ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 002/19-09-2007-ECCC/SC

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

Date: **17 December 2021**
Language(s): **Khmer/English**
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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

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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 003 to Trial as Required by the ECCC Legal Framework" ("International Co-Prosecutor's Appeal" or 'Applciation').[1]

I. PROCEDURAL HISTORY

2. On 20 November 2008, the International Co-Prosecutor filed the Second Introductory Submission, requesting a judicial investigation against SOU Met and MEAS Muth for crimes within the jurisdiction of the ECCC.[2]

3. On the same day, 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.[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 Second Introductory Submission and forwarded the Case File to the Co-Investigating Judges.[5] On 31 October 2014, the acting International Co-Prosecutor filed the Supplementary Submission containing further allegations.[6]

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[1] 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, dated 8 October 2021, Doc. No. 3 ("International Co-Prosecutor's Appeal (Doc. No. 3)" or "International Co-Prosecutor's Appeal").
[2] Co-Prosecutors' Second Introductory Submission regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.
[3] International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1.
[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 Second Introductory Submission, 7 September 2009, D1/1.
[6] International Co-Prosecutor's Supplementary Submission regarding Crime Sites related to Case 003, 31 October 2014, D120.

5. Confidential disagreements between the Co-Investigating Judges in this case were registered on 7 February 2013, 22 February 2013, 17 July 2014, 16 January 2017, and 17 September 2018.[7]

6. On 29 April 2011, the Co-Investigating Judges issued a notice of conclusion declaring that the judicial investigation into Case 003 was concluded.[8] On 9 October 2011, the International Co-Investigating Judge resigned[9] and the Reserve International Co-Investigating Judge ordered the judicial investigation to resume on 2 December 2011.[10]

7. On 24 February 2012, the Reserve International Co-Investigating Judge notified SOU Met and MEAS Muth that they were suspects in Case 003 and that they had the right to legal representation and to access to the Case File.[11]

8. On 22 October 2013, the Co-Investigating Judges notified the Parties that SOU Met had died,[12] and the proceedings against him were consequently terminated on 2 June 2015.[13]

9. On 26 November 2014, MEAS Muth was summoned by the International Co-Investigating Judge for an initial appearance at the ECCC scheduled on 8 December 2014,[14] which MEAS Muth disputed before the Co-Investigating Judges.[15] On 3 December 2014, the Pre-Trial Chamber recognised the legality of the summons.[16]

10. The International Co-Investigating Judge issued two arrest warrants against MEAS Muth on 10 December 2014[17] and 4 June 2015 after he failed to comply with the summons.[18]

11. On 3 March 2015, the International Co-Investigating Judge charged MEAS Muth *in absentia* with violations of Articles 500 (torture), 501 and 506 (premeditated homicide) of the Penal Code of the Kingdom of Cambodia 1956 ("1956 Penal Code"), crimes against humanity,

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[7] Closing Order, 28 November 2018, D267 ("Indictment (D267)"), paras 5, 7, 15, 27.
[8] Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.
[9] *See* ECCC Press Release, "Statement by the International Co-Investigating Judge", 10 October 2011, https://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge.
[10] Order on Resuming the Judicial Investigation, 2 December 2011, D28.
[11] Notification of Suspect's Rights [Rule 21(1)(d)], 24 February 2012, D30 (regarding MEAS Muth); Notification of Suspect's Rights [Rule 21(1)(d)], 24 February 2012, D31 (regarding SOU Met).
[12] Notification of the Death of a Suspect in Case File 003, 22 October 2013, D86.
[13] Dismissal of Allegations against SOU Met, 2 June 2015, D86/3.
[14] Summons to Initial Appearance, 26 November 2014, A66.
[15] Notice of Non-Recognition of Summons, dated 2 December 2014 and filed 3 December 2014, A67/1.1.
[16] Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Order on Suspect's Request concerning Summons Signed by One Co-Investigating Judge, 3 December 2014, D117/1/1/2.
[17] Arrest Warrant of MEAS Muth, dated 10 December 2014 and filed 11 December 2014, C1.
[18] Arrest Warrant of MEAS Muth, dated 4 June 2015 and filed 5 June 2015, C2.

and grave breaches of the Geneva Conventions,[19] detailing the charges in an annex to the decision.[20]

12. On 14 December 2015, at MEAS Muth's initial appearance, the International Co-Investigating Judge charged MEAS Muth with genocide, additional counts of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the 1956 Penal Code.[21]

13. On 10 January 2017, the International Co-Investigating Judge issued a first notice of conclusion of the judicial investigation against MEAS Muth.[22] On the same day, the International Co-Investigating Judge decided, in accordance with Rule 66*bis*, to limit the scope of the investigation by excluding alleged facts.[23] On 24 May 2017, the International Co-Investigating Judge issued a second notice of conclusion of the judicial investigation.[24]

14. On 25 July 2017, the International Co-Investigating Judge forwarded the Case File to the Co-Prosecutors, inviting them to file their final submissions pursuant to Rule 66(4).[25] On 14 November 2017, the National Co-Prosecutor filed a final submission requesting that all allegations against MEAS Muth be dismissed since he did not fall within the ECCC jurisdiction.[26] On the same day, the International Co-Prosecutor filed a final submission requesting MEAS Muth be indicted and tried.[27]

15. On 18 September 2017, the Co-Investigating Judges informed the Parties that due to a disagreement, they considered that separate and opposing closing orders were permissible under the applicable law and likely consequences for the appeal process under Rule 77(13).[28] On 17 September 2018, the Co-Investigating Judges registered their disagreement regarding the issuance of separate and opposing closing orders.[29]

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[19] Decision to Charge MEAS Muth *in Absentia*, 3 March 2015, D128.
[20] Notification of Charges against MEAS Muth, Annex to Decision to Charge MEAS Muth *in Absentia* (D128), dated 3 March 2015 and filed 12 September 2018, D128.1.
[21] Written Record of Initial Appearance of MEAS Muth, 14 December 2015, D174, pp. 2-9.
[22] Notice of Conclusion of Judicial Investigation against MEAS Muth, 10 January 2017, D225.
[23] Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66*bis*, 10 January 2017, D226.
[24] Second Notice of Conclusion of Judicial Investigation against MEAS Muth, 24 May 2017, D252.
[25] Forwarding Order pursuant to Internal Rule 66(4), 25 July 2017, D256.
[26] Final Submission concerning MEAS Muth pursuant to Internal Rule 66, 14 November 2017, D256/6.
[27] International Co-Prosecutor's Rule 66 Final Submission, 14 November 2017, D256/7.
[28] Order to Place Decisions regarding Disagreements onto Case File 003, 18 September 2017, D262.
[29] Indictment (D267), para. 27.

16. On 28 November 2018, the International Co-Investigating Judge issued the Indictment, committing MEAS Muth to trial,[30] while the National Co-Investigating Judge issued the Dismissal Order, dismissing the case against MEAS Muth.[31]

17. Following the Co-Lawyers for MEAS Muth's appeal to the Pre-Trial Chamber, as well as the International Co-Prosecutor's appeal against the Dismissal Order and the National Co-Prosecutor's appeal against the Indictment,[32] the Pre-Trial Chamber issued its *Considerations* on the respective appeals on 7 April 2021, stating that it lacked the required majority to decide on the merits of the appeals on Closing Orders.[33] The *Considerations* were publicly notified on the same day, and the International Co-Prosecutor proceeded with the preparation to file her pre-trial materials. On 27 April 2021, the Greffier of the Trial Chamber informed the Parties *via* email that the Trial Chamber would not accept any communications from the Parties because it had not been notified of the *Considerations* or received the Case File.[34]

18. On 19 April 2021, the International Co-Prosecutor requested that the Case File be forwarded to the Trial Chamber,[35] which the Co-Investigating Judges denied on 20 May 2021, noting that they lacked jurisdiction to consider the request.[36] Adding that "should no other path be found to progress this case either to trial or to a termination [...] [they] would [...] be open to receiving or requesting arguments about whether [they] have an exceptional residual jurisdiction of last resort to terminate the case".[37]

19. On 17 June 2021, MEAS Muth requested the Pre-Trial Chamber to terminate, seal and archive Case File 003.[38] On 21 June 2021, the International Co-Prosecutor requested the Pre-Trial Chamber to conclude the pre-trial stage of the proceedings in Case 003 on the basis of a joint confirmation from the Pre-Trial Chamber to refer MEAS Muth to the Trial Chamber.[39]

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[30] Indictment (D267).
[31] Order Dismissing the Case against MEAS Muth, 28 November 2018, D266.
[32] Considerations on Appeals against Closing Orders, 7 April 2021, D266/27 & D267/35 ("Pre-Trial Chamber's Considerations in Case 003 (D266/27 & D267/35)"), para. 30.
[33] Pre-Trial Chamber's Considerations in Case 003 (D266/27 & D267/35), p. 40.
[34] Email from Trial Chamber Greffier Suy-Hong Lim entitled "Re: Request for extension of time to file Rule 80 list of witnesses and experts", 27 April 2021, D271/1.1.41.
[35] International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, dated 19 April 2021, notified on 20 April 2021, D270.
[36] Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7 ("Decision on International Co-Prosecutor's Request to Forward Case 003 to Trial Chamber (D270/7)").
[37] Decision on International Co-Prosecutor's Request to Forward Case 003 to Trial Chamber (D270/7), para. 42.
[38] MEAS Muth's Request to Terminate, Seal and Archive Case File 003, dated 17 June 2021, notified in English on 22 June 2021 and notified in Khmer on 28 June 2021, D272.
[39] International Co-Prosecutor's Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 21 June 2021, D271/1.

On 8 September 2021, the Pre-Trial Chamber deemed both requests inadmissible,[40] while affirming its *Considerations* and declaring that it had completed all its duties in accordance with the ECCC legal framework.[41]

20. On 16 September 2021, the Co-Investigating Judges notified the Parties that unless the International Co-Prosecutor intends to seise the Supreme Court Chamber with the case, the Co-Investigating Judges' residual jurisdiction to terminate the case remained to be decided.[42] On the same day, the International Co-Prosecutor informed the Co-Investigating Judges of the intent to appeal the case to the Supreme Court Chamber.[43]

II. SUBMISSIONS

Admissibility

21. The International Co-Prosecutor submits 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.[44]

22. The International Co-Prosecutor contends that the Pre-Trial Chamber's and the Co-Investigating Judges' failure to forward Case 003 to the Trial Chamber perpetuates the procedural impasse and risks irreparable harm to the administration of justice in Case 003.[45] Asserting that seeking redress from judges who have decided that the case will be dismissed is illusory and would cause irreparable harm and a miscarriage of justice.[46]

23. The International Co-Prosecutor 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.[47]

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[40] Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for MEAS Muth Concerning the Proceedings in Case 003, 8 September 2021, D271/5 & D272/3 ("Consolidated Decision (D271/5 & D272/3)"), para. 78, Disposition.
[41] Consolidated Decision (D271/5 & D272/3), paras 64, 68, 76.
[42] Order to File Submissions on Residual Jurisdiction to Terminate Case 003, 16 September 2021, D273, paras 5-7.
[43] International Co-Prosecutor's Response to the Co-Investigating Judges' Request to Declare Whether She Intends to Seise the Supreme Court Chamber, 16 September 2021, D273/1.
[44] International Co-Prosecutor's Appeal (Doc. No. 3), paras 42-45.
[45] International Co-Prosecutor's Appeal (Doc. No. 3), paras 46-48.
[46] International Co-Prosecutor's Appeal (Doc. No. 3), paras 48-50.
[47] International Co-Prosecutor's Appeal (Doc. No. 3), para. 51.

24. In the response, MEAS Muth's Defence submits that the International Co-Prosecutor's Appeal is inadmissible and should be dismissed because no cogent reasons, error in reasoning or any change in circumstances are provided, that would justify the Supreme Court Chamber to depart from its Case 004/2 decision in Case 003.[48]

III. APPLICABLE LAW

25. Article 9 of the ECCC Law states that the Supreme Court Chamber, shall serve as both appellate chamber and final instance.

26. In accordance with the standard of appellate review against decisions set out in Rules 104(1) and 105(4), the Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds: a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a miscarriage of justice, or discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

IV. DISCUSSION

Admissibility of appeals under Internal Rules 104 and 105

27. At the outset, the Supreme Court Chamber notes that the ECCC legal compendium does not include provisions that support any Party catapulting an appeal from the Pre-Trial Chamber to the Supreme Court Chamber in proceedings, especially in light of the Pre-Trial Chamber's appellate jurisdiction at the pre-trial stage. 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.

28. Being cognisant of the Supreme Court Chamber's limited jurisdiction, the International Co-Prosecutor proceeded to file an Application concerning Case File 003 that does not involve an appeal against the Trial Chamber's decision or judgment, but rather an *appeal* against "the

[48] MEAS Muth's Response to 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, dated 25 October 2021, Doc. No. 3/1, paras 1-18.

Pre-Trial Chamber's failure to send Case 003 to Trial as required by the ECCC Legal framework."[49]

29. In determining the admissibility of this professed *appeal*, this Chamber must resolve whether the International Co-Prosecutor's *application* constitutes an appeal that it can be seised of. The application is titled as an *appeal*, citing Article 12(2) of the ECCC Agreement, Articles 33 new and 37 new of the ECCC Law, and Rule 21(1), which do not concern filing appeals before the Supreme Court Chamber, thus commingling the procedure for initiating appeals before it. Demonstrably, the mere fact that the International Co-Prosecutor does not rely on the relevant provisions to support appeals before this Chamber is telling, misleading and categorically incorrect. Without further ado, it is determined that the International Co-Prosecutor's *Application* does not constitute an appeal that falls within the competence of the Supreme Court Chamber under Rules 104 and 105. Aptly, in order to curb any potential confusion, the Supreme Court Chamber will refer to it as an 'Application' in the context of the current deliberations.

