



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

អង្គជំនុំជម្រះសាលាដំបូង

Pre-Trial Chamber
Chambre préliminaire

APPEALS HEARING
PUBLIC

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

29 November 2019

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 11-Feb-2020, 10:01
CMS/CFO: Sann Rada

Before the Judges: Prak Kimsan, Presiding
Olivier Beauvallet
Huot Vuthy
Kang Jin Baik
Ney Thol

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List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
The President (Prak Kimsan)	Khmer
Mr. KARNAVAS	English
Judge BEAUVALLET	French
Ms HOLLIS	English
Judge BAIK	English
Mr. SENG BUNKHEANG	Khmer

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1 P R O C E E D I N G S

2 (Beginning of public session: 1124H)

3 MR. PRESIDENT:

4 Please be seated.

5 Judge, please put the questions.

6 [11.25.07]

7 JUDGE BEAUVALLET:

8 Thank you, Mr. President. My greetings to the parties present,
9 and the public.

10 I have a few questions for the parties. My first question is for
11 the International Co Prosecutor.

12 Madam, you presented your points in your arguments and your
13 submissions regarding the Closing Briefs, and this situation is
14 unprecedented. Rule 67.1 provides that the Co Investigating
15 Judges issue an Order which can be a Dismissal Order or an
16 Indictment. We have questions regarding the simultaneous delivery
17 of two contradictory Closing Orders as opposed to the validity --
18 the intrinsic validity of each Closing Order taken separately.

19 [11.26.26]

20 MS. HOLLIS:

21 Your Honour, our position is quite simply that each of the
22 Closing Orders is validly issued, not to say both are adequate or
23 accurate. Our position being that the Dismissal Order is fatally
24 inadequate and inaccurate. We submit that the issuance of
25 conflicting Closing Orders was always a possibility, perhaps even

1 a probability given the co-equal and independent status of the Co
2 Investigating Judges. Where there are irreconcilable differences,
3 the issuance of separate conflicting Closing Orders is not only
4 valid, but we suggest may be the best solution.

5 We take this position based on the language of the ECCC
6 Agreement, Establishment Law, Internal Rules, and supported by
7 the discussions in two joint decisions of the Co Investigating
8 Judges, which also cite to the jurisprudence of this Chamber, and
9 we also look at the advantages of two Orders, the disadvantages
10 of not allowing such an alternative resolution of irreconcilable
11 differences.

12 [11.27.46]

13 First, the ECCC Agreement: we submit it was always envisioned the
14 Co Investigating Judges would have equal standing. We see that in
15 the Agreement, Article 6.3, Co Investigating Judges, "shall be
16 independent in the performance of their functions", and we read
17 this language in the context of Rule 1.2 referring to Co
18 Investigating Judges, including both of them acting jointly or
19 each of them acting individually.

20 It was always envisioned that these judges could have
21 disagreements, including fundamental disagreements, such as those
22 before you now. Article 5.4 and 7 of the ECCC Agreement were put
23 in place to provide one mechanism for dealing with this
24 situation, disagreements between Co Investigating Judges. This
25 one option was set out in these articles, but use of that option

1 was not mandatory, it was permissive.

2 [11.28.55]

3 This can be seen from the language of these articles. They each
4 contain subsections which use the mandatory "shall". So, if we
5 look at Article 5, subarticles 1, 2, and 3 include mandatory
6 "shall". Subarticle 4 also contains the mandatory "shall", but
7 not in reference to using the disagreement mechanism, rather, to
8 a potential outcome.

9 The subarticle states in relevant part:

10 "The Co-Investigating Judges shall cooperate with a view to
11 arriving at a common approach to the investigation."

12 But the article goes on to recognize that disagreements may
13 arise, and in that regard, the language mandates not that the
14 procedure must be followed, but a potential outcome that must be
15 followed.

16 [11.29.53]

17 The language we refer to is as follows:

18 "In case -- in case -- the Co Investigating Judges are unable to
19 agree whether to proceed with an investigation, the investigation
20 shall proceed unless -- unless -- the judges or one of them
21 requests this Chamber settle the disagreement."

22 Note: there is no mandatory language requiring that the judge or
23 judges shall request that this Chamber settle the disagreement,
24 but it is mandatory that the investigation shall proceed unless
25 one or both of the judges make such a request. Indeed, the

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1 language that the investigation shall proceed unless such a
2 request is made, indicates that it is understood this
3 disagreement mechanism was permissive, not mandatory.

4 [11.30.49]

5 The language of Article 7.1 continues in this same vein. Use of
6 the disagreement mechanism is permissive, not mandatory. Again,
7 in case the Co Investigating Judges have made a request in
8 accordance with paragraph 5, again, contrast this language with
9 the use of mandatory "shall" in other subparts of this article
10 and it becomes, we submit, even more clear that use of this
11 mechanism to settle disputes is permissive, not mandatory.

12 The same is true of the ECCC Establishment Law. The language of
13 Article 23 new, confirms the permissive nature of this dispute
14 resolution mechanism. In the event of disagreement between Co
15 Investigating Judges the following shall apply. The investigation
16 shall proceed unless -- unless -- the Co Investigating Judges or
17 one of them requests this Chamber to settle the disagreement.

18 [11.31.55]

19 Again, it is instructive to note the mandatory "shall" in this
20 regard is that the investigation shall proceed with the
21 permissive language "unless" for the use of this mechanism to
22 settle this dispute. Note the absence of any language mandating
23 that the judges shall request this Chamber to settle the
24 disagreement.

25 Internal Rule 72 implements the provisions of the Agreement and

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1 Establishment Law using the permissive "may" in subarticle 2 in
2 pertinent part: "May bring the disagreement before the" Pre-Trial
3 Chamber. Contrast that language with the language in subarticle 4
4 regarding the situation where the investigating judges choose to
5 bring the disagreement before, Your Honours, "The Chamber shall
6 settle the disagreement forthwith."

7 As with Internal Rule 77.13b, Internal Rule 67.1 requiring the Co
8 Investigating Judges to conclude the investigation by issue a
9 Closing Order must be read in the context of Internal Rule 1.2.
10 The plural Co Investigating Judges, meaning either both acting
11 jointly or one acting individually, in which case each could
12 issue a Closing Order.

13 And then the rationale of the Co Investigating Judges on separate
14 and opposing Closing Orders that we find in their decision on Ao
15 An's urgent request for disclosure of documents relating to
16 disagreements. Your Honours, that is D262/2 of 18 September 2017
17 at paragraph 14.

18 [11.33.52.]

19 Both the National and International Co Investigating Judges
20 considered separate and opposing Closing Orders as generally
21 permitted under applicable law for, quote, "very much the same
22 reasons", unquote, they found regarding opposing final
23 submissions, and this in reference to their joint decision in the
24 decision on Ao An's request for clarification, which is D353/1.
25 And in that decision, they analyzed the ECCC Agreement, they're

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1 dealing with Co Prosecutors so they look at Article 6.4, but the
2 language we are concerned with is identical in relation to Co
3 Investigating Judges, and they look at Establishment Law, Article
4 20 new. In our instance, it would be Article 23 new, and again,
5 the language is identical. And they also consider Rule 71.

