



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Preliminaire

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

D271/5 & D272/3

In the name of the Cambodian people and the United Nations, and pursuant to the 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

Case File No. 003/07-09-2009-ECCC/OCIJ (PTC 37 and 38)

PRE-TRIAL CHAMBER

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

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CONSOLIDATED DECISION ON THE REQUESTS OF THE INTERNATIONAL CO-PROSECUTOR AND THE CO-LAWYERS FOR MEAS MUTH CONCERNING THE PROCEEDINGS IN CASE 003

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TABLE OF CONTENTS

I.	PROCEDURAL HISTORY.....	1
II.	JOINDER.....	4
III.	PRELIMINARY OBSERVATIONS CONCERNING THE CO-INVESTIGATING JUDGES' RECENT DECISION IN CASE 003.....	5
IV.	ADMISSIBILITY	7
	A. SUBMISSIONS OF THE PARTIES RELATING TO THE CO-LAWYERS' REQUEST	7
	1. Co-Lawyers' Request	7
	2. International Co-Prosecutor's Response.....	10
	B. SUBMISSIONS OF THE PARTIES RELATING TO THE INTERNATIONAL CO-PROSECUTOR'S REQUEST.....	13
	1. International Co-Prosecutor's Request	13
	2. Co-Lawyers' Response	17
	3. National Co-Prosecutor's Response	21
	C. DISCUSSION ON ADMISSIBILITY	22
	1. Respective roles of the Office of the Co-Investigating Judges and the Pre-Trial Chamber	22
	2. The Pre-Trial Chamber fulfilled its duty in Case 003.....	24
V.	DISPOSITION	28



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of MEAS Muth’s Request to terminate, seal and archive Case 003 (“Co-Lawyers’ Request”) filed on 17 June 2021,¹ as well as the Request by the International Co-Prosecutor to conclude the pre-trial stage of the proceedings in Case 003 (“International Co-Prosecutor’s Request”) filed on 21 June 2021² (collectively, “Requests”).

I. PROCEDURAL HISTORY

1. On 28 November 2018, the International Co-Investigating Judge issued a Closing Order (“Indictment”) against MEAS Muth,³ while the National Co-Investigating Judge issued a separate Dismissal Order in favour of MEAS Muth⁴ (“Dismissal Order”) (collectively, “Closing Orders”). The Closing Orders were issued in English and Khmer only, with translation to follow.

2. On 5 April 2019, the National Co-Prosecutor filed her submissions on appeal against the Indictment⁵ in Khmer. On 8 April 2019, the International Co-Prosecutor and the Co-Lawyers for MEAS Muth (“Co-Lawyers”) (collectively, “Applicants”) filed their submissions on appeal in English, against the Dismissal Order⁶ and the Indictment,⁷ respectively.

3. On 7 April 2021, the Pre-Trial Chamber issued its Considerations on Appeals against the Closing Orders (“Considerations in Case 003”).⁸

¹ Case 003/07-09-2009-ECCC/OCIJ (“Case 003”), 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 (“Co-Lawyers’ Request (D272)”).

² Case 003, International Co-Prosecutor’s Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 21 June 2021, D271/1 (“International Co-Prosecutor’s Request (D271/1)”).

³ Case 003, Closing Order, 28 November 2018, D267 (“Indictment (D267)”).

⁴ Case 003, Order Dismissing the Case against MEAS Muth, 28 November 2018, D266 (“Dismissal Order (D266)”).

⁵ Case 003, National Co-Prosecutor’s Appeal against the International Co-Investigating Judge’s Closing Order in Case 003, 5 April 2019, D267/3.

⁶ Case 003, International Co-Prosecutor’s Appeal of the Order Dismissing the Case against MEAS Muth (D266), 8 April 2019, D266/2.

⁷ Case 003, MEAS Muth’s Appeal against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4.

⁸ Case 003 (PTC35), Considerations on Appeals against Closing Orders, 7 April 2021, D266/27 and D267/35 (“Considerations on Appeals against Closing Orders (D266/27 and D267/35)”).