Admissibility of the 'Application' in the interests of justice

30. Further, in support of the admissibility argument, the International Co-Prosecutor implores the Supreme Court Chamber to exercise its inherent jurisdiction to preserve the interests of justice and maintain the integrity of the proceedings.[50] In sum, MEAS Muth's Defence requests the Chamber to summarily dismiss the Application.

31. Although the International Co-Prosecutor's Application has been determined to be inadmissible pursuant to Rules 104 and 105, legal clarity and certainty is sought on issues that the Chamber believes it has previously addressed in its decision pertaining to Case File 004/2,[51] which concerned an analogous scenario involving the Pre-Trial Chamber's *Considerations* regarding the Co-Investigating Judges' issuance of two conflicting Closing Orders.

32. The Chamber recalls that on occasions, it has been seised of requests for legal clarifications and certainty by a Party.[52] Requests for clarification or legal guidance may

[49] International Co-Prosecutor's Appeal (Doc. No. 3).
[50] International Co-Prosecutor's Appeal (Doc. No. 3), paras 42-45.
[51] 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)").
[52] 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

emanate from another judicial body or from a party to proceedings.[53] In Case 004/2, the International Co-Prosecutor sought legal clarity and certainty following the Pre-Trial Chamber's unanimous declaration that the Co-Investigating Judges' issuance of two conflicting Closing Orders was illegal, and 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"[54], while acknowledging the extraordinary circumstances that occurred before the Pre-Trial Chamber, leading to an impasse.[55] Consequently, the Chamber decided 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".[56] In the interest of justice and fairness, the Chamber then proceeded to exercise its discretion and considered the International Co-Prosecutor's motion.

33. In the same spirit, the Chamber acts in accordance with Article 9 of the ECCC Law, which states that it will serve as both an appellate chamber and a chamber of final instance. As a final instance chamber, it will however, not re-litigate similar issues, but for the strictly limited purpose of reiterating its unchanged position and correcting the misapprehensions expressed in the International Co-Prosecutor's Application, the Chamber will exercise its discretion and provide legal clarity and certainty in the interest of justice on: (i) the effect of the Pre-Trial Chamber's *Considerations* in Case 003; (ii) whether the Indictment was unanimously found to be valid;[57] and (iii) the status of Case File 003.

Merits

The effect of the Pre-Trial Chamber's Considerations in Case 003

34. The Chamber will not revisit the International Co-Prosecutor's arguments in paragraphs 53-68 in toto, that the issuance of the opposing closing order was not illegal, thus not null and void, and that the case should proceed to trial because this entails a reconsideration of the Pre-

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.
[53] 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.
[54] Case 004/2 Decision (E004/2/1/1/2), para. 59.
[55] Case 004/2 Decision (E004/2/1/1/2), para. 59.
[56] Case 004/2 Decision (E004/2/1/1/2), para. 60.
[57] International Co-Prosecutor's Appeal (Doc. No. 3), paras 53-82.

Trial Chamber's Consideration in Case 003. Recalling that the Pre-Trial Chamber's *Considerations* in Case 003 issued on 7 April 2021, unanimously declared "that the Co-Investigating Judges' issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC".[58] In the disposition, the Pre-Trial Chamber further stated that "[i]n accordance with Internal Rule 77(13), the present Decision is not subject to appeal".[59] Herein, the Pre-Trial Chamber's *Considerations*, which were publicly filed and unanimously pronounced not to be subject to appeal, are considered complete. The Chamber further recalls that in its Case 004/2 Decision, the disposition and declaration were unanimously agreed and endorsed by the five judges of the Pre-Trial Chamber who appended their respective signatures, it concluded that any considerations on the validity of the separate and conflicting closing orders was undoubtedly a redundant exercise.[60] It also observed that "[i]t 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".[61] The Pre-Trial Chamber, in particular to Case 003, took the same decision in the unanimous part of the disposition, which was signed by all five judges of the Pre-Trial Chamber. To this effect this Chamber's position remains unchanged.

35. As a result, the Supreme Court Chamber determines 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.

36. The Supreme Court Chamber's position, as well as its authority, should not be undermined by a flagrant disregard of its precedent in Case 004/2, which involved more or less comparable facts and conclusions by the Pre-Trial Chamber. This would cast doubt on the Supreme Court Chamber's pivotal decision, especially given the International Co-Prosecutor's zealous pursuit of legal clarity and certainty but preference for cherry-picking what suits their position. The International Co-Prosecutor has thus failed to persuade the Chamber to formally amend or override its precedent.

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[58] Pre-Trial Chamber's Considerations in Case 003 (D266/27 & D267/35), Disposition.
[59] Pre-Trial Chamber's Considerations in Case 003 (D266/27 & D267/35), Disposition.
[60] Case 004/2 Decision (E004/2/1/1/2), para. 53.
[61] Case 004/2 Decision (E004/2/1/1/2), para. 53.

Whether the Indictment was unanimously found to be valid?

37. The Opinions of the Judges of the Pre-Trial Chamber are as follows: the International Judges confirmed the validity of the Indictment ruling that "the Trial Chamber must be seised of Case 003 on the basis of the Indictment pursuant to Internal Rule 77(13)" and ruling "that the Dismissal Order is intrinsically and extrinsically null and void".[62] While relying on the same provisions of Rule 77(13), the National Judges declared "the two Closing Orders are of the same value and stand valid", and that "[t]the Co-Investigating Judges enjoy equal status, and in accordance with the exception of the presumption of innocence, the law in force does not allow the Pre-Trial Chamber to rule that the act of any Co-Investigating Judges has preponderance. Therefore, the two Closing Orders maintain the same value".[63] The National Judges then went on to say that "Case File 003 against the Charged Person MEAS Muth should be held at the ECCC archives."[64]

38. Upon reading the above Opinions, the International Co-Prosecutor has offered incorrect interpretations, claiming that the Pre-Trial Chamber unanimously deemed the Indictment valid, thus implying that the Indictment was not overturned by a supermajority.[65] It is posited that the fact that all five Pre-Trial Chamber Judges agreed that the Indictment against MEAS Muth was valid constitutes a supermajority decision under Rule 77(13).[66]

39. The Chamber recalls that the theme of unanimity is echoed as essential in the ECCC's judicial decision-making process in Article 4 of the ECCC Agreement, Articles 14 new of the ECCC Law, and Rules 98(4), 101(2), 111(6), 112(3), 12 ter (3), 39(5), and 71(3). Separate opinions, also referred to as *votum separatum* are anticipated, where a supermajority is unattainable. The Opinions of the Pre-Trial Chamber's National and International Judges are thus issued in accordance with the relevant provisions of the ECCC legal framework.[67] However, these Judges' Opinions are of no legal effect in the case.

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[62] Pre-Trial Chamber's Considerations in Case 003 (D266/27 & D267/35), Opinion of Judges OLIVIER BEAUVALLET and KANG JIN BAIK, Disposition, p. 145.
[63] Pre-Trial Chamber's Considerations in Case 003 (D266/27 & D267/35), Opinion of Judges PRAK KIMSAN, NEY THOL and HUOT VUTHY, paras 115-117.
[64] Pre-Trial Chamber's Considerations in Case 003 (D266/27 & D267/35), Opinion of Judges PRAK KIMSAN, NEY THOL and HUOT VUTHY, paras 115-118, p. 42.
[65] International Co-Prosecutor's Appeal (Doc. No. 3), paras 53-82.
[66] International Co-Prosecutor's Appeal (Doc. No. 3), para. 69.
[67] Several provisions of the Internal Rules support issuance of *opinions* including Rules 71(4)(d), 72(4)(e), 77(14), 78, 79, 101(2) & (6), and 102(1).

40. This Chamber's view is that in conformity with the ECCC legal framework, for a decision to have legal force and authority, it must be unanimous or be adopted by a supermajority.

41. The International Co-Prosecutor's claim that unanimity was achieved by computing a supermajority based on the Pre-Trial Chamber Judges' Opinions noted above, thereby deeming the Indictment valid, is duplicitous and fundamentally defective. Such misleading assertions have the effect of jeopardising judicial decisions. As evidenced by the International Co-Prosecutor's submissions, alternate and opposing interpretations are tendered to bolster their position. For example, that the conclusion is unanimous even if it was not included in the "joint disposition" of the *Considerations* or if the judges arrived at it by alternative reasons.[68] This also undercuts the argument that even if this Chamber decides there was no *de facto* unanimous ruling on the Indictment's validity, the Pre-Trial Chamber was obligated to send the matter to trial because the Indictment was not overturned by a supermajority.[69] This conflation demerits the International Co-Prosecutor's assertions entirely.

The status of Case File 003

42. Recalling its Case 004/2 Decision, the Supreme Court Chamber reiterates that in the absence of a definitive and enforceable Indictment, the International Co-Prosecutor's 'Application' for Case 003 to be forwarded to the Trial Chamber, cannot be entertained.

43. The Chamber also recalls that Rule 79(1) states that "the Trial Chamber shall be seised by an indictment from the Co-Investigating Judges or the Pre-Trial Chamber," but in Case 003, there has been no transmission of a case file by either the Co-Investigating Judges or the Pre-Trial Chamber, this unambiguously affirms that Case 003 was concluded during the pre-trial stage of the proceedings.

V. DISPOSITION

44. For the foregoing reasons, the Supreme Court Chamber **CLARIFIES** that in the absence of a definitive and enforceable indictment, Case 003 is terminated.

[68] International Co-Prosecutor's Appeal (Doc. No. 3), paras 70-71.
[69] International Co-Prosecutor's Appeal (Doc. No. 3), para. 76.

DISMISSES the International Co-Prosecutor's Application.

Judge Maureen HARDING CLARK appends a Dissenting Opinion.

Phnom Penh, 17 December 2021

Judge KONG Srim
President

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Florence Ndepele MWACHANDE-MUMBA

Judge MONG Monichariya

Judge YA Narin

DISSENTING OPINION OF JUDGE MAUREEN HARDING CLARK

I. PRELIMINARY REMARKS

1. At the outset, this Judge observes that the Application, albeit described as an appeal by the International Co-Prosecutor, is not an appeal against a trial judgment nor is it an immediate appeal under Internal Rule 104(4)(a). This Judge recalls that the Internal Rules provide in very explicit terms that there is no appeal from any decision of the Pre-Trial Chamber.[70]

2. This Application came before the Supreme Court Chamber when the International Co-Prosecutor requested permission to file an urgent motion in English only.[71] The request was refused as no exceptional circumstances were presented to warrant deviation from the requirement that all documents be filed in two of the Court's official languages.[72] On 8 October 2021, the International Co-Prosecutor filed her "*Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework*" in English and Khmer. The Application was received and allocated a temporary file number by the Supreme Court Chamber. The Chamber was unaware of the nature of the requests until the documents were filed and they were received on a without prejudice to jurisdiction basis.

3. Since then, the International Co-Prosecutor has filed an additional "Appeal" in similar terms in Case 004 involving the Charged Person YIM Tith.[73] The Co-Lawyers for both MEAS Muth[74] and YIM Tith[75] have opposed the applications. The detail contained in the submissions filed by all Parties together with the documents referred to in the footnotes informs the full procedural history. Until those documents were consulted, information not known of the failed attempts to prosecute any further cases since the trials in Cases 001 and 002 came to light. Cases 001 and 002 are the only cases ever brought to trial at the ECCC in its fifteen years of existence. The first Accused KAING Guek Eav *alias* "Duch" was

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[70] *See* Internal Rules 11(5) and (6), 38(3), 71(4)(c), 72(4)(d), 77(13), 77*bis*.
[71] International Co-Prosecutor's Request to File in One Language, 14 September 2021.
[72] Decision on International Co-Prosecutor's Request to File in One Language, 22 September 2021.
[73] 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 in Case 004").
[74] MEAS Muth's Response.
[75] 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, Doc. No. 2/1, 12 November 2021 ("YIM Tith's Response in Case 004").

tried as one of those most responsible for the crimes which occurred during the reign of Democratic Kampuchea ("DK"), whereas the Accused IENG Sary, IENG Thirith, NUON Chea and KHIEU Samphân were charged as senior leaders.[76]

4. The Supreme Court Chamber is in a position to respond with its observations and decision on the International Co-Prosecutor's Application. Unfortunately, I find myself in a single minority and writing a dissenting decision on this important application. My esteemed colleagues have determined that the International Co-Prosecutor cannot succeed in her application as it is their view that the Chamber has no jurisdiction to consider the application and certainly has no jurisdiction to grant any relief. That applies to the applications from both MEAS Muth and YIM Tith. We arrive at not dissimilar conclusions by different routes.

5. This is the sole dissenting opinion of the Chamber.

II. THE RETROSPECTOSCOPE

6. This Application is not one where a simple solution is available. An understanding of the fundamental disagreements between the Co-Prosecutors, the Co-Investigating Judges, the Judges of the Pre-Trial Chamber is necessary. The early procedural history is important and what follows is more detailed than is usual. The procedural history also contains clarifications as this dissenting opinion traces the events with the advantage of hindsight.

7. It is difficult to know where the starting point to these very difficult issues raised by the International Co-Prosecutor should lie. It is clear that the original disputes relating to Cases 003 and 004 did not commence with a legal impasse or a legal limbo arising from opposing Closing Orders or with the Pre-Trial Chamber's inability to reach judicially reasoned consensus on which of those Closing Orders should stand. The seeds of the current issue precede these applications by many years and go back to a disagreement between the Co-Prosecutors in 2008 which has persisted to the present day. The underlying differences were evident and should perhaps have been recognised by the Legal Office of the United

[76] *Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003, *entered into force* 29 April 2005 ("ECCC Agreement"), Art. 1; *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 10 August 2001, NS/RKM/1004/006, as amended 27 October 2004 ("ECCC Law"), Arts 1, 2*new*.