6 [11.34.54]

7 And in this discussion, they look at several decisions of, Your
8 Honours, which if I may characterize, looks like an evolution in
9 your decisions over time in relation to final submissions.

10 The option of issuing two conflicting Closing Orders makes sense.
11 Forcing the Co Investigating Judges to forgo such an option would
12 in effect be converting the permissive disagreement mechanism set
13 out in Articles 5.4 and 7 of the Agreement, and Article 23 new of
14 the Establishment Law, as well as Internal Rule 72, converting
15 those provisions into a mandatory mechanism, and we suggest would
16 violate those articles and the Rule. In addition, it would unduly
17 limit the exercise of the independence of each of the Co
18 Investigating Judges.

19 [11.35.57]

20 Finally, Your Honour, we suggest it would not reconcile the
21 disagreement. Absent a supermajority decision by, Your Honours,
22 the case would proceed to trial based on an indictment, the same
23 outcome that is before you today should you fail to reach a
24 supermajority reversing the Indictment.

25 While it may seem that the issuance of only one order would make

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1 life much easier for, Your Honours, that may not be the case. The
2 disadvantages of requiring that there be only one closing order
3 are significant when faced with a situation such as we have here,
4 two diametrically opposed positions. One determining it
5 appropriate to indict the individual, and the other determining
6 it appropriate to dismiss the case.

7 How are these irreconcilable positions dealt with if there is
8 only one closing order? Do you require that one of the
9 Investigating Judges forego the duty to act independently and
10 sign on to this one order, acquiescing to the other position,
11 even though it is diametrically opposed to theirs?

12 [11.37.10]

13 The Judge who has concluded the case must be dismissed, should
14 that Judge be forced to sign on to the order advancing an
15 Indictment? The Judge who thinks an indictment is appropriate,
16 should that Judge be forced to sign on to a closing order that
17 endorses a dismissal? That should not be expected of judges who
18 are required to be independent in their functions.

19 So, is one of the judges foreclosed from issuing a Closing Order
20 reflecting his or her determination? If yes, how is it determined
21 which determination is published and which is discarded? Or would
22 we find ourselves with a situation where we have supposedly one
23 Closing Order which contains, in effect, a separate and opposite
24 disposition? The same situation we have here in a much more
25 convoluted procedural setting should there have been a

1 requirement for only one closing order.

2 [11.38.14]

3 There are advantages to the issuance of two opposing closing
4 orders, whereas here you are faced with irreconcilable
5 differences; one to dismiss, and one to indict. This solution
6 brings to light clearly the different dispositions and the
7 reasons for them, whether those reasons are sufficient or
8 insufficient depending on the appellate briefs that you are
9 reviewing.

10 And thus, this solution enhances the ability of the parties to
11 more fully assess the conflict and submit more informed pleadings
12 on appeal. It also affords, Your Honour, more complete reasons
13 for the conflict, and thus, provides a more informed basis on
14 which, Your Honours, can decide appeals of those conflicting
15 orders brought before you to be resolved initially on the
16 standard on appellate review, and then to be determined
17 procedurally on what the next step must be after the appellate
18 issues are dealt with.

19 [11.39.20]

20 Exercising this option of two closing orders, even if they are
21 conflicting, also contributes to the transparency of this Court's
22 judicial process, where, for example, as here, the Closing Orders
23 are public. By contrast, if we were to -- if, Your Honours, were
24 to force the Co Investigating Judges to go through the dispute
25 resolution mechanism, not only would it fail to correct or to

1 remedy irreconcilable differences, the parties' submissions,
2 including the draft closing orders, would be confidential, and
3 then after a hearing, it is possible, depending on the decision
4 made by a supermajority, that only one of those orders would ever
5 see the light of day.

6 Your Honour, we submit that there is no prohibition against two
7 conflicting closing orders, nor should there be. Issuance of two
8 conflicting closing orders is consistent with the independence
9 with which each Co Investigating Judge is mandated to act. The
10 advantages of such an option outweigh the disadvantages of
11 denying Investigative Judges this option. And in the context of
12 two independent Investigating Judges with irreconcilable
13 positions on fundamental issues, this option of issuing two
14 conflicting closing orders makes the most sense.

15 Thank you, Your Honour.

16 [11.40.55]

17 JUDGE BEAUVALLET:

18 Thank you, Prosecutor.

19 My second question refers to the preceding debate. So, if the
20 Chamber understood you correctly, you indicated it in your oral
21 submissions on Wednesday, that you believed that you were not
22 bound by all of the factual findings in the -- by the
23 Indictments. So, could you specify what you mean by that?

24 MS. HOLLIS:

25 In elaborating on this point, we suggest it is important to

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1 consider the context in which we stated we did not consider we
2 were bound by all the factual findings of the Indictment. We made
3 that statement in the context of our Appeal, alleging that the
4 Dismissal Order is fatally flawed because it is not a reasoned
5 decision based on consideration of all evidence in the case file
6 or based on an inaccurate assessment of the evidence that was
7 considered.

8 [11.42.00]

9 The remark in question was made by my colleague, Mr. de Wilde, on
10 Wednesday about the membership of Meas Muth to the Central
11 Committee. He then explained to you why we submit the Dismissal
12 Order erred by discarding the reliable testimony of a direct
13 witness, Khieu Samphan, on this point, Khieu Samphan being a
14 Central Committee member himself, and giving priority instead to
15 the second hand less reliable testimony of Duch, who was not a
16 member of the Committee.

17 It was in this context that the statement was made, and in the
18 context that the Dismissal Order concluded that Meas Muth had
19 never been a Central Committee member, but only an assistant to
20 this Committee. So, it is in that context that we suggested that
21 we may look to other facts and are not bound by the particular
22 facts in the Indictment in that particular instance.

23 [11.43.01]

24 Our position is that Meas Muth, as Khieu Samphan says, was a full
25 member or a candidate member of the Central Committee. In this

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1 regard, the Indictment does not remove the obligation on the
2 National Co Investigating Judge to review all evidence on the
3 case file, assess it reasonably, and to come to factual findings
4 that are not patently incorrect based on a fully-reasoned
5 decision, and that was the basis upon which we made that comment.
6 Now, we would also note, that indeed the Indictment acknowledges,
7 at paragraph 150, the position of Meas Muth as Central Committee
8 candidate/reserve member from late 1978, and says that prior
9 that, he was a member of a Military Committee that assisted the
10 Central Committee. We wish to underline that we do agree with the
11 Indictment that at some point during the DK Regime Meas Muth
12 became a member of the Central Committee. That alone, according
13 to paragraph 395 of the Dismissal Order, would suffice to
14 establish that Meas Muth meets the requirements of ECCC personal
15 jurisdiction.

16 Thank you, Your Honour.

17 [11.44.28]

18 JUDGE BEAUVALLET:

19 Thank you, Prosecutor. I -- I have finished with my questions for
20 you.

21 I have a question now for the National Prosecutor.

22 Prosecutor, during the debate you heard certain statements. So
23 how can you address the International Co Prosecutor's statements
24 according to which your Appeal doesn't meet the appellate review
25 criteria and should be dismissed because it does not raise any

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1 grounds pointing to a specific legal error which would invalidate
2 the Indictment or would lead to a miscarriage of justice or would
3 show that the Co-Investigating Judge abused of his discretionary
4 powers?

