Case would be disproportionate to the gravity of the crimes, the high social costs of preventing the case from proceeding, the interests and rights of all the parties, and the proportionality of the remedy to the alleged harm.¹¹¹

41. Third, the International Co-Prosecutor somewhat optimistically argues that the Pre-Trial Chamber was required to forward the Case for trial since the Indictment was not overturned by a supermajority.¹¹² The “fundamental and determinative” default position that the investigation should proceed under Internal Rule 77(13)(b) - which is *lex specialis* over Internal Rule 77(13)(a) - requires the Indictment to be transferred to the Trial Chamber.¹¹³

42. Fourth, she argues that the Pre-Trial Chamber’s National Judges erred in finding that the entire Case File 004 is illegal.¹¹⁴ In particular, she asserts that even if the preliminary investigation was unilateral, it was allowed under the Internal Rules and thus there was no procedural defect.¹¹⁵ The interpretation adopted by the National Judges of the Pre-Trial

¹⁰⁵ International Co-Prosecutor’s Application, paras 36-44.

¹⁰⁶ International Co-Prosecutor’s Application, paras 45-51.

¹⁰⁷ International Co-Prosecutor’s Application, paras 52-57.

¹⁰⁸ International Co-Prosecutor’s Application, paras 58-71.

¹⁰⁹ International Co-Prosecutor’s Application, para. 36.

¹¹⁰ International Co-Prosecutor’s Application, paras 45-49.

¹¹¹ International Co-Prosecutor’s Application, paras 46, 50-51.

¹¹² International Co-Prosecutor’s Application, para. 52.

¹¹³ International Co-Prosecutor’s Application, paras 52-54.

¹¹⁴ International Co-Prosecutor’s Application, para. 58.

¹¹⁵ International Co-Prosecutor’s Application, paras 59-62.

Chamber that the preliminary investigation was in violation of the personal jurisdiction provisions in the ECCC Agreement and the ECCC Law is erroneous.¹¹⁶ In any event, any procedural defect was cured by the forwarding of the Third Introductory Submission to the Co-Investigating Judges and by the failure of the Parties or Co-Investigating Judges to seek its annulment during the judicial investigation.¹¹⁷

43. In their Response, the Co-Lawyers for YIM Tith submit that (1) the issuance of two Closing Orders is unlawful and that both are therefore null and void; (2) there is no lawful indictment in Case 004, and that the International Co-Prosecutor presents no cogent reasons to deviate from the Supreme Court Chamber's decision in Case 004/2; (3) the Co-Investigating Judges now have exclusive jurisdiction; and (4) the Supreme Court Chamber should dismiss the International Co-Prosecutor's Appeal *in limine*.¹¹⁸

V. DISCUSSION

44. As in Case 003, I very regretfully find myself at variance with my colleagues on the Supreme Court Chamber on my approach to the legal reasons for termination in this case. While we all agree that it is appropriate that we should apply our inherent jurisdiction to provide clarity and resolution, we disagree on why the case should be terminated. My dissent goes beyond the fact that the decision of the Pre-Trial Chamber failed to produce a valid indictment but looks at the fault lines in the process. My considered opinion is that it is unworthy of us to grasp at want of a valid indictment to order termination of the case and to ignore the legitimate arguments made by the Applicant and to ignore the glaring defects of the Pre-Trial Chamber's decision and the procedural history of this case. Permitting the pre-trial processes to rely on the discredited old chestnut that the preliminary investigation by the International Co-Prosecutor was unlawful and that SOK An assured the National Assembly that only five prosecutions would ever take place is to ignore reality. This has been dealt with in the Dissenting Opinion in the associated Case 003 Decision involving MEAS Muth.¹¹⁹ These issues are even more fully argued by the International Co-Prosecutor in this case when she outlines her version of the seminal facts relating to the Third Introductory Submission.¹²⁰ In the Case 003 Decision, my conclusions relied on the very documents filed by the National

¹¹⁶ International Co-Prosecutor's Application, paras 63-66.

¹¹⁷ International Co-Prosecutor's Application, paras 67-71.

¹¹⁸ YIM Tith's Response, paras 34-40, p. 15.

¹¹⁹ SCC Case 003 Decision (3/1/1/1), Dissenting Opinion of Judge Maureen Clark.

¹²⁰ International Co-Prosecutor's Application, paras 58-66.

Co-Prosecutor in the first Disagreement that came before the Pre-Trial Chamber and which are referred to in the International Co-Prosecutor's submissions. It is unfortunate that the documents were not perused rather than blindly relying on them as a policy script which is factually inaccurate.

45. Two liberal statesmen, John Stuart MILL and Edmund BURKE have both been attributed with the authorship of this wise observation: *the only thing necessary for the triumph of evil is that good men should do nothing*. I view the International Co-Prosecutor as that good man who says and does something and who deserves our full respect. She grasps the nettle of the argument that the original investigation was unlawful and she presents the contra argument on the facts. She has done everything in her power to fulfil her mandate and that of the ECCC to bring to trial those suspected of responsibility through complicity in the ghastly crimes perpetrated by the Khmer Rouge during the period of DK. As I previously outlined in Case 003, those facts relied upon by national office holders at the ECCC are disputed and were never resolved. However for the sake of argument, if the National Co-Prosecutor is correct in her now much repeated assertions that (1) the preliminary investigation that led to the International Co-Prosecutor to express his desire to issue a third introductory submission was without notice or agreement and (2) there was a clear understanding on the part of the Royal Government of Cambodia that no further trials beyond Duch, IENG Sary, IENG Thirith, NUON Chea and KHIEU Samphân would be conducted, then the following questions must be posed:

1. Why did the National Co-Prosecutor not bring an application under Internal Rule 76 to the Pre-Trial Chamber at the first opportunity in 2009 or since to annul the investigation into the suspects who formed the subject matter of the Third and the Fourth Introductory Submissions?
2. Why was it necessary to maintain a large staff of investigators in the Co-Prosecutors' office if no further trials were envisaged and why were they there?
3. Why was it necessary to have a Co-Investigating Judges' Office, which investigated alleged crimes and perpetrators in Cases 003 and 004, when that assurance/understanding from SOK An meant that there would never be any need for those further investigations?
4. Why were resigning International Co-Investigating Judges replaced with the approval of the Supreme Council of the Magistracy if there were to be no more investigations?