Nations ("UN") or by the negotiators who carefully nurtured the ECCC Law and the ECCC Agreement which created the ECCC. The dysfunction was openly flagged in Pre-Trial Chamber decisions,[77] in the International (Reserve) Co-Investigating Judges' public statements accompanying resignations,[78] and with the advantage of the retrospectoscope, the problem could quite literally have been nipped in the bud. That did not happen.

8. No investigations in Cases 003 and 004, which were opposed by the National Co-Prosecutor since 2008, have led to trials. Thirteen years of the investigations which proceeded - only because of the default mechanism – were conducted without input from the National Co-Prosecutor and for many years without the input of the National Co-Investigating Judge. This has brought us to where we are where the International Co-Prosecutor felt compelled to come before the Supreme Court Chamber in a final effort to bring the Charged Persons MEAS Muth and YIM Tith to trial.

9. Let us examine how we came to such an apparent impasse. Case 003 against MEAS Muth, the subject of the current decision, and 004 against YIM Tith are emblematic of the national, cultural and political differences between the persons who fill roles of National Co-Prosecutor, National Co-Investigating Judge and National Judges of the Pre-Trial Chamber, and perhaps beyond, and with their equivalent co-positions on the international side. Within those differences are found two diametrically opposing approaches leading to the fissures of misunderstanding which exist today. The International Judges are the foreign judges from other countries that often, but not always, share a common legal system with

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[77] *See e.g.*, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, D1/1.3, 18 August 2009 ("Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3)"; Considerations of the Pre-Trial Chamber regarding the International Co Prosecutor's Appeal against the Decision on Time Extension Request and Investigative Requests regarding Case 003, D20/4/4, 2 November 2011; 003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges DOWNING and CHUNG on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, 10 February 2012; Decision on YIM Tith's Appeal against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, D212/1/2/2, 4 December 2014; Decision on Ta An's Appeal against the Decision Rejecting His Request for Information concerning the Co-Investigating Judges' Disagreement of 5 April 2013, D208/1/1/2, 22 January 2015; Considerations on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision to Charge MEAS Muth *in Absentia*, D128/1/9, 30 March 2016; Considerations on MEAS Muth's Appeal against the International Co-Investigating Judge's Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, D120/3/1/8, 26 April 2016.

[78] *See e.g.*, ECCC Press Release, "Statement by the International Co-Investigating Judge [Siegfried BLUNK]", 10 October 2011, https://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge; ECCC Press Release, "Statement by the International Reserve Co-Investigating Judge [Laurent KASPER-ANSERMET]", 4 May 2012, https://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge. *See also* ECCC Press Release, "Press Statement by the National Co-Investigating Judge [YOU Bunleng]", 12 October 2011, https://www.eccc.gov.kh/en/node/17495.

Cambodia.[79] We are guests in Cambodia, appointed by the Secretary General of the UN and approved by the Supreme Council of Magistracy of the Kingdom of Cambodia. We do not speak the Khmer language, so legal nuances are lost and of importance, and we have not suffered the effects of the conflict which gave rise to these Extraordinary Chambers. It may therefore be easier for the international judges to stand back and objectively examine procedures and evidence within the framework of the ECCC Law, the ECCC Agreement and the Internal Rules, and to identify applicable international norms. National Judges working within Cambodian law and its national norms may view the ECCC law as tempered by national policy including national security fears. These difficulties were foreseen by the negotiators of the ECCC Law and the ECCC Agreement when the unique default procedures that favour prosecution, investigation and trial over understandable national and political preferences were included in the pre-trial and trial proceedings before the ECCC.[80] However, the extent of the role and strength of national sentiment and policy was not appreciated.

10. The problems that have afflicted the ECCC may well have been generated even before 20 November 2008, when the International Co-Prosecutor filed the Second Introductory Submission, requesting a judicial investigation against SOU Met and MEAS Muth for crimes within the jurisdiction of the Court,[81] and on the same day, submitted the "International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2)"[82] before the Pre-Trial Chamber, stating that the National Co-Prosecutor disagreed on prosecuting new crimes identified in the proposed Introductory Submission.[83] Intelligence dictates that this could not have occurred without some

[79] There have to date been 1 judge from Australia, 1 judge from Austria, 1 judge from Ireland, 1 judge from Japan, 1 judge from the Netherlands, 1 judge from New Zealand, 1 judge from Sri Lanka, 1 judge from Switzerland, 1 judge from Zambia, 2 judges from Germany, 2 judges from Republic of Korea, 2 judges from the U.S.A., 4 judges from France; and 1 prosecutor from Canada, 2 prosecutors from the U.S.A.

[80] *See* A Response Letter dated 3 March 2001 to the United Nations, published in Searching for the Truth, No. 19 July 2001, Annex 3 to the National Co-Prosecutor's Response to the Pre-Trial Chamber's Invitation (Doc. No. 10), Doc. No. 10.3 ("A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3)") at ERN 00295017; Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations, published in Searching for the Truth, No. 21 September 2001, Annex 4 to the National Co-Prosecutor's Response to the Pre-Trial Chamber's Invitation (Doc. No. 10), Doc. No. 10.4 ("Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4)") at ERN 00295019, 00295028; Open Society Institute, Political Interference at the Extraordinary Chambers in the Courts of Cambodia, Political Interference at the Extraordinary Chambers in the Courts of Cambodia, July 2010, p. 5.

[81] Co-Prosecutors' Second Introductory Submission regarding the Revolutionary Army of Kampuchea, D1, 20 November 2008.

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

[83] International Co-Prosecutor's Written Statement.

knowledge considerably before 20 November 2008 that cooperation was absent or had been withdrawn.

11. On 5 January 2009, the Co-Prosecutors issued a joint statement ("Statement of the Co-Prosecutors") outlining the disagreement that had been brought before the Pre-Trial Chamber.[84] In that Statement, the Co-Prosecutors admirably and transparently set out their respective positions:

> The International Co-Prosecutor has proposed the filing of two new Introductory Submissions and one Supplementary Submission, as according to him, there are reasons to believe that (1) the crimes described in those submissions were committed, (2) those crimes are within the jurisdiction of the Court, and (3) they should be investigated by the Co-Investigating Judges. He believes that this last set of cases to be prosecuted by this Court would lead to a more comprehensive accounting for the crimes that were committed under Democratic Kampuchea regime during 1975-1979. He does not believe that such prosecutions would endanger peace and stability.
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> The National Co-Prosecutor believes that these investigations should not proceed on account of (1) Cambodia's past instability and the continued need for national reconciliation, (2) the spirit of the agreement between the United Nations and the Government of Cambodia ("Agreement") and the spirit of the law that established this Court ("ECCC Law"), and (3) the limited duration and budget of this Court. She feels that this Court should instead prioritize the trials of the five suspects already detained, especially when, according to her, the Agreement and the ECCC Law envisioned only a small number of trials. She maintains that this Court's mandate can be adequately fulfilled by the prosecution of the suspects already detained.[85]

12. Little has changed in the ensuing twelve years. Apart from the National Co-Prosecutor's submission on 22 May 2009,[86] which was described by the International Co-Prosecutor as an "apparent afterthought",[87] adding her claim that the International Co-Prosecutor's actions (which was disputed) in conducting an investigation without her knowledge was an unlawful investigation,[88] the reasons for refusing to advance any further cases remain the same.

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[84] ECCC Press Release, "Statement of the Co-Prosecutors", 5 January 2009, https://www.eccc.gov.kh/sites/default/files/media/Statement_OCP_05-01-09_EN.pdf ("Co-Prosecutors 5 January 2009 Statement").

[85] Co-Prosecutors 5 January 2009 Statement.

[86] National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor's Additional Observations, Doc. No. 17, 22 May 2009 ("National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction").

[87] International Co-Prosecutor's Reply to the National Co-Prosecutor's Response to the Directions of the Pre-Trial Chamber to Provide Further Particulars, Doc. No. 8, 27 May 2009, para. 7.

[88] National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction, para. 86(C) ("The preliminary investigation conducted unilaterally by the International Co-Prosecutor is in violation of the ECCC Law, the

13. Any gaps in my knowledge of the origins of the differences in national and international approaches to these two Cases, which were filed confidentially and were not placed on the Case File pursuant to Internal Rule 71(2), are mended by the Pre-Trial Chamber's decision on the Co-Prosecutors' disagreement filed on 18 November 2008, which was declassified as public on 8 April 2021.[89] 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.[90] The action of the International Co-Prosecutor therefore, by operation of law, was executed in accordance with the default mechanism that the prosecution shall proceed.[91]

14. As this decision is an important turning point in ECCC jurisprudence, a detailed examination follows. The primary dispute between the Co-Prosecutors related to whether the Preamble to the ECCC Agreement determined the operation of the objects of the agreement. The International Co-Prosecutor's Written Statement also addresses the argument that the facts outlined in the further Introductory Submissions had already been covered in the First Introductory Submission.

15. Although all Judges of the Pre-Trial Chamber stated that they would decide the disagreement solely on the basis of the primary submissions being the International Co-Prosecutor's Written Statement filed on 20 November 2008 and the National Co-Prosecutor's Response to the International Co-Prosecutor's Written Statement[92] filed on 29 December 2008,[93] and that they would ignore the National Co-Prosecutor's new argument of unilateral preliminary investigation raised in her Response to the Pre-Trial

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Agreement and the Internal Rules, which require both Co-Prosecutors to work together in cooperation to accomplish each action").

[89] Decision on the Pre-Trial Chamber's Reclassification of Documents in Case File 003, D266/28 and D267/36, 8 April 2021.

[90] Corrigendum to the Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, D1/1.2, 31 August 2009 ("Corrigendum to the Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.2)"), para. 45.

[91] *See* ECCC Law, Art. 20*new*; Internal Rule 71(4)(C). *See also* Corrigendum to the Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.2), para. 45 ("As the Pre-Trial Chamber has not reached a decision on the Disagreement brought before it, Internal Rule 71(4)(c) provides that the action of the International Co-Prosecutor shall be executed. In the current case, this means that the International Co-Prosecutor shall, pursuant to Internal Rule 53(1), forward the New Introductory Submissions to the Co-Investigating Judges to open judicial investigations").

[92] National Co-Prosecutor's Response to the International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), Doc. No. 7, 29 December 2008 ("National Co-Prosecutor's Response to the International Co-Prosecutor's Written Statement").

[93] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), para. 24.

Chamber's Directions filed on 22 May 2009[94] that issue clearly exercised their minds. The National Judges noted that the International Co-Prosecutor raised the issue that the regularity of the preliminary investigation could be challenged under Internal Rule 76, before the Co-Investigating Judges.[95]

16. In the opinion provided by the National Judges, the conflicting arguments on the "fresh issues" were the primary focus. The National Judges fully addressed and recited in detail the National Co-Prosecutor's argument that she had not participated in the International Co-Prosecutor's preliminary investigations to obtain evidence related to new suspects nor did she delegate power to her staff to participate in such investigation, and that she remained unaware of the investigation until 18 November 2008.[96] The National Judges then recited the opposing version in equal detail including the International Co-Prosecutor's assertion of earlier joint cooperation on the agreed list of potential suspects *including the subjects of the Second and Third Introductory Submissions.*[97] The International Co-Prosecutor's position was that by the end of September 2006, two lists of suspects had been agreed[98] and that during the preliminary investigations conducted from July 2007 to November 2008, teams of National and International staff members of the Office of Co-Prosecutors continued to analyse the evidence.[99]

17. The conflicting recollections cannot both be correct, and no judicial resolution could be fairly achieved without further investigation of the Case File and work assignments. *Audi alteram partem* applies. However, without hearing or seeking further evidence, the National Judges made factual findings favouring the version of events presented by the National Co-Prosecutor. The National Co-Investigating Judge and the National Judges of the Pre-Trial Chamber have reiterated this version since and found that:

> The International Co-Prosecutor's preliminary investigation without prior notification or discussion in terms of cooperation with the National Co-Prosecutor

[94] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, para. 14; Opinion of Judges LAHUIS and DOWNING, para. 7.
[95] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, paras 11, 13. No such action was ever brought.
[96] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, paras 1-4.
[97] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, paras 5-11.
[98] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, para. 7.
[99] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, para. 10.

> is a violation of the ECCC Law, Agreement and the Internal Rules. The consequences of such violation may exist in the proceedings that follow and shall not be taken into consideration in relation to the disagreement.[100]

18. Various versions of this factual finding by the National Judges of the Pre-Trial Chamber have been used as their reasons for rejecting the legality of further investigative action since 2008.

19. The operative finding by the National Judges of the Pre-Trial Chamber was that:

> All of the facts and crime sites described in the Second and Third Introductory Submissions dated 20 November 2008, which was initiated by the International Co-Prosecutor, already existed in the First Introductory Submission. [...] In light of the above interpretation, we find that there is no reason for the International Co-Prosecutor to issue the Second and Third Submissions [...]. [...] Considering this finding, we find that it is not necessary to reason on the other arguments raised by the National Co-Prosecutor.[101]

20. It is noted that no reference was made to the role of the Preamble or to national security or reconciliation. The International Judges, in their reasoning, noted the different versions of the facts relating to the preliminary investigation,[102] but observed that based on her own assertions, the National Co-Prosecutor must have been aware of the matter on 29 December 2008 when she filed her Response to the International Co-Prosecutor's Written Statement as on her version of events, she would have first known of the preliminary investigation on 18 November 2008 when a meeting was held to discuss the filing of the New Submissions and would have had more details of the matter on 3 December 2008 when the International Co-Prosecutor's Written Statement was notified.[103] Since these assertions relating to the illegality of the preliminary investigations were made late on 22 May 2009, they could not be considered as part of the disagreement of which the Pre-Trial Chamber was seised, and therefore a discussion on her state of knowledge of the preliminary investigations was unnecessary.[104]

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[100] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, para. 19. How prophetic that remark was. The *unlawfulness* of the initial investigation to open a judicial investigation has been repeated by the National Judges of the Pre-Trial Chamber since.
[101] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges PRAK, NEY and HUOT, para. 30.
[102] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges LAHUIS and DOWNING, para. 4.
[103] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges LAHUIS and DOWNING, para. 4.
[104] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges LAHUIS and DOWNING, para. 4.