5 [11.45.30]

6 MR. SENG BUNKHEANG:

7 Thank you, Judges, for the question.

8 I would like to inform, Your Honours, that the principle of the
9 strict interpretation of the criminal law is a general principle
10 which shall be applied. The broad interpretation by the
11 International Co Prosecutor of the roles and responsibilities of
12 Meas Muth in Democratic Kampuchea before the ECCC's jurisdiction
13 is inconsistent with the principles as outlined earlier.

14 Please note that the roles and responsibilities of Meas Muth, as
15 the Co -- National Co Prosecutor has already stated in the
16 Appeal, is that National Co Prosecutor finds although Meas Muth
17 had some roles in the Democratic Kampuchea, he did not have the
18 actual autonomy and authority.

19 [11.46.43]

20 All contribution and participation of Meas Muth was carried out
21 under the orders and the instructions of the Higher Echelon. He
22 had to follow the instructions and orders of the Higher Echelon
23 completely.

24 And also, the National Co Prosecutor has to state that it is the
25 illegal errors with the interpretation of International Co

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1 Investigating Judge. When Meas Muth does not fall within the
2 personal jurisdiction of the ECCC, the Indictment shall not have
3 been issued. This legal error is complete and appropriate to
4 allow the PTC to issue a reasoned decision.

5 [11.48.04]

6 JUDGE BEAUVALLET:

7 Thank you, Prosecutor.

8 My question will now be put to the Defence, and my first question
9 is based on the admissibility of your Appeal and can be broken
10 down into two parts. In your Appeal Ground A, you raise that the
11 International Co Investigating Judge did -- committed a factual
12 error by interpreting Rule 76.13 (sic), saying that lack of a
13 confirmation of one or the other Closing Orders, either both
14 Closing Orders would remain or only the Indictment would remain.
15 So, in this Ground A, you also acknowledge in paragraph 32 that
16 it does not fall under the International Co Investigating Judges'
17 jurisdiction to rule on that question.

18 Which -- so with these observations, first of all, how do you
19 consider the admissibility of your Appeal Ground A, pursuant to
20 Rules 74.3 and 21 of the Internal Rules, given that this Ground
21 challenges the opinion of a Co Investigating Judge that was based
22 on a question that did not fall under his jurisdiction, and
23 second of all, is not part of the findings of the Co
24 Investigating -- International Co Investigating Judge, that is to
25 say, whether or not Meas Muth falls under the personal

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1 jurisdiction of the ECCC?

2 [11.49.38]

3 And the second part of my question: If the Pre-Trial Chamber
4 finds that your Appeal Ground is admissible, and in light of the
5 standard of review, how can you explain that the opinion of the
6 International Co Investigating Judge regarding Internal Rule
7 77.13 invalidates the finding according to which Meas Muth falls
8 under the personal jurisdiction criteria of the ECCC?

9 MR. KARNAVAS:

10 Thank you, Your Honour. Very thoughtful questions and let me
11 begin with the first part.

12 Mr. Meas Muth's Appeal is an appeal of the International Co
13 Investigating Judge's confirmation of jurisdiction over him and
14 is thus admissible under Rule 74.3a, and this was exhaustively
15 explained in paragraphs 7 to 11 in our reply.

16 [11.50.43]

17 Rule 74.3a covers appeals of orders confirming the ECCC's
18 personal, temporal, and subject matter jurisdiction. While it was
19 not within the International Co Investigating Judge's remit to
20 opine on this issue, he nonetheless confirmed the ECCC's personal
21 jurisdiction in his Indictment by erroneously interpreting Rule
22 77.13. This Indictment is now before the Pre-Trial Chamber, which
23 will ultimately decide whether Mr. Meas Muth falls within the
24 ECCC's personal jurisdiction.

25 While the International Co Investigating Judge's confirmation of

15

1 jurisdiction was only in part -- it was only in part in his
2 Indictment, the decision on pre-trial detention, had he correctly
3 interpreted Rule 77.13, he would not have indicted Mr. Meas Muth,
4 and therefore, confirmed the ECCC's personal jurisdiction over
5 him.

6 [11.52.01]

7 But even if the International Co Investigating Judge's suggestion
8 that either only his Indictment stands or both Closing Orders
9 stand in view as obiter, he implicitly confirmed the ECCC's
10 personal jurisdiction over Mr. Meas Muth.

11 The Pre-Trial Chamber has held that Orders implicitly confirming
12 the ECCC's jurisdiction is admissible under Rule 74.3a, and here,
13 I'm referring to Case 002, Decision on the Appeals Chambers
14 against the Co Investigating Judge's Order on Joint Criminal
15 Enterprise, D97/14/15, paragraphs 24 to 25.

16 Now, our jurisdictional challenges are distinguishable from Khieu
17 Samphan's Appeal against the Closing Order. While Khieu Samphan
18 wished to challenge the Indictment in its entirety, his
19 challenges were not jurisdictional as they related to: a, the Co
20 Investigating Judge's denial of his right to submit a final
21 submission; b, that evidence was not available in French and
22 Khmer; and, c, the transparency of the Co Investigating Judge's
23 Indictment. These are in D427/4/15, in paragraph 6.

24 So, unlike Mr. Meas Muth's jurisdictional challenges, none of
25 Khieu Samphan's relate to the ECCC's confirmation of personal

1 jurisdiction over him. Rather, the errors he raised concern
2 procedural errors committed by the Co Investigating Judges during
3 the conduct of the investigation.

4 [11.54.22]

5 We also submit that a broader right of appeal under Rule 74.3a in
6 light of Rule 21 is necessary. We say so because the
7 International Co Investigating Judges suggested resolution to the
8 opposing Closing Order is not contemplated in the Rules. Meas
9 Muth's Appeals raises matters not reconcilable, not rectifiable,
10 I should say, by the Trial Chamber.

11 Not allowing Mr. Meas Muth to appeal the Indictment would
12 irreparably harm and permanently deprive him of his
13 constitutional right of: a, to be presumed innocent; b, to defend
14 himself; c, to have proceedings against him brought to a
15 conclusion within a reasonable time; d, equal protection before
16 the ECCC; and, e, to have his constitutional right to have doubt
17 resolved in his favour. All these rights would be deprived were
18 you to find that his Appeal is impermissible.

19 [11.55.52]

20 Thirdly, we submit that the interests of justice and procedural
21 fairness militates in favour of admitting his Appeal. We suggest
22 you would be absurd if the Pre-trial Chamber considers the Co
23 Prosecutor's Appeal while rejecting Mr. Meas Muth's Appeal, given
24 that the cross-appeals concern the core issue the Pre-trial
25 Chamber is seized to resolve, which of the two Closing Orders

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1 should stand or whether they can both stand in perpetuity, and
2 rejecting Mr. Meas Muth's Appeal will profoundly impact his fair
3 trial rights guaranteed under the Cambodian Constitution and this
4 Court's framework.