5. Why were so many witnesses and victims identified and interviewed in Cases 003 and 004 when the policy was that there would be no further trials?
6. Why were so many victims and civil parties permitted to participate and be led to expect their day in Court if there was no possibility of any further trials?

46. Were the last 13 years merely an expensive exercise in optics? Does the law on inordinate and inexcusable delay in exercising a right and the law of waiver by conduct not apply to the National Co-Prosecutor? Does International Criminal Law close its eyes and permit a party who fails to exercise its obligation to bring an application for annulment under Rule 76 or pursuant to Disagreement Procedures provided by the Rules, to rely on that very issue as a reason to reject every indictment? Is it the case that the conflicting Closing Orders were no more than the inevitable consequence of the unresolved jurisdiction issue or indeed the manifestation of the national understanding that there would never be any further trials beyond Cases 001 and 002?

47. Real *politique* triggered the futility argument mentioned in my Dissenting Opinion in Case 003. Courts avoid making orders which will not be obeyed, or which cannot be enforced. How could it then be conscionable in those circumstances and how could it be in accordance with international standards to quash a decision of the Pre-Trial Chamber in the sure knowledge that the policy that *there will be no further trials* will be called upon to frustrate any operation of the default mechanism? How can it be conscionable to seek more funding to engage in further attempts to direct a rational re-examination of the defective Pre-Trial Chamber decision in circumstances where the argument that the initial investigation was flawed because *the International Co-Prosecutor opened secret preliminary investigations unilaterally without notifying and engaging the National Co-Prosecutor...[t]his is against the ECCC Law which requires both Co-Prosecutors to work together* will be deployed.

48. This very argument begs many questions. Why for instance should the further investigations into secondary suspects in the Office of the Prosecutors whose *raison d'être* is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible during the period from 17 April 1975 to 6 January 1979 be considered out of order? Why did the National Co-Prosecutor not embrace the further investigations and work with her fellow Co-Prosecutor in carrying out the mandate of her office? The reasons given for the National Co-Prosecutor's reluctance to endorse the Third Introductory Submission

was not that she was unaware and had not been involved in the investigation process but that she did not agree with the necessity for further investigation because the crimes alleged and the crime sites involved had been covered in the Case 001 and 002 indictments. The “secret unilateral investigation” argument only raised its head for the first time six months later. None of this history makes sense unless one accepts that it was general and inflexible government policy to stop all trials after Cases 001 and 002.

49. This policy application has infected decisions of the Pre-Trial Chamber. It must be recalled that all judges of the Pre-Trial Chamber found that the actions of the Co-Investigating Judges were unlawful yet ignoring this jurisdictional dismissal, all five Judges went on to consider the validity of the orders made pursuant to these unlawful actions. The three National Judges upheld the legality of the Dismissal Order on the basis that YIM Tith who faced an investigation for genocide, crimes against humanity, war crimes and domestic offences did not meet the profile for jurisdiction. They also relied on the unlawful preliminary investigation argument. The two International Judges of the Pre-Trial Chamber upheld the Indictment on the basis that the crimes alleged and the roles the suspect occupied reached the level of a Khmer Rouge official who was most responsible for the crimes that were committed during the DK era. They examined the facts presented in considerable detail and concluded that the Indictment should be upheld.

50. Under the rules of justice, the Pre-Trial Chamber decision has no validity and ought to be quashed for its irrationality, its failure to allow the default mechanism to operate and its failure to provide any legal clarity or finality. The International Co-Prosecutor’s present Application and her previous Application concerning MEAS Muth have exposed disturbing issues before this final Chamber of the ECCC and at the same time reveal that there is no utility whatever in directing a replay of the same positions through a re-hearing of the appeals.

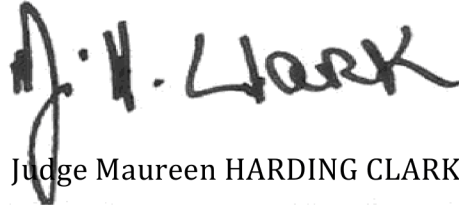
51. With that knowledge, there is no avenue open to this Court but to accept that further actions to remedy irreconcilable differences between the national and international components of the pre-trial processes is futile. These unavoidable truths predicate use of the ultimate tool of termination of all proceedings against YIM Tith.

52. What I write is from the standpoint of an international judge tasked to operate to the highest international legal standards. This dissent emanates from my perception of the truth

as far as that truth is available. Many disagreements and associated documents remain under seal. This dissent is based on the documents presented in this Case 004 and the Cases of AO An and MEAS Muth (Cases 004/2 and 003 respectively). I reiterate that the national judges behave according to their conscience and their culture and their views differ to mine as to functions and obligations. It is accepted that my position may be weakened by the fact that I am not supported either by my international colleagues or by my national colleagues. Despite our disagreements, all members of the Supreme Court Chamber bench have shown me utter courtesy in relation to my dissenting views.

Cork, Ireland 28 December 2021

Judge of the Supreme Court Chamber

A handwritten signature in black ink, appearing to read 'M. H. CLARK', written in a cursive style.

Judge Maureen HARDING CLARK