21. On the principal submission of disagreement, the International Judges found that there were some new facts and some overlap contained in the new Introductory Submissions, and they identified those new particular crimes and crime sites.[105] They examined the language of Internal Rule 53(1) that "[i]f the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they *shall* open a judicial investigation" and Internal Rule 50(1) which uses contrasting language that the "Co-Prosecutors *may* conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed".[106] Furthermore, the Judges observed that given the Forwarding Orders issued by the Co-Investigating Judges and the Supplementary Submissions jointly filed by the Co-Prosecutors, the position of the National Co-Prosecutor was inconsistent with the past practice, adopted jointly, of the two Co-Prosecutors, the ECCC Law and the Internal Rules.[107]

22. The International Judges stated that:

> In the current case, where the International Co-Prosecutor wants to open a judicial investigation into both new facts and facts overlapping with an ongoing investigation in order to cover the criminal responsibility *of new suspects*, there is no legal provision which would prevent him from filing a new Introductory Submission, even if some facts are, to some extent, already being investigated in another case.[108]

23. As the Pre-Trial Chamber was unable to reach the required super majority of votes on a decision concerning the Co-Prosecutors' disagreement on filing a new Introductory Submission, the default mechanism favouring continuance of prosecution was triggered pursuant to Article 20*new* of the ECCC Law and Internal Rule 71(4)(c). This decision has set the future trajectory of the ECCC.

24. On 7 September 2009, the Acting International Co-Prosecutor filed the Second Introductory Submission and forwarded the Case File to the Co-Investigating Judges

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[105] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges LAHUIS and DOWNING, paras 18-22.
[106] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges LAHUIS and DOWNING, para. 23.
[107] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges LAHUIS and DOWNING, paras 10-14. This raises the question that the National Co-Prosecutor may be mistaken in her memory that she or her team knew nothing of the investigation into the additional suspects the subject of the Second and Third Introductory Submissions.
[108] Considerations regarding the Disagreement between the Co-Prosecutors (D1/1.3), Opinion of Judges LAHUIS and DOWNING, para. 27 (emphasis added).

pursuant to Internal Rule 53.[109] On 31 October 2014, the Acting International Co-Prosecutor filed the Supplementary Submission containing further allegations.[110] The National Co-Prosecutor did not engage in the process.

25. On 29 April 2011, the Co-Investigating Judges issued a notice of conclusion declaring that the judicial investigation into Case 003 was concluded.[111]

26. On 9 October 2011, the International Co-Investigating Judge resigned,[112] and the Reserve International Co-Investigating Judge ordered the judicial investigation to resume on 2 December 2011.[113]

27. Confidential disagreements between the Co-Investigating Judges in this Case were registered on 7 February 2013, 22 February 2013, 17 July 2014, 16 January 2017 and 17 September 2018.[114] These disagreements remain confidential.

28. On 10 October 2011, the International Co-Investigating Judge BLUNK issued a public statement, informing of his resignation and noting that:

> Although the International Co-Investigating Judge will not let himself be influenced by [the statements of the Cambodian Prime Minister, the Cambodian Minister of Information and the Cambodian Foreign Minister], his ability to withstand such pressure by Government officials and to perform his duties independently, could always be called in doubt, and this would also call in doubt the integrity of the whole proceedings in Cases 003 and 004.
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> Because of these repeated statements, which will be perceived as attempted interference by Government officials with Cases 003 and 004, the International Co-Investigating Judge has submitted his resignation [...].[115]

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[109] Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, D1/1, 7 September 2009.
[110] International Co-Prosecutor's Supplementary Submission regarding Crime Sites related to Case 003, D120, 31 October 2014.
[111] Notice of Conclusion of Judicial Investigation, D13, 29 April 2011.
[112] *See* ECCC Press Release, "Statement by the International Co-Investigating Judge", 10 October 2011, https://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge
[113] Order on Resuming the Judicial Investigation, D28, 2 December 2011.
[114] Closing Order, D267, 28 November 2018 ("Indictment (D267)"), paras 5, 7, 15, 27.
[115] ECCC Press Release, "Statement by the International Co-Investigating Judge [Siegfried BLUNK]", 10 October 2011, https://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge.

29. On 24 February 2012, the International Reserve Co-Investigating Judge notified SOU Met and MEAS Muth that they were suspects in Case 003 and that they had the right to legal representation and to access to the Case File.[116]

30. On 4 May 2012, the International Reserve Co-Investigating Judge KASPER-ANSERMET issued a public press release, informing of his resignation and stating that:

> Judge Laurent Kasper-Andermet's (sic) authority to investigate cases 003 and 004 has been constantly contested by the National Co-Investigating Judge, You Bunleng, despite the opinion issued by Pre-Trial Chamber Judges Downing and Chung confirming [his authority and power to act accordingly].
>
> Judge You Bunleng's active opposition to investigations into cases 003 and 004 has led to a dysfunctional situation within the ECCC. [...] Furthermore, internal investigations have been opened by Judge Laurent Kasper-Ansermet under Internal Rule 35 for "interference with the administration of justice".
>
> Judge Laurent Kasper-Ansermet recently organised an informal meeting with Judge You Bunleng, during which the latter refused to discuss cases 003 and 004. On 27 February 2012 Judge Bunleng issued a written order to Judge Laurent Kasper-Ansermet, demanding that he immediately cease his "unlawful activity". This ultimatum was reiterated last week.
>
> In view of the victims' right to have investigations conducted in a proper manner and despite his determination to do so, Judge Laurent Kasper-Ansermet considers that the present circumstances no longer allow him to properly and freely perform his duties. He has tendered his resignation [...].[117]

31. The investigation continued. On 22 October 2013, the Co-Investigating Judges notified the Parties that SOU Met had died,[118] and the proceedings against him were terminated on 2 June 2015.[119]

32. On 26 November 2014, MEAS Muth was summoned by the International Co-Investigating Judge for an initial appearance at the ECCC scheduled on 8 December 2014,[120] which

[116] Notification of Suspect's Rights [Rule 21(1)(d)], D30, 24 February 2012 (regarding MEAS Muth); Notification of Suspect's Rights [Rule 21(1)(d)], D31, 24 February 2012 (regarding SOU Met).
[117] ECCC Press Release, "Statement by the International Reserve Co-Investigating Judge [Laurent KASPER-ANSERMET]", 4 May 2012, https://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge.
[118] Notification of the Death of a Suspect in Case File 003, D86, 22 October 2013.
[119] Dismissal of Allegations against SOU Met, D86/3, 2 June 2015.
[120] Summons to Initial Appearance, A66, 26 November 2014.

MEAS Muth disputed before the Co-Investigating Judges.[121] On 3 December 2014, the Pre-Trial Chamber unanimously upheld the legality of the summons.[122]

33. MEAS Muth did not appear to the summons. The International Co-Investigating Judge, acting alone, issued two arrest warrants against MEAS Muth on 10 December 2014[123] and 4 June 2015 after he failed to comply with the summons.[124]

34. On 3 March 2015, the International Co-Investigating Judge, again acting alone, charged MEAS Muth *in absentia* with violations of Articles 500 (torture), 501 and 506 (premeditated homicide) of the Penal Code of the Kingdom of Cambodia 1956 ("1956 Penal Code"), crimes against humanity, and grave breaches of the Geneva Conventions,[125] detailing the charges in an annex to the decision.[126]

35. On 14 December 2015, MEAS Muth appeared before the International Co-Investigating Judge alone who charged him with genocide and with additional counts of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the 1956 Penal Code.[127]

36. On 10 January 2017, the International Co-Investigating Judge issued a first notice of conclusion of the judicial investigation against MEAS Muth.[128] On the same day, the International Co-Investigating Judge decided, in accordance with Internal Rule 66*bis*, to limit the scope of the investigation by excluding certain alleged facts.[129] On 24 May 2017, the International Co-Investigating Judge issued a second notice of conclusion of the judicial investigation.[130] The National Co-Prosecutor did not engage in any of these steps or processes. **The principle of continuation of judicial investigation and prosecution was upheld by the default mechanism of the ECCC legal framework.**[131]

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[121] Notice of Non-Recognition of Summons, A67/1.1, dated 2 December 2014 and filed 3 December 2014.
[122] Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Order on Suspect's Request concerning Summons Signed by One Co-Investigating Judge, D117/1/1/2, 3 December 2014.
[123] Arrest Warrant of MEAS Muth, C1, dated 10 December 2014 and filed 11 December 2014.
[124] Arrest Warrant of MEAS Muth, C2, dated 4 June 2015 and filed 5 June 2015.
[125] Decision to Charge MEAS Muth *in Absentia*, D128, 3 March 2015.
[126] Notification of Charges against MEAS Muth, Annex to Decision to Charge MEAS Muth *in Absentia* (D128), D128.1, dated 3 March 2015 and filed 12 September 2018.
[127] Written Record of Initial Appearance of MEAS Muth, D174, 14 December 2015, pp. 2-9.
[128] Notice of Conclusion of Judicial Investigation against MEAS Muth, D225, 10 January 2017.
[129] Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66*bis*, D226, 10 January 2017.
[130] Second Notice of Conclusion of Judicial Investigation against MEAS Muth, D252. 24 May 2017.
[131] *See* ECCC Law, Arts. 20*new*, 23*new*; Internal Rules 71(4)(C), 72(4)(d).

37. On 25 July 2017, the International Co-Investigating Judge forwarded the Case File to the Co-Prosecutors, inviting them to file their final submissions pursuant to Internal Rule 66(4).[132] On 14 November 2017, the National Co-Prosecutor filed a final submission requesting that all allegations against MEAS Muth be dismissed since he did not fall within the ECCC jurisdiction.[133] On the same day, the International Co-Prosecutor filed a final submission requesting MEAS Muth be indicted and tried for a series of very serious crimes charged.[134]

38. On 18 September 2017, the Co-Investigating Judges informed the Parties in Case 003, by their "Order to Place Decisions regarding Disagreements onto Case File 003", that due to a disagreement, they considered that separate and opposing closing orders were permissible under the applicable law and likely consequences for the appeal process under Internal Rule 77(13).[135] No response was filed by any Party. One year later, on 17 September 2018, the Co-Investigating Judges registered their disagreement regarding the issuance of separate and opposing closing orders.[136]

39. The Closing Orders were filed simultaneously on 28 November 2018: The International Co-Investigating Judge issued the Indictment, committing MEAS Muth to trial,[137] while the National Co-Investigating Judge issued the Dismissal Order, dismissing the Case against MEAS Muth.[138]

40. On 8 April 2019, the Co-Lawyers for MEAS Muth ("Co-Lawyers")[139] and the National Co-Prosecutor[140] appealed against the Indictment to the Pre-Trial Chamber. The International Co-Prosecutor appealed against the Dismissal Order.[141] Following the public reading of the Report of the Case and Appeals,[142] oral arguments on the appeals were heard

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[132] Forwarding Order pursuant to Internal Rule 66(4), D256, 25 July 2017.
[133] Final Submission concerning MEAS Muth pursuant to Internal Rule 66, D256/6, 14 November 2017.
[134] International Co-Prosecutor's Rule 66 Final Submission, D256/7, 14 November 2017.
[135] Order to Place Decisions regarding Disagreements onto Case File 003, D262, 18 September 2017 *referring to* Decision on AO An's Request for Clarification, 5 September 2017, D262.1; Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2. On 16 August 2018, the Co-Investigating Judges issued two separate and conflicting Closing Orders in Case 004/2.
[136] Indictment (D267), para. 27.
[137] Indictment (D267).
[138] Order Dismissing the Case against MEAS Muth, D266, 28 November 2018.
[139] MEAS Muth's Appeal against the International Co-Investigating Judge's Indictment, D267/4, 8 April 2019.
[140] National Co-Prosecutor's Appeal against the International Co-Investigating Judge's Closing Order in Case 003, D267/3, 5 April 2019.
[141] International Co-Prosecutor's Appeal of the Order Dismissing the Case against MEAS Muth (D266), D266/2, 8 April 2019.
[142] Case 003, Report of the Case and Appeals, D266/15 and D267/20, 27 November 2019.

in camera on 27, 28 and 29 November 2019.[143] On 7 April 2021, the Pre-Trial Chamber issued its *Considerations* on the respective appeals, stating that it lacked the required majority to decide on the merits of the appeals on Closing Orders.[144] All five Judges considered that the actions of the Co-Investigating Judges in issuing the two conflicting Closing Orders were unlawful.[145] The National Judges of the Pre-Trial Chamber found that both the Indictment and the Dismissal Order are of the same value and stand valid[146] while the International Judges confirmed the Indictment and found the Dismissal Order null and void.[147]

41. The *Considerations* were publicly notified on the same day, and the International Co-Prosecutor, acting on the basis that there had been no super-majority upholding the Dismissal Order, proceeded with preparations to file her pre-trial materials. On 27 April 2021, in an exercise of *déjà vue*, the Greffier of the Trial Chamber informed the Parties *via* email that the Trial Chamber would not accept any communications from the Parties because it had not been notified of the *Considerations* or received the Case File.[148]

42. On 19 April 2021, the International Co-Prosecutor requested the Co-Investigating Judges to forward the Case File to the Trial Chamber.[149] The Co-Investigating Judges denied the request on 20 May 2021, stating that they lacked jurisdiction to consider the request because the Case was still pending with the Pre-Trial Chamber for the Civil Party Co-Lawyers' appeal against the Order on the Admissibility of the Civil Party Applicants as well as the International Co-Prosecutor's Internal Rule 80(1) request to the Trial

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[143] The public session of the Hearing included the Introduction and the reading of the Case Report on 27 November 2019 as well as the Questions by the Judges to the Parties on 29 November 2019. *See* Case 003, Transcript of Appeal Hearing in Case 003, D266/16.1 and D267/21.1, dated 27 November 2019 and filed on 11 February 2020 (CS); Case 003, Transcript of Appeal Hearing in Case 003, D266/17.1 and D267/22.1, dated 28 November 2019 and filed on 11 February 2020 (CS); Case 003, Transcript of Appeal Hearing, D266/18.1 and D267/23.1, dated 29 November 2019 and filed on 11 February 2020 (CS); Case 003, Transcript of Appeal Hearing, D266/18.2 and D267/23.2, dated 29 November 2019 and filed on 11 February 2020.