4. On 27 May 2021, the International Co-Prosecutor notified the Pre-Trial Chamber of her intention to file a motion requesting that the Chamber concludes the pre-trial stage of the proceedings in Case 003.⁹
5. On 17 June 2021, MEAS Muth filed a request, in English only, before the Pre-Trial Chamber to terminate, seal and archive Case File 003.¹⁰
6. On 21 June 2021, the International Co-Prosecutor filed a request 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.¹¹
7. On 25 June 2021, the Pre-Trial Chamber sent an e-mail inviting the Parties to file their responses to the Requests: (i) within 10 days of the notification of the Co-Lawyers' Request in Khmer¹² and (ii) within 10 days of the notification of its instructions regarding the International Co-Prosecutor's Request ("Instructions").¹³
8. On the same day, the Co-Lawyers filed a request for an extension of time to respond to the International Co-Prosecutor's Request ("Co-Lawyers' Request for Extension").¹⁴
9. On 28 June 2021, the International Co-Prosecutor indicated that she did not wish to take a position on the Co-Lawyers' Request for Extension and that she would defer to the Pre-Trial Chamber's assessment.¹⁵
10. On 28 June 2021, the Pre-Trial Chamber granted the Co-Lawyers' Request for Extension by granting them an additional five days to file their response.¹⁶

⁹ Case 003, International Co-Prosecutor's Notice of her Intent to File a Request that the Pre-Trial Chamber Conclude the Pre-Trial Stage of the Proceedings in Case 003, 25 May 2021, D271.

¹⁰ Co-Lawyers' Request (D272).

¹¹ International Co-Prosecutor's Request (D271/1).

¹² Case 003, E-mail from the Case Manager relating to the Pre-Trial Chamber's Instructions to the Parties (re: PTC38), 25 June 2021.

¹³ Case 003, E-mail from the Case Manager relating to the Pre-Trial Chamber's Instructions to the Parties (re: PTC37), 25 June 2021.

¹⁴ Case 003, MEAS Muth's Request for an Extension of Time to Respond to the International Co-Prosecutor's Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 25 June 2021, D271/2.

¹⁵ Case 003, E-mail from the Deputy International Co-Prosecutor to the Judges of the Pre-Trial Chamber on MEAS Muth's Request for Extension (D271/2), 28 June 2021.

¹⁶ Case 003, E-mail from the Greffier of the Pre-Trial Chamber addressed to the lawyer of MEAS Muth's Co-Lawyers regarding MEAS Muth's Request for an Extension (D271/2), 28 June 2021.



11. On 8 July 2021, the International Co-Prosecutor filed a response to the Co-Lawyers' Request ("International Co-Prosecutor's Response") in English only, with Khmer translation to follow.¹⁷

12. On 12 July 2021, the Co-Lawyers filed their response to the International Co-Prosecutor's Request ("Co-Lawyers' Response"), in English only, with Khmer translation to follow.¹⁸ On the same day, the National Co-Prosecutor filed her response to the International Co-Prosecutor's Request ("National Co-Prosecutor's Response").¹⁹

13. On 15 July 2021, the Chamber denied²⁰ the Co-Lawyers' request dated 14 July 2021 for leave to submit a reply to the International Co-Prosecutor's Response.²¹

¹⁷ Case 003, International Co-Prosecutor's Response to MEAS Muth's Request to Terminate, Seal and Archive Case 003, dated and filed on 8 July 2021 in English, D272/1 ("International Co-Prosecutor's Response (D272/1)").

¹⁸ Case 003, MEAS Muth's Response to the International Co-Prosecutor's Request for the Conclusion of the Pre-Trial Stage of the Proceedings in Case 003, dated and filed on 12 July 2021 in English, D271/3 ("Co-Lawyers' Response (D271/3)").

¹⁹ Case 003, National Co-Prosecutor's Response to the International Co-Prosecutor's Request for the Conclusion of the Pre-Trial Stage of the Proceedings in Case 003, dated and filed on 12 July 2021 in English and Khmer, D271/4 ("National Co-Prosecutor's Response (D271/4)").