5 Four, we did not raise inadmissible errors, as we noted, because
6 these are mixed questions of law and fact, and in the past, you
7 have indicated, you, the Pre-trial Chamber, that such matters are
8 to be raised at trial upon hearing and weighing the relevant
9 evidence. And here, I am citing or relying on decision on the
10 Ieng Sary Appeal against the Closing Order, 11 April 2011,
11 D427/1/30, paragraph 46.

12 [11.57.40]

13 Thus, had we challenged the International Co Investigating
14 Judge's application of the Law, in all likelihood you would have
15 deemed it inadmissible at this time. But in any event, as I note,
16 the Prosecution inasmuch agrees in the admissibility section of
17 their brief, that we raise issues that are before you that need
18 to be addressed and resolved, and as a result, they merely spend
19 three-quarters of a page on arguing the lack of admissibility, as
20 they argued yesterday, and then go on to address the very same
21 issues that we addressed before you.

22 Now, getting to the second part of your question, Your Honour,
23 Grounds A and B of our Appeal are intertwined. Not only did the
24 International Co Investigating Judge err in interpreting Rule
25 77.13 so as to suggest that either his Indictment stand or both

1 Closing Orders stands, but he also failed to apply the principle
2 of in dubio pro reo.

3 [11.59.14]

4 Now, while we have argued that two Closing Orders are
5 permissible, were the Co Investigating Judges required to issue a
6 single Closing Order, as I noted earlier, and this is a
7 possibility that lies before you. This is an issue I, we, I
8 should say, agree with the analysis we just heard from the
9 International Co Prosecutor, this is our understanding; however,
10 we could be wrong. And if we are wrong, then I suggest, as I
11 understand it in France, you may in a very complex case have two
12 Co Investigating Judges, so I am told. I've never practiced in
13 France, but my research tells me that there is such a
14 possibility. In those situations, they each do not submit their
15 own Closing Order, they submit one, even if there are
16 disagreements.

17 [12.00.18]

18 And so I do allow for the possibility that we may, we, being the
19 Prosecution and the Defence, may be in error in maintaining
20 steadfastly that it was not ultra vires for the Judges to file
21 two separate Closing Orders, but I would depart from what my
22 colleague on the other side indicated, that were they to file a
23 single Closing Order there would be parts where there is
24 commonality, the background, and other findings of facts where
25 they both agree, there's a meeting of the mind. And then there

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1 would be a departure, much like you have where judges, who are in
2 a minority, would file their separate opinion, the separate
3 descending opinion.

4 [12.01.20]

5 So, it's possible that within this global Closing Order you would
6 have a common part, and then you would have the Dismissal Order,
7 you would have the Indictment, and here is where I disagree.

8 While they could both at the end of the day, at the end of their
9 analysis make their decision, dismiss/indict, together they would
10 then have to apply the principle of in dubio pro reo, and in the
11 final analysis, in the final analysis they would have to say,
12 assuming they -- you could -- they're cooperating in -- within
13 the spirit of the constitutional provision, the Agreement, the
14 Establishment Law, and the Rules, all of which have to apply the
15 principle of in dubio pro reo, they would have to issue a
16 Dismissal Order.

17 So it's not necessarily I disagree that one would have to --
18 their opinion, their decision would have to give to the other,
19 it's just that they would maintain it, but then coming together
20 recognize that since these differences are based on the factual
21 analysis that the principle -- based on the principle of in dubio
22 pro reo they would have to dismiss.

23 And if we were wrong, if we were wrong, and if they acted ultra
24 vires, nothing would prevent you from either remanding the matter
25 back, having them reconstitute, and with instructions that they

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1 are to issue an order, or the possibility exists for you to take
2 it upon yourselves.

3 [12.03.17]

4 And we submit, and we have submitted that whether in a sense it's
5 one closing order or two, at the end of the day, based on the
6 principle of in dubio pro reo, not whether one is national or
7 international -- and if I gave that impression yesterday, I want
8 to make sure that I'm very clear -- we're -- it matters not, both
9 judges are equal. And assuming that the Closing Orders are at
10 equal standing, based on the principle of in dubio pro reo, you
11 must go with the dismissal.

12 And that's why if you were to have a single closing order, after
13 they each make a determination as to what they conclude, then
14 collectively they would have to enter a dismissal on the
15 principle of in dubio pro reo, and they could do so in a very
16 transparent fashion. There is no difference between issuing two
17 and issuing one.

18 [12.04.23]

19 Now, there is the technical possibility of the International
20 Judge or the National Judge, whoever is on one side or the other,
21 but primarily on the indictment side, saying, well I'm not -- I
22 do not agree with the final analysis, because they are
23 independent. But then that would come to you, and then you would
24 have to apply the principle of in dubio pro reo, and say well,
25 you both can't agree, you both -- these are factual

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1 determinations, we have to apply this.

2 So, I think that answers your question but let me go on a little
3 bit.

4 You've asked for some authority, and I've indicated -- Meas
5 Muth's response to in dubio pro reo in relation to the standard
6 of proof. Even at the pre-trial stage the principle of in dubio
7 pro reo applies, and this is despite the applicable standard of
8 proof of sufficient--

9 [12.05.35]

10 JUDGE BEAUVALLET:

11 Excuse me, Counsel. It looks as if you are anticipating the
12 questions that will be asked by my colleagues.

13 MR. KARNAVAS:

14 I apologize. I -- it's been a long morning. Sorry. My apologies.
15 Should I still stand up, or should I sit down?

16 JUDGE BEAUVALLET:

17 Unless you waive your request for a closed session, I would like
18 to reserve my next question for the closed session.

19 MR. KARNAVAS:

20 I would prefer that -- to deal with that matter in the closed
21 session, Your Honour, but I'm at your disposal. I'm at the
22 Bench's disposal.

23 [12.06.23]

24 JUDGE BEAUVALLET:

25 Would you like me to ask the question now?

22

1 MR. KARNAVAS:

2 I -- it's not whether I'd like to. I'm saying if you -- I would
3 prefer doing it in closed session, but I have no objections.

4 JUDGE BEAUVALLET:

5 If you have no objections, I will proceed.

6 In the motion you filed before the Chamber - Pre-trial Chamber on
7 the 18th of November 2019, I'm referring to document 266 (sic),
8 you want the -- Meas Muth to be allowed not to testify in Court
9 or by videoconference. You said he left -- they left Cambodia on
10 the 7th of November 2019, for health reasons and went to
11 Thailand. I would like you to specify the following issues:

12 Does he have a new valid passport? And secondly, to what extent
13 is his recent trip to Thailand in conformity with his commitment
14 to remain at the disposal of the ECCC by handing in his passport
15 and being available to the Court on a daily basis? We are talking
16 about D174, page 11, and D174/2. So that's my question.

17 [12.08.05]

18 MR. KARNAVAS:

19 Thank you, Your Honour, and let me begin by saying that we are on
20 a weekly -- on a weekly basis we communicate with our client, and
21 he's always made himself available.

22 I should note that a question such as this one was asked by Judge
23 Bohlander. How is it that you go to Thailand when you don't have
24 a valid passport? His passport had expired. And the answer was
25 quite simple. Near Samlout, in that area, there is a border

23

1 crossing --there's several border crossings into Thailand, and
2 it's not open all the time, but it is open and easily to go
3 through even with simple identification, provided you only go to
4 that region and for limited purposes. So, it is not common -- it
5 was not uncommon for Mr. Meas Muth before he was formally
6 charged, you know, and -- or read the charges by Judge Bohlander
7 to go to Thailand for medical purposes including having open
8 heart surgery.