[144] Considerations on Appeals against Closing Orders, D266/27 & D267/35 7 April 2021 ("Considerations on Appeals against Closing Orders (D266/27 & D267/35)"), p. 40.

[145] Considerations on Appeals against Closing Orders (D266/27 & D267/35), p.40.

[146] Considerations on Appeals against Closing Orders (D266/27 & D267/35), Opinion of Judges PRAK, NEY and HUOT, paras 115-118.

[147] Considerations on Appeals against Closing Orders (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, p. 145.

[148] Email from Trial Chamber Greffier Suy-Hong Lim entitled "Re: Request for extension of time to file Rule 80 list of witnesses and experts", D271/1.1.41, 27 April 2021.

[149] International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, D270, 19 April 2021.

Chamber.[150] However, the Co-Investigating Judges advised the Parties that "should no other path be found to progress this case either to trial or to a termination [...] [they] would [...] be open to receiving or requesting arguments about whether [they] have an exceptional residual jurisdiction of last resort to terminate the case".[151]

43. On 17 June 2021, the Co-Lawyers for MEAS Muth requested the Pre-Trial Chamber to terminate, seal and archive Case File 003.[152] On 21 June 2021, the International Co-Prosecutor requested the Pre-Trial Chamber to conclude the pre-trial stage of the proceedings in Case 003 on the basis of a joint confirmation from the Pre-Trial Chamber to refer MEAS Muth to the Trial Chamber.[153] On 8 September 2021, the Pre-Trial Chamber deemed both requests inadmissible,[154] while affirming its *Considerations* and declaring that it had completed all its duties in accordance with the ECCC legal framework.[155]

44. On 16 September 2021, the Co-Investigating Judges notified the Parties that unless the International Co-Prosecutor intends to seise the Supreme Court Chamber with the Case, the Co-Investigating Judges' residual jurisdiction to terminate the Case remained to be decided.[156] On the same day, the International Co-Prosecutor informed the Co-Investigating Judges that she intended to appeal the Case to the Supreme Court Chamber.[157] 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,

[150] Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber, D270/7, 20 May 2021 ("Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber (D270/7)"), para. 40.
[151] Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber (D270/7), para. 42, *see also* paras 35-37.
[152] MEAS Muth's Request to Terminate, Seal and Archive Case File 003, D272, dated 17 June 2021, notified in English on 22 June 2021 and notified in Khmer on 28 June 2021.
[153] International Co-Prosecutor's Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, D271/1, 21 June 2021.
[154] Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for MEAS Muth concerning the Proceedings in Case 003, D271/5 & D272/3, 8 September 2021 ("Consolidated Decision (D271/5 & D272/3)"), para. 78, Disposition.
[155] Consolidated Decision (D271/5 & D272/3), paras 64, 68, 76.
[156] Order to File Submissions on Residual Jurisdiction to Terminate Case 003, D273, 16 September 2021, paras 5-7.
[157] International Co-Prosecutor's Response to the Co-Investigating Judges' Request to Declare Whether She Intends to Seise the Supreme Court Chamber, D273/1, 16 September 2021.

> 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.[158]

45. As has been recited in detail above in the procedural history, this Case has been dogged by disagreement from its very inception in 2008. It is caught between two conflicting opinions indicative of the deep fissure of interpretation of the fundamental purpose of the ECCC. On the national side, the Case is seen as unlawful from birth and at variance with the political background against which the foundation documents creating the ECCC must be interpreted. From the international side, the ECCC Law and the ECCC Agreement are interpreted as clear international agreements binding on both sides where political opinion or policy forms no part of the international rules of interpretation. *Pacta sunt servanda* applies. They see this accusation against MEAS Muth as legitimate for trial.

III. ADMISSIBILITY

A. SUBMISSIONS

46. The International Co-Prosecutor submits that the Appeal is admissible under Article 12(2) of the ECCC Agreement, Articles 33 new and 37 new of the ECCC Law and Internal 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.[159]

47. The International Co-Prosecutor bases her argument for intervention by this Chamber on a number of premises: that the failure on the part of the Pre-Trial Chamber and the Co-Investigating Judges to forward Case 003 to the Trial Chamber perpetuates the procedural impasse and risks causing irreparable harm to the administration of justice in Case 003.[160] She asserts that based on past experience, any effort at returning the case to

[158] Co-Investigating Judges' Notification to the Parties in Cases 003 and 004, 22 November 2021.
[159] International Co-Prosecutor's Application, paras 42-45.
[160] International Co-Prosecutor's Application, paras 46-48.

the investigating judges seeking redress from judges who have decided that the case will be dismissed is illusory and would cause irreparable harm and a miscarriage of justice.[161]

48. The Defence Co-Lawyers for MEAS Muth responded to the International Co-Prosecutor's Appeal, submitting that the Appeal is inadmissible, and that Supreme Court Chamber should summarily dismiss all arguments therein,[162] because:

> (1) the issuance of two Closing Orders was illegal, and that the International Co-Prosecutor presents no cogent reasons, error in reasoning or change in circumstances to deviate from the Supreme Court Chamber's Decision in Case 004/2;[163]
>
> (2) the Closing Orders are null and void and that the International Co-Prosecutor provides irrelevant factors for the Supreme Court Chamber's consideration in Case 003;[164]
>
> (3) the International Co-Prosecutor misrepresents the Pre-Trial Chamber's Case 003 *Considerations* by stating that the Pre-Trial Chamber unanimously upheld the Indictment in Case 003;[165]
>
> (4) Case 003 cannot proceed to trial because there is no valid Indictment.[166]

49. The International Co-Prosecutor informed the Supreme Court Chamber that she does not intend to file a reply to MEAS Muth's Response.[167]

B. DISCUSSION

1. Applicable Law

50. 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*

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[161] International Co-Prosecutor's Application, paras 48-50.
[162] MEAS Muth's Response to the International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Requested by the ECCC Legal Framework, Doc. 3/1, 25 October 2021 ("MEAS Muth's Response"), paras 1, 18.
[163] MEAS Muth's Response, paras 1-5.
[164] MEAS Muth's Response, paras 6-10.
[165] MEAS Muth's Response, paras 11-13.
[166] MEAS Muth's Response, paras 14-17.
[167] International Co-Prosecutor's Notice of her Intent Not to File a Reply to MEAS Muth's Response 3/1, 27 October 2021, 3/1/1.

and those who were most responsible during the period from 17 April 1975 to 6 January 1979.

51. Article 9*new* of the ECCC Law provides that the Supreme Court Chamber shall serve as both appellate and final instance chamber.

52. Concerning the disagreements between the Co-Prosecutors, Internal Rule 71 provides settlement procedures:

> Rule 71. Settlement of Disagreements between the Co-Prosecutors
>
> 1. In the event of disagreement between the Co-Prosecutors, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Prosecutors.
>
> 2. Within 30 (thirty) days, either Co-Prosecutor may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges, with a copy to the other Co-Prosecutor. [...] The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases [where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs]. The Greffier of the Co-Prosecutors shall forward a copy of the case file to the Chamber immediately.
>
> 3. Throughout this dispute settlement period, the Co-Prosecutors shall continue to seek consensus. However, the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning:
>
> a) an Introductory Submission;
>
> b) a Supplementary Submission relating to new crimes;
>
> c) a Final Submission; or
>
> d) a decision relating to an appeal.
>
> in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.
>
> 4. The Chamber shall settle the disagreement forthwith, as follows:
>
> [...]

> c) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 20 new of the ECCC law, the default decision shall be that the order or investigative act done by one Co-Prosecutor shall stand, or that action or decision proposed to be done by one Co-Prosecutor shall be executed. [...].

53. Article 20*new* of the ECCC Law provides that "[i]f there is no majority as required for a decision [of the Pre-Trial Chamber on the disagreement between the Co-Prosecutors], the prosecution shall proceed."

54. Regarding the disagreements between the Co-Investigating Judges, Internal Rule 72 specifies the procedures of settlement as the following:

> Rule 72. Settlement of Disagreements between the Co-Investigating Judges
>
> 1. In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.
>
> 2. Within 30 (thirty) days, either Co-Investigating Judges may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges, with a copy to the other Co-Investigating Judge. [...] The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases [where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs]. The Greffier of the Co-Investigating Judges shall forward a copy of the case file to the Chamber immediately.
>
> 3. Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However, the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning:
>
> a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs;
>
> b) notification of charges; or
>
> c) an Arrest and Detention Order,
>
> in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.

4. The Chamber shall settle the disagreement forthwith, as follows:

[…]

d) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 23 new of the ECCC law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. […].

55. Article 23*new* of the ECCC Law provides that "[i]f there is no majority as required for a decision [of the Pre-Trial Chamber on the disagreement between the Co-Investigating Judges], the investigation shall proceed."

56. Internal Rule 77(13), in relevant part, states that:

> A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the default decision of the Chamber shall be as follows:
>
> […]
>
> b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

57. Pursuant to Internal Rule 77(13), the Pre-Trial Chamber's decision on appeals against closing orders is not subject to appeal.

58. Internal Rule 77(14) provides that the Pre-Trial Chamber's decision on appeals against closing order shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the Parties by the Greffier of the Pre-Trial Chamber.

59. According to Internal Rule 69, upon notification of the Pre-Trial Chamber's decision on appeals against a closing order pursuant to Internal Rules 77(13) and (14), the Greffier of the Office of the Co-Investigating Judges shall forward the case file to the Greffier of the Trial Chamber in accordance with Internal Rule 69(2)(a).

60. With respect to the jurisdiction of the Supreme Court Chamber, Internal Rule 104(1) provides that:

> The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds:
>
> a) an error on a question of law invalidating the judgment or decision; or
>
> b) an error of fact which has occasioned a miscarriage of justice.
>
> Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.
>
> For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.

Jurisdiction of the Supreme Court Chamber

61. While described as an appeal, the International Co-Prosecutor's Application is not in fact directed to the Pre-Trial Chamber's decision or reasoning in either Case 003 or Case 004 but to the failure to send Cases 003 and 004 to trial *as required by the ECCC legal framework.* No issue on jurisdiction arises as to whether this is an appeal against a decision of the Pre-Trial Chamber. The Application is basically a request for clarity: does the fact that all Judges of the Pre-Trial Chamber stated that the Indictment was valid mean that the Case 003 must go to trial? If the interpretation which the International Co-Prosecutor puts on the consequences of the reasoning and disposition of the Pre-Trial Chamber's determination of the conflicting Closing Orders succeeds, the Indictment stands, and a trial should follow. If she fails to establish this, then the argument falls, and the Case should be terminated. In either case, the Parties wish the Supreme Court Chamber to provide clarity and finality. While attempting to provide clarity and finality, this dissenting opinion takes a different approach to those alternatives and to the Supreme Court Chamber's inherent powers.

62. On 10 August 2020, this Chamber received and then provided finality in a similar application of the International Co-Prosecutor in Case 004/2 involving the Charged Person AO An.[168]

[168] 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 ("Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2).

63. There are distinctions between the cases. The International Co-Prosecutor's Immediate Appeal in Case 004/2[169] was not based on the Pre-Trial Chamber's *Considerations* in Case 004/2 but was against a public joint statement issued by the Judges of the Trial Chamber on 3 April 2020, noting that "issuing a formal decision of the Trial Chamber is not possible" given the disagreement between the National and International Judges on the Trial Chamber's seisin of and jurisdiction over the Case File 004/2.[170] The National Judges stated that *there will not be a trial of AO An now or in the future.*[171] The immediate appeal was against that statement which the International Co-Prosecutor claimed effectively terminated Case 004/2.

64. The International Co-Prosecutor relies on findings in that case to support her argument on inherent jurisdiction and in particular where the Chamber stated 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* and that [*m]aintaining a judicial limbo fundamentally breaches those legitimate expectations.*[172] The Chamber thus determined that as the final chamber of the ECCC, it had inherent jurisdiction to receive the application as the Chamber *has a duty to bring clarity and finality to such situations*, noting that *[l]egal stalemates are indicative of failure of the judicial system.*[173] This Chamber determined that cases should not find themselves in a legal limbo unable to go forward for trial and unable to be dismissed and archived. This Chamber determined that we the Supreme Court Chamber had the duty and obligation to provide clarity and finality in unresolved disputes whether in law or on the facts.