²⁰ Case 003, E-mail from the Case Manager Informing the Parties of the Pre-Trial Chamber's Decision on the Request for Leave to Reply to the International Co-Prosecutor's Response, 15 July 2021.

²¹ Case 003, Request for Leave to Reply to the International Co-Prosecutor's Response to MEAS Muth's Request to Terminate, Seal and Archive Case File 003, 14 July 2021, D272/2.



II. JOINDER

14. As noted above,²² the Pre-Trial Chamber is currently seized of two Requests by the Co-Lawyers and the International Co-Prosecutor, respectively.

15. According to Article 12(1) of the ECCC Agreement²³ and Internal Rule 2,²⁴ if, in the course of the proceedings, a matter raised is not addressed by the texts of the ECCC, the Chambers must refer to Cambodian law. In this regard, the Pre-Trial Chamber recalls²⁵ that Article 299 of the Cambodian Code of Criminal Procedure provides that “[w]hen the court has been seized with several related cases, it may issue an order to join them.”²⁶

16. In the present case, the Pre-Trial Chamber is seized of two proceedings in the shape of two requests filed after the issuance of the Considerations in Case 003 and which invite the Pre-Trial Chamber to conclude the pre-trial stage of this case either (i) by announcing the termination, sealing and archiving of the Case (the Co-Lawyers’ Request), or (ii) by referring MEAS Muth to the Trial Chamber (the International Co-Prosecutor’s Request). Since the two Requests follow the same appeal proceedings and concern identical facts and accused person, the Chamber finds that the proceedings are related in this particular instance.

17. Given its power to order the joinder of several related proceedings, its obligation to ensure the fair and expeditious administration of justice, and the need to avoid solutions that might be irreconcilable should the cases be tried separately, the Pre-Trial Chamber concludes that a joinder is warranted.

²² See *supra*, p. 1; paras 5-6.

²³ *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*, signed on 6 June 2003 and entered into force on 29 April 2005 (“ECCC Agreement”), Art. 12(1).

²⁴ *Internal Rules of the Extraordinary Chambers in the Court of Cambodia* (rev. 9), as revised 16 January 2015 (“Internal Rules”).

²⁵ Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 38; Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”) (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33 (“Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33)”), para. 25.

²⁶ *Code of Criminal Procedure of the Kingdom of Cambodia* (7 June 2007) (“Cambodian Code of Criminal Procedure”), Art. 299.



18. Accordingly, the Pre-Trial Chamber orders the joinder of the proceedings in this case and will consider the Requests together in this Decision.

III. PRELIMINARY OBSERVATIONS CONCERNING THE CO-INVESTIGATING JUDGES' RECENT DECISION IN CASE 003

19. The Pre-Trial Chamber notes with curiosity the Co-Investigating Judges' lengthy observations on the manner in which their conduct of the judicial investigation was assessed by the appellate court.²⁷ The Chamber observes that it is now too late for the Co-Investigating Judges to adopt to a reasonable and legal practice that they have, time and again, excluded in favour of what they referred to as their "discretionary" practice.²⁸ Moreover, their recent decision does not seem to be in keeping with the former. Indeed, contrary to their assertion, the Pre-Trial Chamber does not "make much of [the Co-Investigating Judges'] alleged duty to present [their] disagreement on personal jurisdiction to the [Pre-Trial Chamber] for resolution".²⁹ The Pre-Trial Chamber, on the other hand, is committed to the strict application of the law and the rejection of arbitrariness. Moreover, the Chamber mainly sees, in the above-mentioned decision, attempts at justification and idle speculations³⁰ that were unrelated to the request the Co-Investigating Judges were seized of.

20. Notwithstanding the bitterness expressed by the Co-Investigating Judges with respect to the Pre-Trial Chamber's assessment of their agreement to end the judicial investigation with conflicting closing orders, the Pre-Trial Chamber performed its duty to exercise judicial oversight over the first instance judges, through strict application of

²⁷ See Case 003, Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7 ("Decision Denying the Request to Forward Case File 003 to the Trial Chamber (D270/7)"), paras 8–27.