9 [12.09.22]

10 So, he would just cross the border with his passport. He's only
11 allowed in that province to go to the hospital and comes back as
12 opposed to having to go Pailin and going through the other border
13 where it's a -- that border opens and closes at certain periods
14 of time and it's much more formalized.

15 So, whether he has a passport or doesn't have a passport, with
16 all due honesty, it doesn't really make a difference. He can
17 leave to go to Thailand to that part for medical purposes.

18 Now, at the time, he did have an expired passport. I learned this
19 morning based on the question that was posed to us last night --
20 I learned this morning that he has a new passport and he has it
21 since 2016. I was not aware of that. And it's on him. Now, there
22 may have been some confusion, but he has not turned over the
23 passport to the police. It has been -- he has had it.

24 [12.10.41]

25 But throughout this period, I just want to emphasize that he has

24

1 been extensively engaged with us and we have gone up there to see
2 him and if to any degree of -- if he misunderstood his
3 obligations, I would certainly place the blame on his lawyers and
4 not on him. Because of his age, perhaps he didn't understand
5 because there was a passage of time between when he got this --
6 when he was informed and he got his new passport and so if there
7 was any dereliction or deviation from what he was expected to do,
8 his lawyers are to be held account for that and not Mr. Meas Muth
9 because he -- as I've indicated, he has constantly been in
10 communication.

11 He's taken an active role in assisting in his defence. We see
12 him, go over the documents with him and he has no problems
13 turning over his passport because as I noted, if on - in - on an
14 emergency basis he needs to go to Thailand for emergency
15 purposes, that's the only time he goes to Thailand. He doesn't go
16 there for any other reason. If he needs to go for emergency
17 purposes, even under the old order, he could do so provided he
18 would inform his lawyers who were to inform the Court.

19 [12.12.29]

20 But I can assure you, he's not a flight risk. He's not going
21 anywhere. He's aware of these proceedings for the last 10 years.
22 He's made himself available and to the extent that he hasn't
23 complied with that order, I would blame -- put -- place the blame
24 on his co-lawyers.

25 JUDGE BEAUVALLET:

25

1 Thank you, Counsel. I understand by your answer that you informed
2 the ECCC of any new trips that he intends to go on.

3 MR. PRESIDENT:

4 Thank you, Counsel. I give the floor to Judge.

5 [12.13.22]

6 JUDGE BAIK:

7 Thank you, President. Good morning everyone. I'm following my
8 colleagues order, so first I have two questions for International
9 Co-Prosecutor and my apologies for not sharing the second
10 question, but I promise it's very -- it will be very simple.

11 My first question is this: The co-lawyers for Meas Muth argued in
12 their reply that the Co-Investigating Judges opposing personal
13 jurisdiction determinations do not raise an issue of procedural
14 uncertainty.

15 MR. PRESIDENT:

16 (No interpretation).

17 [12.14.15]

18 JUDGE BAIK:

19 Okay, maybe -- my mic, I think it's okay. Okay.

20 I'll repeat the question. The co-lawyers for Meas Muth argue in
21 their reply that the Co-Investigating Judges opposing personal
22 jurisdiction determinations do not raise an issue of procedural
23 uncertainty but raise factual doubt.

24 For the co-lawyers, the two Co-Investigating Judges have assessed
25 the fact based on the same methodology applying the same factors,

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1 but have reached the opposite factual conclusions on personal
2 jurisdiction. This factual doubt must be resolved by applying the
3 principle of in dubio pro reo to benefit the accused. This is the
4 co-lawyers' argument in their reply.

5 What's the answer or response to this argument of International
6 Co-Prosecutor, please?

7 [12.15.22]

8 MS. HOLLIS:

9 Thank you, Your Honour.

10 Before going to the substance of the question, let us be
11 unequivocally clear; we do not agree that the two
12 Co-Investigating Judges assessed the same evidence using the same
13 factors. Far from it.

14 The Indictment considered all the evidence in the case file, both
15 before and after, 29 April 2011, made findings regarding crimes
16 committed, likely modes of liability and made these based on
17 legal characterization of the material facts in the case file.

18 The Dismissal Order, on the other hand, is quite clear that it
19 did not take into consideration the overwhelming majority of
20 evidence that was placed in the case file after, 29 April 2011.

21 Indeed, our position is that it does not reflect consideration of
22 much of the evidence available before, 29 April 2011. The
23 Dismissal Order did not use the same factors. It did not make
24 findings regarding types of crimes committed, mode of liability,
25 nor did it legally qualify the facts.

1 [12.16.43]

2 Thus, Your Honour, we submit it cannot be said that the
3 conclusions arrived at in these two conflicting Closing Orders
4 have the same legal validity. For the reasons we have argued
5 extensively, our position is the Dismissal Order does not have
6 legal validity because of fatal errors and requires reversal.
7 Moving to the substance of the question, Your Honour, regarding
8 whether you are faced with a question of procedural uncertainty
9 or factual doubt, we suggest in dealing with that question we
10 must be appreciative of the fact that, Your Honours, are faced
11 with a two-stage situation.

12 The first stage involves exercising your appellate function to
13 determine if either or both the Closing Orders are fatally flawed
14 in that there are legal errors in one or both, which would
15 invalidate the decision; there are factual errors which have
16 occasioned a miscarriage of justice in one or both and that these
17 were determinative of the ultimate conclusion regarding personal
18 jurisdiction. That is your appellate function. That is stage one.

19 [12.18.06]

20 Our suggestion, Your Honours, is that the substantive question
21 does not arise during stage one; rather, the substantive question
22 that you have posed arises during the second stage. And the
23 second stage with which you are faced is the -- what is the
24 consequence of your determinations on the appeals before you; not
25 the substance of the Closing Orders, but what is the consequence

1 of your decisions on the appeals before you. And that, Your
2 Honours, is a procedural issue, not a question of doubt of facts.
3 And, Your Honours, we would have -- and we would equate this
4 really to, Your Honours, in this case before you, not being able
5 to arrive at a supermajority. Rather, you have perhaps three
6 judges with one decision and two judges with another. The fact
7 that you have three judges with one decision, two judges with
8 another does not raise a question of factual doubt, not at all.
9 Nor would it be the case if there were dissenting opinions in a
10 case.

11 [12.19.22]

12 So, we're not dealing in the second stage where you are assessing
13 what is the consequence of our determinations of the appeals.
14 That is procedural. That is a situation where after the appeal
15 process is completed, you remain faced with two Closing Orders.
16 What is the procedure that you must follow now that you have
17 determined the appeals in such a way that you still have two
18 opposing Closing Orders?

19 And we suggest that this procedural question is answered by
20 looking at the language of the ECCC agreement, the Establishment
21 Law, the Internal Rules and the jurisprudence of the Supreme
22 Court Chamber and of this Chamber.

23 So, in the second stage -- in the second stage, we're no longer
24 questioning the basis on which Investigating Judges discretion
25 was exercised; we simply have two different discretionary

1 decisions and there is no question of factual doubt relating to
2 them.