65. Having exercised our inherent jurisdiction in Case 004/2, we should do likewise in this Case for a number of reasons, not least of which, is an explanation to the victims who filed their claims, who provided statements to the investigators and who were prepared to give live testimony in court and to the international community who observe these proceedings

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[169] Case 004/2/07-09-2009-ECCC/TC/SC, International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, E004/2/1, 4 May 2020 ("International Co-Prosecutors' Immediate Appeal in Case 004/2 (E004/2/1)").
[170] ECCC Press Release, "Statement of the Judges of the Trial Chamber of the ECCC regarding Case 004/2 Involving AO An", 3 April 2020, https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao
[171] ECCC Press Release, "Statement of the Judges of the Trial Chamber of the ECCC regarding Case 004/2 Involving AO An", 3 April 2020, https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao
[172] Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para 60.
[173] Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para 64.

with interest as a possible formula for resolving future internal conflicts where crimes against humanity and war crimes of the horror and magnitude of those that occurred during the reign of DK are committed. Second, it must be recalled that courts exist to administer justice and to apply the Rule of Law which means without negative or positive bias towards any party and without fear of repercussions from any outside source. As part of the exercise of justice, the highest courts of every state must be accessible to provide remedies when there has been a failure of inferior courts to apply the law, where the law has been misapplied, where facts have been manipulated and where decisions are made arbitrarily as for instance when reasons are not provided or for other reasons when it is demonstrated that the errors of law have been made. All legal systems operating in a democracy provide access to legal justice whether by way of Judicial review or by Cassation whenever a want of jurisdiction or an excess of jurisdiction in the actions of judges of lower courts is identified.[174] Those remedies apply equally to administrative decisions outside of the Criminal Law system and are there to ensure that the law applies to everyone regardless of status and that decisions that no reasonable decision-making body could make are set aside and quashed. It is especially appropriate that there is an ultimate court independent of outside influences which can review the actions of lower courts from which there is no procedural or statutory right of appeal. In Cambodia, the Cambodian Code of Criminal Procedure provides such remedies in Article 419. In Common Law systems, the prerogative writs of certiorari and mandamus are available to quash the decisions of lower courts which are made in excess of jurisdiction, for want of jurisdiction or for abuse of process. These remedies bear a strong similarity to the remedy provided for in Article 419 of the Cambodian Code of Criminal Procedure.

66. In this Case, the International Co-Prosecutor is unfortunately correct in her argument that without the Supreme Court Chamber's intervention, the procedural impasse continues.[175] The Pre-Trial Chamber has indicated that it can do no more and determined that it has no further role.[176]

67. It must be recalled that the whole Chamber unanimously held that the Co-Investigating Judges' issuance of the two Closing Orders was illegal, violating the legal framework of

[174] For the Supreme Court Chamber's role as "both appellate chamber and final instance", see Case 001, Appeal Judgement, F28, 3 February 2012, paras 13, 28-31; Case 002/01, Appeal Judgment, F36, 23 November 2016, para. 199.
[175] International Co-Prosecutor's Application, para. 51.
[176] Consolidated Decision (D271/5 & D272/3), paras 69-78.

the ECCC.[177] However, all the judges then went on to consider the validity of the impugned Closing Orders: the National and the International Judges differed in their views. In a partly incoherent and inconsistent reasoning the National judges agreed on the validity of both the Dismissal and the Indictment, while the International judges upheld the Indictment and rejected the Dismissal.[178] This is a perplexing and irrational decision that must be grasped by this Supreme Court Chamber.

68. There are other disturbing aspects to the considerations. While the detailed analysis of the Closing Orders by the International Judges of the Pre-Trial Chamber is careful and illustrative of the gravity of the crimes alleged and the alleged roles of MEAS Muth in his various positions as a military leader of high position within DK, this must be contrasted against the short and formulaic dismissal of the totality of the evidence by the National Judges of the Pre-Trial Chamber on the basis of that MEAS Muth was neither a senior leader nor most responsible. It should be recalled that investigations, admittedly conducted by one Co-Prosecutor and three International Co-Investigating Judges acting alone have proceeded, first on a reason to believe and then on the balance of probabilities basis, to indicate that MEAS Muth was a person of authority, very closely allied with Ta Mok, holding the positions of the Division 164 Commander in 1975,[179] member of the General Staff Committee,[180] assistant in 1975 and reserve member of the Central Committee in late 1978, perceived as the representative of the Central Committee during certain missions outside of Kampong Som Autonomous Sector,[181] Secretary of Kampong Som Autonomous Sector,[182] and eventually deputy to SON Sen who was Commander of the Revolutionary

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[177] Considerations on Appeals against Closing Orders (D266/27 & D267/35), p.40.
[178] *See* Considerations on Appeals against Closing Orders (D266/27 & D267/35), Opinion of Judges PRAK Kimsan, NEY Thol and HUOT Vuthy, paras 115, 118 ("the two Closing Orders are of the same value and stand valid"); Considerations on Appeals against Closing Orders (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, p. 145 ("FIND that the Dismissal Order is intrinsically and extrinsically null and void; CONFIRM the Indictment").
[179] CHET Bunna WRI (D114/65), at ERN (EN) 01180851 (A6, A9); Written Record of Interview of SAY Born, 6 September 2010, D2/8, at ERN (EN) 00613011 (A27), 00613012 (A32).
[180] *See, e.g.*, Written Record of Analysis, 18 July 2007, D234/2.1.52, at ERN (EN) 00142852; LON Seng WRI (D54/110), at ERN (EN) 01331643 (A10); Duch WRI (D114/158), at ERN (EN) 01213413 (A24); Duch WRI (D114/159), at ERN (EN) 01213423 (A23); Case 002 Transcript of 5 April 2012 (KAING Guek Eav *alias* Duch), D53/2.1.42, at ERN (EN) 00799904, paras 8-13. While Duch specified in one statement that MEAS Muth was a reserve member of the General Staff Committee, most other witnesses state that MEAS Muth was a member of that Committee.
[181] Written Record of Interview CHEANG Chuo, 22 February 2015, D114/52 ("CHEANG Chuo WRI (D114/52)"), at ERN (EN) 01076750 (A40), 01076753 (A54); Written Record of Interview of SENG Soeun, 11 November 2009, D4.1.810, at ERN (EN) 00412180 (A26, A27).
[182] Written Record of Interview of YOEM Sroeung, 27 July 2015, D114/95, at ERN (EN) 01137210 (A195, A196, A197, A198, A199); DC-Cam Interview of SANN Kan, 29 May 2007, D54/106.2, at ERN (EN) 01509187;

Army of Kampuchea (RAK). Overturning such findings required contra arguments relying on facts. It is of note that while the disagreement between the Co-Investigating Judges was on whether MEAS Muth qualified as a senior leader or a person who was most responsible for the crimes alleged, there was little dispute between those Judges that the crimes alleged were committed.

69. While the Pre-Trial Chamber laid the blame squarely at the door of the Co-Investigating Judges for their inability to provide one Closing Order, they ignored the reality that they themselves were equally polarised.

70. The Pre-Trial Chamber, in its Disposition of the *Considerations*:

- **ORDERS** a joinder of the Appeals against both Closing Orders;
- **DECIDES** that the National Co-Prosecutor's Appeals is admissible;
- **DECIDES** that the International Co-Prosecutor's Appeals is admissible;
- **DECIDES** that the Co-Lawyers' Appeal for MEAS Muth is inadmissible;
- **DECLARES** that the Co-Investigating Judges' issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC;
- **DECLARES** that it has not assembled an affirmative vote of at least 4 judges for a decision based on common reasoning on the merits.[183]

71. Reading the obligatory reasons which must be furnished in the absence of a unanimous decision, reveals the internal inconsistency where having found that the actions of issuing conflicting orders were illegal, all five Judges found the indictment to be valid while three found the dismissal order equally valid. As there is no appeal against these illogical findings, the only remedy would be for this Chamber to use its inherent powers and those pursuant to Article 419 of the Cambodian Code of Criminal Procedure of Cassation or judicial review to quash the order of the Pre-Trial Chamber and direct a reconsideration of the conflicting Closing Orders by the Judges of the Pre-Trial Chamber to arrive at a legally sound decision.

Written Record of Interview of CHENG Laung, 25 July 2015, D114/96, at ERN (EN) 01142619 (A10-11); OCP Interview of SIENG, 12 August 2008, D1.3.13.11, at ERN (EN) 00217564.

[183] Considerations on Appeals against Closing Orders (D266/27 & D267/35), p.40.

72. Experience indicates that this normal legal solution may be a vain exercise. The past record of rigidly held views that are repeated for rejecting any further investigations or trials in Case 003, Case 004 and previously in Case 004/2 since the original disagreement in 2008 on the fully discussed Second and Third Introductory Submissions militates against any optimism that anything will change. The same reasons will appear with the National Judges: (1) the preliminary investigation was void and unlawful, and (2) SOK An had enunciated public policy to only have trials of five senior leaders and (3) the suspect is not within the jurisdiction of the ECCC. Realistically, this stands in the way of any reasonable prospect of progress on the matter. Similarly, if assuming that it were procedurally possible to quash the decisions of the National Co-Investigating Judge, there still seems little possibility that consensus will be achieved. It is inevitable that the same scenario will replay producing no result.

73. This brings me to the present situation where the International Co-Prosecutor asserts failure of the part of the Judges of the Pre-Trial Chamber to apply the law as mandated by the ECCC Agreement and the ECCC Law. *Prima facie* as an interested party, she has *locus standi* to bring such an application. I consider that the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia has the legal, inherent and moral authority to receive this Application, and I propose to consider the substance of the International Co-Prosecutor's Application on the merits before coming to my conclusion.

IV. MERITS

A. SUBMISSIONS

74. The International Co-Prosecutor requests the Supreme Court Chamber to order that Case 003 be forwarded to the Trial Chamber,[184] submitting that:

> (1) the opposing Closing Orders were not issued illegally;
>
> (2) even if their simultaneous issuance was illegal, the opposing Closing Orders are not null and void;

[184] International Co-Prosecutor's Application, para. 85.

(3) the Indictment was unanimously found to be valid by the Judges of the Pre-Trial Chamber; and

(4) the Indictment was not overturned by a supermajority.[185]

B. DISCUSSION

75. Both the International Co-Prosecutor and the Co-Lawyers for MEAS Muth urge this Chamber to treat their submissions in the same way as in Case 004/2 by exercising the Supreme Court Chamber's inherent jurisdiction to provide the legal clarity that every judicial system requires. Thereafter they differ radically in the relief sought but the common ground is to rescue this Case from its current procedural impasse and the legal limbo it now occupies. In essence, the International Co-Prosecutor requests the Chamber to order that Case 003 be forwarded to the Trial Chamber for trial while the Co-Lawyers request that the case against MEAS Muth be terminated.[186]

76. Taking the first two submissions of the International Co-Prosecutor that (1) the opposing Closing Orders were not issued illegally; and that (2) even if their simultaneous issuance was illegal, the opposing Closing Orders are not null and void: the first premise involves a collateral attack on the decision of the Pre-Trial Chamber which in its Disposition found that the Orders of the Co-Investigating judges were illegal. Unless the decision is quashed the finding cannot be appealed. It is my opinion that if the earlier findings on the Pre-Trial Chamber's illogical decision are not addressed by the Supreme Court Chamber by cassation, the decision with all its want of logic stands. This is a major concern for the integrity of this Court.

77. While the Judges of the Pre-Trial Chamber rejected the lawfulness of the actions of the Co-Investigating Judges, both the Applicant and the Co-Lawyers for MEAS Muth defend the legality of the unusual nature of what must have been a planned decision on the part of the Co-Investigating Judges to file the Closing Orders simultaneously and to file conflicting Closing Orders. It seems to me that while this concerted action could indeed prevent the first-in-time advantage of one decision over another in the application of the default mechanism under Internal Rule 72, it does not stand in the way of the Pre-Trial Chamber

[185] International Co-Prosecutor's Application, para. 53.
[186] The reliefs sought by the International Co-Prosecutor and the Co-Lawyers for YIM Tith in Case 004 are identical.

ignoring the actions of the Co-Investigating Judges and considering each Closing Order on the merits of the appeal grounds submitted by the appealing Parties. The motive for issuing conflicting decisions simultaneously must surely be irrelevant when there is a remedy within the Pre-Trial Chamber. The Pre-Trial Chamber Judges had in in their hands the power and the obligation to determine within the law and on the facts which one of the Closing Orders was valid. They could have ignored how the conflicting Closing Orders came to them and addressed themselves solely to the appeal grounds. Even if they followed past form to divide on cultural grounds, they should have produced a coherent decision which would have led to legal certainty. Although divided in approach, a coherent decision would permit the default rule to operate.

78. The Applicant further argues that given the equal and independent status of the Co-Investigating Judges and the permissive disagreement resolution mechanism, the issuance of conflicting closing orders is permissible and envisioned under the ECCC legal framework.[187] She cites this Supreme Court Chamber's decision in Case 004/2, which found that the issuance of conflicting closing orders was "almost inevitable" due to the Co-Investigating Judges' disagreements which had persisted or over a decade, and that a disagreement between the Co-Investigating Judges was even more likely in Case 003.[188]

79. This Judge believes that it is entirely possible that two investigating judges of integrity could come to sincerely held differing views. My earlier discussion on cultural differences in approach applies.

80. Second, the International Co-Prosecutor argues that even if the simultaneous issuance of Closing Orders was illegal, such a procedural error did not cause gross unfairness, material prejudice or abuse of process, requiring the termination of the proceedings.[189] If any remedial action is required, the Pre-Trial Chamber has already taken the fact of the conflicting Closing Orders into account as they weighed the merits of each Closing Order.[190] She urges the Chamber not to consider termination of the Case as the appropriate remedy for the "non-fatal" procedural error as such termination 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

[187] International Co-Prosecutor's Application, paras 53-58.
[188] International Co-Prosecutor's Application, para. 57.
[189] International Co-Prosecutor's Application, paras 62-66.
[190] International Co-Prosecutor's Application, para. 68.

harm.[191] The Supreme Court Chamber previously held that if the actions of the Co-Investigating Judges to issue two conflicting closing orders was unlawful, the product of that unlawful act cannot be legal.[192] The International Co-Prosecutor disagrees and urges this Chamber to find that what occurred was a procedural error.[193] In effect, that the unlawfulness of the acts did not taint their orders.