²⁸ See, e.g., Closing Order (D267), para. 19 referring to Case 003, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2 ("Decision on Disclosure of Documents Relating to Disagreements (D262.2)"), paras 13 to 16; Dismissal Order (D266), para. 7 referring to Decision on Disclosure of Documents Relating to Disagreements (D262.2), para. 15 (by a joint reading of the decisions, the Co-Investigating Judges erroneously believe that their prerogative to refer a disagreement to the Pre-Trial Chamber is discretionary and not compulsory).

²⁹ Decision Denying the Request to Forward Case File 003 to the Trial Chamber (D270/7), para. 15.

³⁰ See Decision Denying the Request to Forward Case File 003 to the Trial Chamber (D270/7), paras 13–25 (of which a brief analysis reveals the massive use of the conditional mode, the use of the conjunction "If" which announces a hypothesis, and a variety of formulations such as: "we fail to comprehend", "there was no reason to think", "miraculously", "would have meant", "we are unsure", "unforeseeable [...] epiphany", "we doubt", etc.).



the law.³¹ The Pre-Trial Chamber has on numerous occasions recalled that “the discretion of the Co-Investigating Judges in making this determination [on personal jurisdiction] is a judicial one and does not permit arbitrary action but should rather be exercised with well settled legal principles.”³²

21. In this context, the Pre-Trial Chamber has always applied the utmost prudence in exercising its jurisdiction during the pre-trial phase³³, and its rigorous assessment of these unprecedented conflicting closing orders is explained by the deliberately unreasonable exercise of the judicial functions that were entrusted with the Co-Investigating Judges,³⁴ in spite of the Chamber's numerous warnings.³⁵

22. The Pre-Trial Chamber deplores the fact that these Judges, having disregarded their obligations, consider themselves victims³⁶ upon discovering that their gross errors have been identified, even though they knowingly violated the applicable law, thereby causing the breakdown of an entire judicial system and dragging the Parties—including the Applicants—and the tens of thousands of victims of the crimes they were responsible for investigating, into legal uncertainty.

23. The Pre-Trial Chamber reiterates its firm intention to perform its duties impartially and in accordance with the law, until they are fulfilled. It also notes the errors committed by the Co-Investigating Judges, which undermined the very foundations of the hybrid system and proper functioning of the ECCC.³⁷

³¹ See Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33) paras 43–48; Considerations on Appeals against Closing Orders (D266/27 and D267/35), Opinion of Judges BEAUVALLET and BAIK, paras 121–130.

³² Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), para. 49. See Considerations on Appeals against Closing Orders (D266/27 and D267/35) para. 45; Case 004/1/07-09-2009-ECCC/OCIJ (“Case 004/1”) (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (“Case 004/1, Considerations on the International Co-Prosecutor’s Appeal of Closing Order (D308/3/1/20)”), para. 20.

³³ See Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), para. 53.

³⁴ See Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), paras 35, 36.

³⁵ See, e.g., Case 004/1, Considerations on the International Co-Prosecutor’s Appeal of Closing Order (D308/3/1/20) paras 28–31, 32–35, 52–56; Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33) paras 60–72, 73–83; Considerations on Appeals against Closing Orders (D266/27 and D267/35), Opinion of Judges BEAUVALLET and BAIK, paras 131–134, 135–149.

³⁶ See Decision Denying the Request to Forward Case File 003 to the Trial Chamber (D270/7), paras 10–13.

³⁷ See Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 106. See also Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), para. 54 (“in complete violation of the very foundations of the ECCC legal framework”).