3 [12.20.44]

4 Now, in response to the answer to the procedural question that
5 you have before you in the second stage, once the appellate
6 process is completed, we have argued extensively that looking at
7 the sources that I have cited, the answer is very clear. Should
8 there be two remaining Closing Orders, whatever the scenario that
9 creates that situation, the case goes forward to trial and we
10 have argued that extensively.

11 It's based on the language about how you resolve disagreements
12 where there's no supermajority, the jurisprudence about how
13 differences are resolved when there's no supermajority and we
14 suggest to you, it doesn't matter.

15 The vehicle by which those questions were brought to you, you
16 remain with the question: What is the consequence of our
17 decision? How do we decide on these two remaining orders?

18 [12.21.45]

19 And you decide based on the law and the law is clear. Should the
20 indictment remain in place, the case goes forward to trial
21 because this is a procedural issue and it would be a trial at
22 which not only the fair trial rights of the accused, which are
23 protected by the principle of in dubio pro reo which relates to
24 proof beyond reasonable doubt, not only would those rights be
25 protected, but the rights of the other interested parties would

30

1 also be protected; the right to a fair hearing, the right to a
2 fair evaluation of the evidence in light of the significant and
3 substantial fair right -- fair trial rights of the accused.
4 So our position is in dubio pro reo does not apply at this
5 procedural stage, that it is a corollary, as was mentioned
6 earlier, of the presumption of innocence and this can only
7 pertain to doubt as to the substantive law, not to procedures
8 such as you will be faced with in stage two of these proceedings.
9 [12.22.55]

10 And we further suggest, Your Honours, that in order to apply in
11 dubio pro reo should you for some reason determine it has some
12 relevance to the procedural stage, in order to apply it, the
13 legal text must be open to interpretation and only if the legal
14 text is open to interpretation do you then apply in dubio pro
15 reo.

16 That is not the case here. The text is very clear. Where there is
17 no supermajority and there is an indictment which remains, the
18 indictment moves forward to trial. So, our suggestion, Your
19 Honours, is that in dubio pro reo is a very important principle
20 to ensure fairness based on the presumption of innocence subject
21 to proof beyond a reasonable doubt, but it does not apply here.
22 Thank you, Your Honour.

23 [12.23.55]

24 JUDGE BAIK:

25 Thank you. Let me ask one follow-up question for this.

1 MS. HOLLIS:

2 Yes, of course.

3 JUDGE BAIK:

4 I may hear the answer for this, but you quote the SCC Decision,
5 which is Khieu Samphan on application for immediate release
6 decision. Daresay, I understand your argument that there's no
7 factual doubt, at all, right?

8 MS. HOLLIS:

9 Yes.

10 JUDGE BAIK:

11 This is only procedural uncertainty. Arguably, if you agree on
12 that, the Khieu Samphan decision said, in dubio pro reo will
13 usually be unnecessary on legal lacuna and may come into play in
14 the far rarer event of a collision (unintelligible), so to my
15 understanding the Supreme Court Chamber does not completely
16 exclude the application of in dubio pro reo in procedural
17 uncertainty.

18 And yes, they say a far rarer event. So, everybody agrees here;
19 this is unprecedented case in entire history of International
20 Khmer Law. Why this is not that rare a case -- far rarer a case.

21 [12.25.05]

22 MS. HOLLIS:

23 Thank you. We suggest that the question about when this principle
24 applies, of course, has been dealt with in many different
25 scenarios and we suggest that when we're looking at, do we apply

1 it in a procedural setting, we first look to whether or not there
2 is some doubt about the laws that apply -- the interpretation of
3 the laws that apply. Where there is some doubt there, perhaps
4 there is some relevance.

5 In our instance, there is no doubt. There is no doubt about what
6 happens if two conflicting orders remain at the conclusion of the
7 appellate process. If one of those orders is that the case goes
8 to trial based on the indictment, the case goes to trial based on
9 the indictment.

10 [12.25.49]

11 So, we think that perhaps because of the unique structure of this
12 Court with two co-equal Co-Investigating Judges, this is the
13 first situation of its kind in which the interpretation of this
14 principle has arisen. It has arisen in many scenarios and it is
15 very rare that it would apply in a procedural setting.

16 JUDGE BAIK:

17 Okay, thank you. And my question is like this: You argued that, I
18 quote:

19 "Article 7, paragraph 4 of the ECCC Agreement provides clear
20 guidance as to what must be done should the PTC be unable to
21 resolve a disagreement between the Co-Investigating Judges or
22 Co-Prosecutors."

23 This is your response to Defence Appeal, paragraph 26, and in
24 this case, it provides that investigation or prosecution shall
25 proceed. You understand my question?

1 So, I understand your policy argument on this matter, but in its
2 ordinary meaning, a transfer of the indictment and case file to
3 Trial Chamber is a part of the investigation or part of
4 prosecution?

5 [12.27.20]

6 MS. HOLLIS:

7 Well, Your Honours, I think there is jurisprudence from this
8 Court that the investigation would encompass the transfer, and in
9 our view, it really doesn't matter. If there's an indictment, if
10 there's no supermajority that reverses that indictment, then what
11 it simply means is call it investigation; call it prosecution,
12 the case moves forward to the next phase of the proceedings. But
13 as I said, I believe there is jurisprudence from this Court an
14 investigation encompasses the Trial Chamber being seized with an
15 indictment.

16 [12.27.56]

17 JUDGE BAIK:

18 So--

19 MS. HOLLIS:

20 I believe we have put that in--

21 JUDGE BAIK:

22 --you urge us to see a beyond the original -- the literal meaning
23 or the written meaning or the meaning of that case, so you say it
24 doesn't matter. That's the language in the law.

25 MS. HOLLIS:

34

1 Well, we say that, Your Honour, because first of all, we believe
2 that there--

3 JUDGE BAIK:

4 Okay, investigation includes the transfer of a file; that's your
5 position?

6 MS. HOLLIS:

7 Based on jurisprudence of this Court, Your Honour.

8 [12.28.22]

9 JUDGE BAIK:

10 But in our Internal Rules say that the closing order concludes
11 the investigation, so how do you think of this?

12 MS. HOLLIS:

13 Well, you -- I don't want to go behind the reasoning of the
14 jurisprudence, but the jurisprudence seems to be clear that
15 investigation would encompass seizing the Trial Chamber with the
16 indictment and I believe in our argument we also talked about --
17 I think it was Internal Rule 79 - 79.1, it talks about the
18 indictment going forward to trial whether it is -- regardless of
19 the origin of that indictment. So, we believe there are rules
20 that would support our position that the indictment goes forward
21 if there's no supermajority reversing that.

22 [12.29.09]

23 JUDGE BAIK:

24 Okay, thank you very much.

25 MS. HOLLIS:

35

1 Thank you, Your Honour.

2 JUDGE BAIK:

3 Thank you.

4 And next - my next question is to National Co-Prosecutor. I have
5 only one question. Thank you. In the Appeal, you claimed that
6 justice has been brought to the victims of Democratic Kampuchea
7 regime through the trials in Cases 001 and 002.