81. This Judge's view is that it is unnecessary to enter a discussion on the nature of any error by the Co-Investigating Judges in pursuing their respective roles. The actions and consequences of the Co-Investigating Judges' Closing Orders is not the core legal matter in this Application from the International Co-Prosecutor. The essential issue is the incomprehensible decision of the Pre-Trial Chamber where unless the Supreme Court Chamber accepts that as a Chamber of absolutely final review, it has inherent jurisdiction to act as a Court of Cassation, the decision of the Pre-Trial Chamber with its illogical and inconsistent findings stands.

82. Third, the International Co-Prosecutor relies heavily on the proposition that all five Pre-Trial Chamber Judges agreed that the Indictment against MEAS Muth was valid and thus constitutes a supermajority decision under Internal Rule 77(13).[194] The finding is unanimous, even if it was not included in the "joint disposition" of the *Considerations* or that the Judges reached it through different reasoning.[195] This unanimous decision in Case 003 is in contrast to the annulment of the Indictment by the National Judges in the Case 004/2 *Considerations*.[196] Transferring Case 003 to trial pursuant to Internal Rule 77(13) will not undermine the equal status of the Co-Investigating Judges or MEAS Muth's presumption of innocence.[197]

83. This Judge's opinion is that the assumption that five Judges concluded/reasoned or decided that the Indictment was valid involves an exercise in cherry picking and the seeking out of small pockets of legal solace from a defective decision. An order forwarding a case for trial requires an unambiguous legally sound decision. In the ECCC, this must come from the clear operation of the Law and the default position or from a clear finding contained in the

[191] International Co-Prosecutor's Application, paras 63, 67-68.
[192] Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 67.
[193] International Co-Prosecutor's Application, para. 65.
[194] International Co-Prosecutor's Application, para. 69.
[195] International Co-Prosecutor's Application, paras 70-71.
[196] International Co-Prosecutor's Application, para. 72.
[197] International Co-Prosecutor's Application, paras 73-74.

Disposition. The reality is, there is neither because of the absence of logic in of the decision where three of the members of the Pre-Trial Chamber decided: (1) the actions of the Co-Investigating Judges in delivering two conflicting Closing Orders was unlawful, (2) because the Co-Investigating Judges were co-equals their decisions had equal validity and (3) their orders were of equal validity, (4) therefore, Case File 003 against the Charged Person MEAS Muth should be held at the ECCC archives.

84. On that basis, leaving aside other valid opinions or reasons, it is not possible to find that there was unanimity on the legitimacy of the Indictment. This Judge's view remains that the decision of the Pre-Trial Chamber has no validity in law as no reasonable decision-making body could arrive at those illogical determinations. It is not possible to adopt the good parts from a bad decision and ignore the rest.

85. Fourth, the International Co-Prosecutor submits that even if it is found that there was no *de facto* unanimous finding on the validity of the Indictment, the International Co-Prosecutor argues that the Pre-Trial Chamber was still required to forward the Case for trial since the indictment was not overturned by a supermajority.[198] The "fundamental and determinative" default position that the investigation should proceed under Internal Rule 77(13)(b) is *lex specialis* and takes precedence over Internal Rule 77(13)(a) thus requiring that the Indictment be transferred to the Trial Chamber.[199] The Pre-Trial Chamber committed a legal error by failing to transfer the Case File to the Trial Chamber as unless the case is halted by a supermajority of the Pre-Trial Chamber, even if a dismissal order runs concurrently with an indictment, the case will proceed to trial on the basis of the indictment.[200] Finally, the International Co-Prosecutor submits that beyond a dismissal or acquittal on the merits, the Cambodian Code of Criminal Procedure explicitly defines and limits the occasions for termination of criminal action.[201] None of those conditions apply to Case 003 and thus the Supreme Court Chamber should not follow its actions in Case 004/2 where the termination of the case was ordered.[202]

86. Much of what is urged by the Applicant is, in my view, valid. However, the submission that the default mechanism should apply in the absence of a super majority in favour of

[198] International Co-Prosecutor's Application, para. 76.
[199] International Co-Prosecutor's Application, paras 77-79.
[200] International Co-Prosecutor's Application, paras 80-81.
[201] International Co-Prosecutor's Application, para. 82.
[202] International Co-Prosecutor's Application, para. 82.

dismissal presupposes the existence of a valid enforceable decision of the Pre-Trial Chamber. It is the reality that the Chamber avoided determining which Closing Order was valid and closed off the legitimacy of any examinations and findings when they unanimously declared in the Disposition that the actions of the Co-Investigating Judges were unlawful.

87. For all these reasons, this Judge's opinion is that no legal inference sufficient to forward Case 003 to trial can be drawn from the Pre-Trial *Considerations* which produced an invalid decision. The International Co-Prosecutor's request to the Supreme Court Chamber to order that Case 003 be forwarded to the Trial Chamber cannot in these circumstances be met.

V. CONCLUSION

88. The Applicable law has been correctly expressed and discussed on every occasion when the many disagreements in this Case and others subject to the disputed First and Second Introductory Submissions have come before the Pre-Trial Chamber. The history of those disagreements demonstrates the progress of those Cases was solely through the default mechanism. This series of Rules has overborne national actions and sentiment and was destined to lead to the ultimate impasse which has occurred in every case which progressed to the Pre-Trial Chamber. It is difficult to say why the failure to provide a decision that could provide the clarity required occurred. The fixation on the actions of the Co-Investigating Judges played a large part and served only to impede legal certainty. My view is that apart from that blind spot which is a recurring theme, cultural differences also play a major role. National office holders without difficulty take a view of personal jurisdiction based on national policy while international counterparts look more readily to the ECCC Law, ECCC Agreement and Internal Rules. How otherwise to explain the differing assessments of what constitutes those "*most responsible*" for the crimes which were committed where the role of provincial Khmer Rouge cadres and military leaders is minimised and reduced to very minor players who were not proximate to the crimes, with little power and inactive participation, and where the necessary characteristics of those most responsible "*mainly focuses on direct participation regardless of positions*."

89. There is a working and functioning method provided for overcoming even this near intractable issue on personal jurisdiction and the alleged illegality of the original investigation. If either issue were the core of early disagreements, the Co-Investigating

Judges could have chosen to send this disagreement to the Pre-Trial Chamber. They chose not to, as is their right. However, their conflicting Closing Orders were manifestly a disagreement[203] which when appealed and cross-appealed came before the Pre-Trial Chamber. The dividing issues were specific and could have been considered as preliminary issues before that Chamber. It surely makes little difference in reality or in principle if the disagreement originates from conflicting Closing Orders or confidential disagreements. In either case, the merits of the disagreement have to be considered by the Pre-Trial Chamber. If the illegality of the original investigation had been fully examined as a preliminary issue but failed to achieve the necessary majority of four judges, then the default mechanism would have determined the core disagreement. The problem would be resolved for the purposes of pre-trial issues and the investigation would either be halted for illegality or would proceed on the basis that the original investigation was valid and that issue relating to the preliminary investigation would not be raised again as a reason to impede any case progressing to trial. No such preliminary objection was advanced as suggested by the International Co-Prosecutor as far back as 2009 and referred to by all Judges of the Pre-Trial Chamber in their decision of 18 August 2009. The issues of the illegality of the original investigation have continued to fester and clog the operation of the Law. These issues were never grappled. The other issue was personal jurisdiction. That too could have been decided as a separate preliminary issue following the guidance provided by the Supreme Court Chamber in the first substantive appeal on the jurisdiction issue.[204] Again, this issue was permitted to remain unresolved to the present day.

90. By engaging in finger pointing and declaring the actions of the Co-Investigating Judges unlawful, and in this Case providing findings intrinsically inconsistent and at variance with their Disposition, the Pre-Trial Chamber has created a decision which provides no clarity and no finality and simply cannot stand. It must be quashed as illogical and incapable of implementation.

91. As mentioned above, in normal circumstances, when a decision is quashed, the file is returned to the original determining body - in this case, the Pre-Trial Chamber, to start again and reconsider its decision in the light of directions from the Chamber of Cassation. However, the Pre-Trial Chamber is no longer complete or functioning. If reconvened, there

[203] As opposed to a disagreement whose nature was confidential and not placed on the Case Files pursuant to Internal Rule 72(2).
[204] *See* Case 001, Appeal Judgement, F28, 3 February 2012, pages 27-43.

is no reason to believe that the Judges will deviate from their view that the actions of the Co-Investigating Judges were illegal. There is no reason to believe that national policy differences on personal jurisdiction or judicial views on the illegality of the original investigation in 2008 will change. Further, there is no reason to believe that the national component of the Trial Chamber will be receptive to a trial.[205] It is verging on Panglossian to believe that the National Prosecutor will prosecute. If the order of the Pre-Trial Chamber is quashed, there remain two conflicting Closing Orders, one indicting the Charged Person MEAS Muth and the other dismissing all charges against him. *Realpolitik* operates. Courts do not act or make orders when it is futile to do so.

92. Considering the time spent investigating a person who has benefitted from a national policy not to prosecute suspects at his level of seniority, it would be unconscionable to act further. There is no realistic legal avenue open to correct the determination that is bad in law. In my opinion, there is no option left but to bow to the inevitable: the decision of the Pre-Trial Chamber must be quashed and Case 003 against MEAS Muth should be terminated. It is a matter for the Cambodian Prosecution Service to take up the matter if they wish to do so.

VI. ADDENDUM

93. I believe that it is necessary to address the myth perpetuated so often by the Judges of the Pre-Trial Chamber as reasoning for the rejection of any order which has involved the progress of the cases since the second round of investigations in 2007/2008. The above Dissenting Opinion provides a history of how an assertion came to be considered fact has been fully outlined.

94. I consider it of prime utility to examine the documents filed by the National Co-Prosecutor with the Pre-Trial Chamber on 27 February[206] and on 22 May[207] 2009 in support of her position that conducting further investigations into further suspects would endanger

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[205] *See* Email from Mr Suy-Hong LIM, Greffier of the Trial Chamber, 7 April 2021 ("The President of the Trial Chamber has asked me to advise the parties that the Trial Chamber has not been notified of the "Considerations on Appeals against the Closing Orders" and is not in receipt of the case file. Therefore, the Trial Chamber does not accept any communications from the parties, (see also IR 77/14)"). *See also* Email from Mr Suy-Hong LIM, Greffier of the Trial Chamber, D359/36.8 and D360/45.8, 10 February 2020.

[206] The National Co-Prosecutor's Response to the Pre-Trial Chamber's Invitation to File Further Submissions, Doc. No. 10, 27 February 2009 ("National Co-Prosecutor's Response to the Pre-Trial Chamber's Invitation (Doc. No. 10)").

[207] National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, Dated 24 April 2009, and the National Co-Prosecutor's Additional Observations, Doc. No. 17, 22 May 2009.

national security and further that SOK An as Deputy Prime Minister had assured parliament that no further prosecutions would take place after the first five suspects were identified. The documents attached to this Dissenting Opinion, relied upon by the National Co-Prosecutor in above mentioned submissions, relate generally to the negotiations leading to the agreement between the UN and Cambodia to establish the ECCC:

(1) Three articles published in *Searching for the Truth* magazine written by Thomas HAMMARBERG who had been involved in the negotiations from an early stage;[208]

(2) A minute on the session of the National Assembly of Kingdom of Cambodia in 2000: Presentation and Comments on a Draft Law on the Establishment of the ECCC ("Draft Law") in 2000[209]

(3) A minute on the session of the National Assembly of Kingdom of Cambodia in 2004: Debate and Approval of the ECCC Agreement and that of Amendments to the 2001[210]

These documents are all publicly available and the reference from the National Assembly transcripts was referred to in the Final Submissions of the National Co-Prosecutor in Cases 003, 004 and 004/2,[211] the Dismissal Orders of the National Co-Investigating Judge in Cases 003, 004 and 004/2[212] and the Opinions of the Pre-Trial Chamber National Judges in the Considerations on the Appeals against Closing Orders in Cases 004 and 004/2.[213]

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[208] Comments by a Group of Experts and Memorandum of the Representative of the Royal Government of Cambodia, published in Searching for the Truth, No. 18 June 2001, Annex 2 to the National Co-Prosecutor's Response to the Pre-Trial Chamber's Invitation (Doc. No. 10), Doc. No. 10.2 ("Comments by a Group of Experts and Memorandum of the Representative of the Royal Government of Cambodia, (Doc. No. 10.2)"); A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3); Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4).

[209] Speech of the Representative of the Royal Government of Cambodia in the Assembly Session, published in Searching for the Truth, No. 14 February 2001, Annex 5 to the National Co-Prosecutor's Response to the Pre-Trial Chamber's Invitation (Doc. No. 10), Doc. No. 10.5 ("Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5)").

[210] The First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004.

[211] Case 003, Final Submission concerning MEAS Muth pursuant to Internal Rule 66, D256/6, 14 November 2017, paras 26-30; Case 004, Final Submission concerning YIM Tith pursuant to Internal Rule 66, D378/1, 31 May 2018, paras 24-28; Case 004/2, Final Submission concerning AO An pursuant to Internal Rule 66, D351/4, 18 August 2017, paras 28-32.

[212] Case 003, Order Dismissing the Case against MEAS Muth, D266, 28 November 2018, para. 398; Case 004, Order Dismissing the Case against YIM Tith, D381, 28 June 2019, paras 636-638; Case 004/2, Order Dismissing the Case against AO An, D359, 16 August 2018, paras. 540-542.