IV. ADMISSIBILITY

A. SUBMISSIONS OF THE PARTIES RELATING TO THE CO-LAWYERS' REQUEST

1. Co-Lawyers' Request

24. In their Request, the Co-Lawyers first set out the reasons why their submission is admissible.³⁸ In particular, they argue that the Pre-Trial Chamber has a judicial duty to rule on the issues raised in their Request because it has final jurisdiction over the pre-trial stage which it must exercise even when the law is silent, obscure or insufficient.³⁹ They add that, pursuant to Internal Rule 21, the Chamber is under the obligation to interpret the legal framework so as to safeguard the interests of the Charged Person and to use its inherent authority in the instant case to ensure good and fair administration of justice.⁴⁰ Finally, the Co-Lawyers state that their Request concerns issues of general significance for the ECCC's jurisprudence and legacy and that a ruling on them would clarify the procedure and save judicial resources.⁴¹

25. On the merits, the Co-Lawyers argue that, in the event the Pre-Trial Chamber fails to commit MEAS Muth to trial by supermajority, it has a judicial obligation to terminate, seal and archive Case File 003⁴² because (i) MEAS Muth has a right to expeditious proceedings,⁴³ (ii) the delays in the 13-year investigation are unreasonable⁴⁴ and (iii) the trial and appeal stages will last at least four years to reach an inevitable outcome of acquittal.⁴⁵ Thus, (iv) if the Pre-Trial Chamber should fail to agree by a qualified majority to refer the case to trial, it must terminate, seal and archive the case.⁴⁶

26. Firstly, the Co-Lawyers maintain that the usual time limits prescribed to conduct the pre-trial stage were not respected in Case 003,⁴⁷ recalling that Internal Rule 21(4) requires that proceedings before the ECCC be brought to a conclusion within a

³⁸ Co-Lawyers' Request (D272), para. 46.

³⁹ Co-Lawyers' Request (D272), para. 46.

⁴⁰ Co-Lawyers' Request (D272), para. 46.

⁴¹ Co-Lawyers' Request (D272), para. 46.

⁴² Co-Lawyers' Request (D272), para. 47.

⁴³ Co-Lawyers' Request (D272), paras 48-50.

⁴⁴ Co-Lawyers' Request (D272), paras 51-55.

⁴⁵ Co-Lawyers' Request (D272), paras 56-59.

⁴⁶ Co-Lawyers' Request (D272), paras 60-69.

⁴⁷ Co-Lawyers' Request (D272), paras 1, 34, 47-55, 65.



reasonable time.⁴⁸ They state that the right to be tried without undue delay under Internal Rule 21(4) with its equivalent in Article 35^{new} of the ECCC Law⁴⁹ is a fundamental principle of Article 14(3)(c) of the International Covenant on Civil and Political Rights (“ICCPR”) and is enshrined, *inter alia*, in Articles 31 and 38 of the Cambodian Constitution and the European, African and American Conventions on Human Rights.⁵⁰

27. Secondly, the Co-Lawyers allege that the various disagreements between the national and international components of the ECCC⁵¹ have led to excessive and avoidable delays in the pre-trial stage, which has now lasted 13 years⁵² and is not consistent with proceedings conducted in a timely fashion. Further, the Co-Lawyers recount the reasons for the above-mentioned delays, in particular the Co-Prosecutors’ disagreement at the time of the Introductory Submission,⁵³ between the Co-Investigating Judges on how the investigation was conducted⁵⁴ and between the judges of the Pre-Trial Chamber on whether or not to refer MEAS Muth to trial.⁵⁵

28. Moreover, the Co-Lawyers claim that the complexity of the case—which concerns only one person indicted for acts committed at eight crime sites and events and his role in the Kampuchean Revolutionary Army—can neither explain nor justify the 13 years of judicial investigation, which is three times the duration of the pre-trial stage in Case 002.⁵⁶ Similarly, the conduct of MEAS Muth is not the cause of procedural delays since the latter complied with all the conditions ordered by the International Co-Investigating Judge BOHLANDER.⁵⁷ They also argue that MEAS Muth is 82 years old, that his indictment by a Co-Investigating Judge will perpetually weigh on his reputation and that of his family, and that the chances for a fair trial diminish as time passes.⁵⁸

⁴⁸ Co-Lawyers’ Request (D272), para. 48.