8 As you know, many victims perished, and many more survivors
9 suffered under the Khmer Rouge rule. This includes victims who
10 died or suffered on the Cambodian islands, at sea or within the
11 area of Kampong Som autonomous sector. These are crimes charged
12 in Case 003 which the International Co-Prosecutor submits were
13 not the subject of the Case 001 and 002.

14 What is your response to this argument?

15 [12.30.25]

16 MR. SENG BUNKHEANG:

17 Thank you, Your Honour.

18 That is true. Many victims of the Democratic Kampuchea are direct
19 victims who have suffered physically and emotionally due to the
20 torture and other forms of persecution, while some others are
21 indirect victims of crimes committed during the Democratic
22 Kampuchea, the so-called dark period.

23 Because of the scope of crimes committed throughout Cambodia and
24 because the Communist Party of Kampuchea did not tolerate or
25 exempt any regions or even small -- exempt any sectors, zones,

1 even small villages from its management monitoring orders and
2 implementation, all policies of the Party were to be complied
3 with at all cost.

4 [12.31.51]

5 Victims from all places; zones, sectors, districts, communes and
6 villages, whether they were Cambodians, ethnic minorities or
7 foreign nationals, could not find their escape.

8 Due to the wide scope of crimes across the country, the National
9 Co-Prosecutor stated that the victims of the Democratic Kampuchea
10 have received justice through Cases 001 and 002 as this is a
11 complete representation of the scope of crimes committed within
12 the context of Democratic Kampuchea throughout Cambodia.

13 [12.32.55]

14 There is ample evidence from victims and civil parties from all
15 zones and sectors who have been heard as part of their
16 participation in the trial of Cases 001 and 002. In other words,
17 the trial of Cases 001 and 002 is a collective surge of justice
18 for all victims and this is a complete representation for victims
19 and also for those who have suffered from the inhuman acts which
20 were committed in the regime.

21 This Court -- in fact, all facts could not be brought for trial
22 obviously. Even the Co-Investigating Judges have reduced its
23 scope by removing the facts which are considered offences from
24 being tried; for instance, Stung Tauch execution site, Kampong
25 Chhnang Airport construction site, S-22 to name a few.

37

1 This is the reason why the National Co-Prosecutor emphasize in
2 the Appeal the representation of Cases 001 and 002.

3 MR. PRESIDENT:

4 Please take a one-minute break to change the DVD, Mr.
5 Co-Prosecutor.

6 (Short pause)

7 [12.35.28]

8 MR. PRESIDENT:

9 You may resume your answer.

10 MR. SENG BUNKHEANG:

11 Thank you, Mr. President, may I now continue?

12 The National Co-Prosecutor believes that all of us are actually
13 seeking justice and really wants the justice for each and every
14 victim, not just for the -- only for the victims who died or
15 suffered on the islands, at sea or in Kampong Som autonomous
16 sectors. Victims at other areas along rivers, borders should also
17 be entitled to justice.

18 It is important, however, that we recognize the truth that the
19 ECCC efforts, generally speaking, and the OCP contribution, in
20 particular, to Cases 001 and 002 are the full representation of
21 the precise mandate and mission which is the original objective
22 behind the establishment of the ECCC.

23 Thank you very much, Mr. President, Your Honours.

24 [12.36.51]

25 JUDGE BAIK:

1 Thank you.

2 Now, I turn to Defence. I have two questions. I think I pretty
3 much understand your argument, but for clarity, I ask this
4 intertwined questions.

5 First one is: I correct -- if I correctly understand your
6 argument, you submit that Pre-Trial Chamber does not play a
7 mandatory role in resolving disputes. As your argument goes, the
8 Co-Investigating Judges are under no obligation to seek
9 resolution over procedural stalemate by bringing their
10 disagreement before the PTC under Rule 72. In other words, here
11 these Co-Investigating Judges can choose not to bring their
12 disagreement on whether Meas Muth is within the Court's personal
13 jurisdiction and this was a valid action.

14 Please clarify the basis for your interpretation of the rule
15 supports this view. I don't need authority.

16 [12.37.57]

17 MR. KARNAVAS:

18 Thank you for the question. This is a particular area where I
19 think there's a lot of agreement with the Prosecution.

20 Article 5.4 and 7.4 of the Agreement, Article 23 new of the
21 Establishment Law and Rules 14 and 72, give the Co-Investigating
22 Judges discretionary authority, so they can either come to you
23 and say, "We are at an impasse. Help us out." This is at the
24 investigative stage. Or they can deal with it among themselves.
25 And if they deal with it among themselves, they just place it

1 into the case file.

2 [12.38.44]

3 Now, that does not exclude them to, as I noted earlier, the -
4 were we wrong in the sense that they acted ultra vires? They
5 could very well in trying to resolve this, even though they are
6 -- it's irreconcilable, place their disagreements on one sheet of
7 paper, on one -- in one document, one closing order.

8 But it is our submission that the drafters wanted to give maximum
9 independence to these two individual judges. They're co-equal.
10 And they certainly did not want the Pre-Trial Chamber, as it
11 appears, to dictate how a particular problem should be resolved
12 among themselves if both of them decided that it wasn't necessary
13 to come before you, maybe because they thought it was so
14 irreconcilable that perhaps you could not resolve it or maybe
15 because of some other reason.

16 [12.39.50]

17 And so, at the investigative stage, just like the prosecution
18 stage, if they have this disagreement and they come before you,
19 you can resolve it. But at the investigative stage, if they
20 don't, they resolve it among themselves. Here, they chose to
21 place their disagreement and then part their ways and draft two
22 separate Closing Orders.

23 The Pre-Trial Chamber itself has held that the dispute resolution
24 procedure is not mandatory and that's in the Ieng Sary Closing
25 Order Appeal, D427/1/30, paragraph 274.

40

1 So, I mean it was within the agreement to do things their way.
2 Now, obviously we're in this peculiar situation where you have a
3 dismissal and an indictment, so -- and also where you have the
4 International Co-Investigating Judge who, in our opinion,
5 erroneously interprets Rule 77.13, thus invalidating his
6 indictment which is the basis of our Appeal if you look at
7 Grounds A and B in tandem.

8 We disagree with the International Co-Prosecutor in her
9 interpretation that the manner which the question reaches the
10 Pre-Trial Chamber and the substantive outcome under the dispute
11 resolution mechanism.

12 [12.41.23]

13 The manner which the question -- the manner which the question
14 reaches the Pre-Trial Chamber is different, so we cannot say,
15 well, treat these two divergent Closing Orders as a disagreement.
16 That's not what Rule 77 -- 72 meant, and you cannot, in our
17 humble submission, interpret 77 on the basis of 72. The timing is
18 different. And so, the investigation ends and the
19 Co-Investigating Judges' mandate end, when they issue a closing
20 order. That's Rule 67.1.

21 And so, we submit that the dispute resolution procedure only
22 applies before the Co-Investigating Judges issue the Closing
23 Order, not in issuing it or thereafter; before.

24 I believe I've answered the question. If you--

25 [12.42.40]

41

1 JUDGE BAIK:

2 Yes. Yes, it's clear.

3 MR. KARNAVAS:

4 I can go on, but--

5 JUDGE BAIK:

6 Okay. Yes.

7 MR. KARNAVAS:

8 --I'm trying to save to save time. I understand you may have
9 another question for me.