[213] Case 004, Considerations on Appeals against Closing Orders, D381/45 & D382/43, 17 September 2021, Opinion of Judges PRAK, NEY and HUOT, paras 123, 126-128; Case 004/2, Considerations on Appeals against

95. It has been necessary for me to carefully peruse the documents filed by the National Co-Prosecutor before the Pre-Trial Chamber in 2009 to determine the accuracy of what is asserted and repeated with an extraordinary degree of repetition by the National Co-Prosecutor, the National Co-Investigating Judge and the National Judges of the Pre-Trial Chamber. It is an unusual source for an internationalised tribunal whose jurisdictional documents are the ECCC Law and the ECCC Agreement to rely on what was said by politicians during parliamentary debates. What is said in Parliament is not a source of determinative law. There is then the question IF what is asserted was actually said. Judicial officers must apply the law not what they think the law ought to be. In applying law, one would expect that documents of agreement between the Royal Government of Cambodia and the UN are treated as sacrosanct. These agreements and the subsequent Internal Rules were achieved by negotiation, debate, ratification by both houses of the National Assembly, signed by the King and finally promulgated. They have been, or ought to have been, the foundations of the law applied by the ECCC.

96. I have read the transcripts of the debates carefully and find no evidence whatever to support the premise that the Preamble to the ECCC Law and the ECCC Agreement determines whether prosecutions should be commenced. A preamble to a law does not usually form part of the law for interpretative purposes but is intended to set the background for the subsequent law. It is normal in Common Law statutes to have a short preamble which sets out the reason for the law or the amendment to the relevant statute. It invariably states that the preamble or introduction forms no part of the law. EU documents which are admirable for their clarity, recite the reason for the amendment by use of the WHEREAS which sentence by sentence takes the reader through existing law, the need for change, how the change was decided and then recites the change that follows. The same WHEREAS formula was utilised for the ECCC Law and the ECCC Agreement. The preambles of international agreements usually set out the context in which the agreement is made.

97. There are rules of interpretation well known to practitioners. Consultation of the official parliamentary debates is an interpretative tool only when the natural and ordinary meaning of the words, the purposive approach and the teleological rules fail to elucidate the meaning. Judges and prosecutors are not at large to cherry pick parts of statutes that suit and ignore

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Closing Orders, 19 December 2019, D359/24 & D360/33 ("Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33)"), Opinion of Judges PRAK, NEY and HUOT, paras 240-250.

others. If that were to occur, the basis of the Rule of Law is eroded to the point that it is non-existent.

98. A series of articles written by Thomas HAMMARBERG in *Searching for the Truth*, a publication by DC–CAM, number 19 and following on from July 2001, have been examined. Thomas HAMMARBERG refers to the UN appointed Group of Experts who was tasked to investigate and advise on whether there should be prosecutions arising from the Khmer Rouge period. The Group of Experts advised the then Secretary General Kofi ANNAN:

> They also recommended that, as a matter of prosecutorial policy, the Prosecutor limit his or her investigations to those persons most responsible for the most serious violations of international human rights law. This would include senior leaders with responsibility for the violations as well as those at lower levels who were directly implicated in the most serious atrocities.[214]

99. He writes that the experts emphasised that the list of top governmental and party officials in DK might not correspond with the list of persons most responsible for serious violations of international law and domestic laws.[215] Certain top government leaders might have been removed from knowledge and decision making while others not in the chart of senior leaders might have played a significant role.[216] This seems especially true with respect to certain leaders at the zone level as well as officials of torture and interrogation centres such as Tuol Sleng.[217] They advised that the twin goals of a court would be individual accountability and national reconciliation in Cambodia.[218]

100. In his continuing article in Number 20 of *Searching for the Truth*, Thomas HAMMARBERG outlines meeting with the Prime Minister in March 1999.[219] At this stage, the major players in the Khmer Rouge had surrendered, were under arrest or were no longer alive.[220] For instance, Ta Mok had just been arrested.[221] It was announced that his trial was

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[214] Comments by a Group of Experts and Memorandum of the Representative of the Royal Government of Cambodia, (Doc. No. 10.2) at ERN 00295015.
[215] Comments by a Group of Experts and Memorandum of the Representative of the Royal Government of Cambodia, (Doc. No. 10.2) at ERN 00295015.
[216] Comments by a Group of Experts and Memorandum of the Representative of the Royal Government of Cambodia, (Doc. No. 10.2) at ERN 00295015.
[217] Comments by a Group of Experts and Memorandum of the Representative of the Royal Government of Cambodia, (Doc. No. 10.2) at ERN 00295015.
[218] Comments by a Group of Experts and Memorandum of the Representative of the Royal Government of Cambodia, (Doc. No. 10.2) at ERN 00295015.
[219] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3).
[220] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3) at ERN 00295018.
[221] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3) at ERN 00295018.

to take place before a national tribunal.[222] Thomas HAMMARBERG noted there was a change of attitude with the government leaders who were no longer looking for international assistance, a foreign prosecutor or foreign judges.[223] However, the Group of Experts had found the effects of the prolonged conflicts and the policies of the Khmer Rouge with mass killings of the educated classes left no trained cadre of judges, investigators or lawyers or a culture of respect for due process.[224] They recommended that international standards were needed.[225]

101. Those documents made it clear that bitterness existed with senior Cambodian politicians relating to the international community's benign treatment of Khmer Rouge after they were toppled including their continued occupation of a seat at the UN and the international community's insistence in their involvement in peace negotiations.[226] Thomas HAMMARBERG referred to the then political sentiment as being "now that Cambodia has achieved peace and reconciliation, they call for an international tribunal. Can we trust them?"[227]

102. It seems that the Cambodian leaders were no longer actively seeking international assistance now that everything had changed, nationalism and a search for sovereignty were in the ascendant..[228] The Royal Government of Cambodia would decide how to prosecute or even if they would prosecute.[229] Arguments were advanced by some that prosecutions of the Khmer Rouge would lead to a new civil war.[230] The major discussions were then on sovereignty.[231] Justice for the victims ceased to be the objective, and discussions on a

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[222] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3) at ERN 00295017.
[223] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3) at ERN 00295018.
[224] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295019.
[225] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295019.
[226] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3) at ERN 00295018; Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295019.
[227] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3) at ERN 00295018.
[228] A Response Letter dated 3 March 2001 to the United Nations (Doc. No. 10.3) at ERN 00295018; Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295019, 00295024.
[229] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295024.
[230] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295019.
[231] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295019.

possible Khmer Rouge Tribunal were closed.[232] According to the documents furnished by the National Co-Prosecutor, huge negative reaction from Cambodians followed the suspension of talks that there would not be an international tribunal.[233] It was apparent that there was an appetite for an independent tribunal based on international standards.[234]

103. Eventually, under the guidance of SOK An at the helm of the Cambodian negotiating team, the idea of a mixed tribunal began to be discussed.[235] It would be one with Cambodian judges but one that would apply relevant international standards.[236] A working party was established by SOK An.[237] The articles presented follow the slow and painful progress and the differing views of how or even if an internationalised court would operate.

104. The Draft Law on the Establishment of the ECCC was brought before the National Assembly in 2000[238] and a draft law to amend the 2001 Draft Law in 2004.[239] The Draft Law was met with very broad support from all parties represented in parliament in 2000 and again in 2004.[240] The transcripts demonstrate that SOK An explained at great length that sovereignty of Cambodia was not eroded by allowing foreign judges to participate.[241] He outlined instances of international military tribunals after world wars, the International Criminal Tribunal for former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR")[242] and the possibility of a permanent international court where instead of winners prosecuting losers that permanent court would do so.[243] He informed the National Assembly of the concept of individual responsibility for crimes committed,[244] and the process major crimes were judged by those courts which were not in their own countries

[232] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295020.
[233] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295020.
[234] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295020.
[235] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295020, 00295021, 00295023.
[236] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295021.
[237] Comments by a Group of Experts in the Discussion between the Royal Government of Cambodia and the United Nations (Doc. No. 10.4) at ERN 00295023.
[238] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5).
[239] The First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004.
[240] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 3-4, 9-10.
[241] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 14-15, 18-19.
[242] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 11-12.
[243] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 12.
[244] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 12.

but that low level offenders were tried in local courts.[245] With a remark that the concept of foreign judges being involved was not new, but that a proposed court of which Cambodia would be the host and the UN would assist was new,[246] he introduced the hybrid system, the co-prosecutors, the uniqueness of the investigating chamber, the co-judges and the concept of the super majority.[247] He noted that if the Draft Law was approved by the National Assembly, the ECCC would go ahead.[248]

105. The guiding principles of the Draft Law as he outlined them were: (1) Respect of and search for justice for victims and international community;[249] (2) Maintenance of peace, political stability, national unity of Cambodia with least developed nation status due to its civil wars;[250] and (3) Respect of national sovereignty, including territorial integrity.[251] Concerning the principle of national sovereignty, he explained that while accepting foreign judges to participate was a compromise made, it would ensure the support of the international community, especially the UN, and thus provide credibility,[252] and that what had been achieved in the negotiations was that ALL judges would be appointed by the Cambodian Supreme Council of Magistracy upon the UN Secretary General's nomination of international judges.[253] He further noted that there would be a majority of Cambodian judges, but decisions would be based on a new formula, the super majority rule, which would break deadlock where one international judge would have to support the Cambodian judges.[254] He assured that all these principles reflect the UN respect of the national sovereignty of Cambodia and that their lengthy course of negotiation since 1997 strived to achieve a tribunal with international characteristics.[255]

106. The issue of the personal jurisdiction of the ECCC was addressed in 2004. In response to the questions as to who and how many shall be indicted, SOK An answered several

[245] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 12.
[246] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 14, 15, 17.
[247] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 14-15, 18-20.
[248] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 63.
[249] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 13.
[250] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 11-12.
[251] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 14-15.
[252] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 14.
[253] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 14.
[254] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), pp. 14-15.
[255] Minute of National Assembly 29 December 2000 Session (Doc. No. 10.5), p. 15.

informed and focussed questions with no suggestion that a limit on the numbers of suspects was sought.[256]

> His Excellency Mr. Sok An: […] "Article 2 deals with the terms senior leaders and those most responsible. According to the terms, we identified two targets. The first target is leaders. According to the judicial foundations, the co-prosecutors, comprising a Cambodian and an international, are the ones bearing the right to identify who shall be indicted. If we ask the question "who shall be indicted?," neither the UN nor the RGC Task Force can give a response because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: senior leaders and those most responsible. Considering senior leaders, we refer to no more than 10 people, but we don't specify that they be members of the Standing Committee. This is the task of the Co-Prosecutors. Why did we decide to identify such a small number of people? Because experts in the arrangement of international courts acknowledge that the prosecution of dozens or thousands of suspects is not a task that produces good results. That's why we have agreed that no more than 10 people will be designated as senior leaders. **However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That's why we use the term those most responsible. There is no specific amount of people to be indicted from the second group. Those committing atrocious crimes will possibly be indicted.**[257]

107. The transcript of the debates was informed and lengthy. Every word has been perused in an effort to find support for the repeated assertion that SOK An assured the National Assembly that only five senior members would be investigated. The transcript shows the contrary. This accords with an article by one of the lead negotiators, Professor David Schaeffer in 2011 when the issues of personal jurisdiction and agreed policy were raised. This article was referred to by the International Co-Prosecutor in the parallel Case 004. Equally there is no support for the premise that the investigation of those most responsible would be limited by any qualifications such as suspect's position in Cambodian society or whether he/she was serving in the military in the border conflict with Thailand or in any other official post. What SOK An said[258] accords with what is written by Thomas HAMMARBERG and reflects the intention to appoint independent and trained judges. It accords with the ECCC Agreement and the ECCC Law reached and which were intended to apply to the functioning of this hybrid tribunal. However, what has evolved has all the

[256] The First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004.
[257] The First Session of the Third Term of the Cambodian National Assembly, 5 October 2004.
[258] Following the ratification of the law which in Mr SOK An's own words.

appearance of pre-determined inflexible approach to block the investigation and prosecution of anyone outside of the original five suspects.[259]

108. With hindsight how much better it may have been there had been transparency and a clear statement of intention to close the prosecution and investigation process once the closing orders relating to the first suspects was written. Another alternative would perhaps have been for the National Co-Prosecutor to have sought the annulment of the Second and Third Introductory Submissions if what was asserted by her in May 2009 was established. Instead, we have here the extensive investigation of three ageing Charged Persons who have not been able to plan their lives beyond the fear of a trial. A suspect, even one who has taken every legitimate avenue open to him to avoid a trial, has the right to know that he will go forward to a hearing or that the case will be dismissed for legal reasons. A charged person should not be held in a state of suspense forever. The other side of the coin is thousands of Khmer Krom victims whose forced transportation and deaths have never been considered by a court. There are thousands of members of the Revolutionary Army of Kampuchea who were liquidated during the regular purges of the Communist Party of Kampuchea whose families will never know why or who ordered their deaths. Similarly, thousands of Communist Party cadres from the Northwest zone were tortured and executed in Tuol Sleng and other security centres without any possibility to discover who identified them, who gave those orders, who implemented them and why.

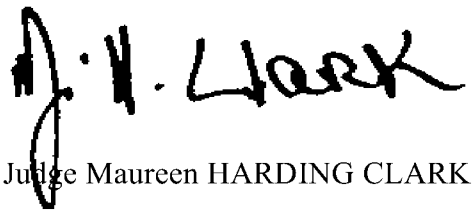
109. It is easy to understand the frustration of the International Co-Prosecutor for why a series of orders to investigate and to indict have been blocked by the National Judges subject to the same law, the same agreement and the same procedural rules.[260] Those actions call out for judicial review if only because the reasons provided for blocking the process are based on a factual foundation which is shaky in fact and unsupported by law being that (1) the original investigation by one Co-Prosecutor was illegal and (2) SOK An assured the National Assembly that only five suspects would ever be charged.

[259] *See e.g.,* ECCC Press Release, "Statement by the International Reserve Co-Investigating Judge [Laurent KASPER-ANSERMET]", 4 May 2012, https://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge gov.kh/en/articles/press-release-international-reserve-co-investigating-judge

[260] This dissenting opinion does not refer to my Chamber colleagues.

Cork, Ireland 17 December 2021

Judge of the Supreme Court Chamber



Judge Maureen HARDING CLARK