⁴⁹ *Law on the Establishment of 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”).

⁵⁰ Co-Lawyers’ Request (D272), para. 48.

⁵¹ Co-Lawyers’ Request (D272), paras 51 and 65.

⁵² Co-Lawyers’ Request (D272), paras 51 and 69.

⁵³ Co-Lawyers’ Request (D272), para. 51 (a).

⁵⁴ Co-Lawyers’ Request (D272), para. 51 (b).

⁵⁵ Co-Lawyers’ Request (D272), paras 51 (c), (d).

⁵⁶ Co-Lawyers’ Request (D272), para. 52.

⁵⁷ Co-Lawyers’ Request (D272), para. 53.

⁵⁸ Co-Lawyers’ Request (D272), paras 54, 55.



29. Thirdly, the Co-Lawyers speculate that a trial against MEAS Muth—assuming that the Pre-Trial Chamber agrees by supermajority to refer him for trial—would not begin until May 2022.⁵⁹ They argue that the Trial Chamber, which would be split on the preliminary objection of the ECCC’s lack of jurisdiction over MEAS Muth, will issue an acquittal which is likely to be upheld by the Supreme Court Chamber.⁶⁰ The Co-Lawyers continue their argument by conjecturing that if MEAS Muth were to be acquitted—a reasonable assumption, in their view, given the National Trial Chamber Judges’ statement in Case 004/2 that the case was dismissed by the Pre-Trial Chamber’s Considerations⁶¹—the International Co-Prosecutor would appeal the acquittal, which leads the Co-Lawyers to assess that a Supreme Court Chamber judgment would only be issued in 2026.⁶²

30. Fourthly, the Co-Lawyers argue that the Pre-Trial Chamber, which is required to ensure that the fundamental principles of the ECCC procedure are respected at the pre-trial stage, must terminate, seal and archive Case File 003 to ensure due process if it is unable to come to a consensus or supermajority and issue a final, binding decision concluding the pre-trial proceedings in Case 003.⁶³ They assert that the doctrine of abuse of process is recognised internationally, and implicitly in the ECCC Agreement and envisioned by the Co-Investigating Judges, the Supreme Court Chamber and Cambodian law.⁶⁴ They contend that this doctrine allows the Pre-Trial Chamber to use its discretion to decline exercising its jurisdiction where in light of *serious* and *egregious* violations of the accused’s rights, to exercise this jurisdiction would prove detrimental to the Court’s integrity.⁶⁵ The Co-Lawyers argue that given the absence of a reasonable prospect for a trial within a reasonable time or for MEAS Muth’s conviction,⁶⁶ the Pre-Trial Chamber would also be guilty of abuse of process if it did not immediately terminate the proceedings against MEAS Muth, even if it decided to refer him to trial.⁶⁷

⁵⁹ Co-Lawyers’ Request (D272), paras 56-57.

⁶⁰ Co-Lawyers’ Request (D272), para. 56.

⁶¹ Co-Lawyers’ Request (D272), para. 59.

⁶² Co-Lawyers’ Request (D272), paras 56, 59.

⁶³ Co-Lawyers’ Request (D272), paras 60-61.

⁶⁴ Co-Lawyers’ Request (D272), paras 62-64.

⁶⁵ Co-Lawyers’ Request (D272), para. 63.

⁶⁶ Co-Lawyers’ Request (D272), para. 62.

⁶⁷ Co-Lawyers’ Request (D272), para. 67.