10 JUDGE BAIK:

11 Okay, so you're talking about the Ieng Sary Appeal, right?

12 MR. KARNAVAS:

13 Right.

14 [12.42.53]

15 JUDGE BAIK:

16 And there in paragraph 77 or 37, sorry, of the response by
17 International Co-Prosecutor, they allege that your -- in your
18 Appeal, you say:

19 "Rule 72 disagreement procedure was mandatory and that the
20 Co-Investigating Judges acted ultra vires by choosing to proceed
21 without referring the matter to the PTC under the disagreement
22 mechanism, which is rejected by PTC." So, you now follow PTC's
23 decision.

24 MR. KARNAVAS:

25 Well, and the Defence, Your Honour, I'm following, you know --

42

1 what I may have argued--

2 JUDGE BAIK:

3 That's what I want to clarify.

4 [12.43.38]

5 MR. KARNAVAS

6 What I may have argued in Ieng Sary is a long time ago. Under the
7 circumstances, I might have taken one position, but my
8 understanding is rather clear and I'm following the position that
9 I've outlined in our submissions and I think our submissions are
10 rather clearly, you know, articulated.

11 JUDGE BAIK:

12 Okay, so to be clear, after issuing Closing Order, the Rule 77 is
13 now start to -- start playing, right? That's how - that's your
14 argument?

15 MR. KARNAVAS:

16 It starts playing; however, we submit that -- at least when you
17 look at 77.13, the problem that we have is you have to--

18 JUDGE BAIK:

19 Right, that's my question, so let me -- let me read and--

20 MR. KARNAVAS:

21 Okay.

22 JUDGE BAIK:

23 --you have the chance to answer.

24 [12.44.24]

25 My second question is: You seemed to imply that the International

1 Co-Prosecutor assertion that Rule 77.13b is *lex specialis* because
2 it specifically addresses indictment, is irrelevant because the
3 rule applies only to joint closing orders. However, you argued
4 that the drafters of the rule foresaw that the Co-Investigating
5 Judges may validly issue opposing closing orders, decide not to
6 refer them to the PTC under Rule 72 and wait for the parties to
7 appeal them following the procedure under Rule 77.

8 If Rule 77, in your view, is the legitimate procedural framework
9 for considering opposing closing orders that the Co-Investigating
10 Judges choose not to refer, then why does not Rule 77.13 apply
11 here? So please?

12 [12.45.25]

13 MR. KARNAVAS:

14 I'll try my level best. The Pre-Trial Chamber can only, in our
15 submission, be seized of appeals from the Co-Investigating
16 Judges' orders under Rule 77, and we do not dispute that.

17 It is the sub provision, the outcome of - the outcome of Rule
18 77.13, that does not apply in this particular instance because of
19 the existence of two closing orders. So we submit that when you
20 look at 77.13 the drafters had in mind, not this unprecedented
21 situation that we find ourselves in; although the Prosecution and
22 I, we contend that this was somewhat envisaged, but we submit
23 that 77.13 as drafted does not -- cannot apply in this situation
24 where you have both a dismissal order where you would have to
25 look at 77.13a and then 'b' where you have the indictment.

44

1 [12.46.35]

2 If under the -- under 'a', the case file is archived -- the case
3 is dismissed, the case file is archived and then at the same
4 time, the same case file that's been archived goes to the Trial
5 Chamber, it seems irreconcilable and we submit that one isn't --
6 that 'b' is not *lex*
7 *specialis*; it may be *lex specialis* where you have only one
8 indictment, one closing order, and when you have one closing
9 order, dismiss or indict, then you can look at 77.13 and 'b',
10 especially if there's an indictment. But when you have two,
11 because of the way it's constructed, you cannot.

12 And it is for those reasons that we submit that it's not
13 applicable and why you have to apply the principle of *in dubio*
14 *pro reo* in reconciling these two Closing Orders assuming, of
15 course, as we argued yesterday and today, that both Closing
16 Orders are of equal value; that one is not invalidated for
17 whatever reason than the other.

18 We agree that if there's a single closing order, 77.13b is *lex*
19 *specialis*.

20 [12.48.11]

21 JUDGE BAIK:

22 So my question is: Is the drafters who are parties to the
23 agreement intentionally, purposefully leave the room for the
24 opposing closing order and what's the intention? If 77.13 makes
25 absurd result, as you argue, then they have no intention, at all,

1 on opposing closing order.

2 MR. KARNAVAS:

3 Well, I'd have to look into the tea leaves on this one, but when
4 the drafters -- the drafters were concerned about there being an
5 impasse, both at the prosecution at the investigative stage. And
6 so there, there would not be a violation of anyone's
7 constitutional rights or fair trial rights. We're there to say,
8 well, you need a supermajority to prevent the prosecution or to
9 prevent the investigation.

10 But now, you're having two judges who are independent of equal
11 standing and because of that, it is my humble submission that the
12 negotiators understood that you can have one judge over the other
13 and that if they're co-equal, you have to give them the breathing
14 space, the room, to where they find themselves in a situation
15 where there's such a disagreement that they would be able to
16 express themselves and their position in a reasoned fashion
17 without doing violence to the other co-equal.

18 [12.49.52]

19 So it's not that they had -- what they had in mind because if
20 that is sort of a -- if we were to think about it, the UN never
21 intended -- I don't think that was their intent to ensure that
22 cases never -- were never resolved or found themselves in this
23 situation, but I think they recognize that you cannot have two
24 equal judges and then perhaps not provide them the space.

25 Although, as I've indicated, the possibility does -- I mean I

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1 allow the possibility for being wrong; that they may have acted
2 ultra vires. I don't argue that, but there is this possibility
3 and if so, one closing order would have been issued; they both
4 would have been able to express their positions, but at the end
5 of the day, there being humongous, not reasonable doubt between
6 the two on the factual findings, the principle of in dubio pro
7 reo would have forced them to dismiss the case. So that's how I
8 see it.

9 [12.51.04]

10 Now, as I have indicated, we have tried to look at all of the
11 documents that we could get our hands on. We don't have
12 everything. The UN did not share for reasons that they don't like
13 to, so it's hard to tell. And the government was the same and so
14 now, we're trying to piece it together. But it seems to me
15 logically that with two co-equal judges -- that's the thing that
16 I rest -- I -- that's the foundation of my thinking that you
17 cannot impose the will on a particular independent judge. If you
18 have three, one can disagree; the two can go their way, and you
19 can have a majority. But we don't have that, so that's the
20 problem.

21 JUDGE BAIK:

22 Okay, thank you very much. I have no further questions. Thank
23 you.

24 [12.52.00]

25 MR. PRESIDENT:

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1 The hearing has now come to the conclusion. After the two day and
2 a half hearing has now come to a conclusion and on behalf of the
3 Pre-Trial Chamber, I would like to extend my appreciation to
4 Judges, co-prosecutors, co-lawyers, staff and all relevant staff
5 members of the ECCC.

6 Now, I declare the close of the hearing. The hearing is
7 adjourned.

8 (Court adjourns at 1252H)

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