31. In conclusion, the Co-Lawyers allege that MEAS Muth is being deprived of his right to a fair trial and that the Pre-Trial Chamber has a duty to safeguard defence rights and preserve the ECCC's integrity.⁶⁸ The Co-Lawyers argue that the Chamber had various means at its disposal to prevent the current judicial limbo, including investigating the case itself and issuing its own closing order.⁶⁹ They reiterate that if the Chamber is unable to reach, by consensus or by supermajority, a final and speedy determination of the pre-trial proceedings against MEAS Muth in Case 003, it is obliged to adhere to its inherent jurisdiction and faithfully follow the law by exercising its authority to terminate the proceedings in Case 003, seal the Case File and archive it.⁷⁰

2. International Co-Prosecutor's Response

32. In her Response to the Co-Lawyers' Request, the International Co-Prosecutor argues that even if the request were admissible, the Pre-Trial Chamber must dismiss it because it is replete with errors of fact, law and logic.⁷¹ She asserts that (i) the content of the Co-Lawyers' Request is inconsistent and contradictory; (ii) there was no unreasonable delay in Case 003; and that (iii) to terminate, seal and archive Case File 003 is unwarranted.⁷² In conclusion, the International Co-Prosecutor requests the Pre-Trial Chamber to dismiss the Co-Lawyers' Request to terminate and conclude the pre-trial stage of Case 003 by providing an "agreed" final determination confirming that MEAS Muth is indicted and ordering him to be sent for trial, and to take all necessary administrative actions to immediately forward the Considerations in Case 003, the Indictment and remaining Case File 003 to the Trial Chamber.⁷³

33. As a preliminary matter, the International Co-Prosecutor notes that the inconsistent and contradictory nature of the Co-Lawyers' Request not only warrants its dismissal, but also warrants its summary dismissal by the Pre-Trial Chamber.⁷⁴ Indeed, according to her, the Co-Lawyers argued for immediate and unconditional termination of the case only in the event that the Chamber is unable to reach a supermajority in favour of sending the case to trial while the Pre-Trial Chamber unanimously found that the

⁶⁸ Co-Lawyers' Request (D272), para. 72.

⁶⁹ Co-Lawyers' Request (D272), para. 72.

⁷⁰ Co-Lawyers' Request (D272), paras 70-73.

⁷¹ International Co-Prosecutor's Response (D272/1), para. 1.

⁷² International Co-Prosecutor's Response (D272/1), paras 2-20.

⁷³ International Co-Prosecutor's Response (D272/1), para. 22.

⁷⁴ International Co-Prosecutor's Response (D272/1), para. 3.



Indictment was valid, a fact that the Co-Lawyers did not dispute.⁷⁵ The International Co-Prosecutor contends that by acquiescing to the possibility of a trial approved by the Pre-Trial Chamber by supermajority, the Co-Lawyers undermine their arguments concerning the immediate and unconditional termination of Case 003.⁷⁶

34. Secondly, the International Co-Prosecutor submits that the Co-Lawyers' argument that the proceedings deprived MEAS Muth of his right to a fair trial and to a decision rendered within a reasonable time is unfounded and paradoxical, given that the Co-Lawyers themselves acknowledged that international criminal justice takes significant time.⁷⁷

35. In particular, the International Co-Prosecutor rejects the Co-Lawyers' argument concerning the existence of excessive delays, which is without merit as it is neither well-founded in law nor in fact.⁷⁸ First of all, she notes that MEAS Muth was informed of his status as a suspect by the Reserve International Co-Investigating Judge KASPER-ANSERMET on 24 February 2012, *i.e.* approximately nine years ago and not 13 as the Co-Lawyers claim.⁷⁹ Second, relying on Internal Rule 21(4) and Article 14(3)(c) of the ICCPR, the International Co-Prosecutor emphasises that the right to expeditious proceedings does not depend on the duration of those proceedings, nor on the existence of certain delays, but rather on whether or not the duration of the proceedings is deemed reasonable,⁸⁰ which, in accordance with international criminal jurisprudence, must be determined in light of the circumstances of the case.⁸¹ Furthermore, contrary to the Co-Lawyers, the International Co-Prosecutor insists that it is necessary to strike a balance between the accused's right to be tried within reasonable time and the interests of justice.⁸²

⁷⁵ International Co-Prosecutor's Response (D272/1), para. 3.

⁷⁶ International Co-Prosecutor's Response (D272/1), para. 3.

⁷⁷ International Co-Prosecutor's Response (D272/1), para. 4 *referring to* Case 003, MEAS Muth's Submission on the Budgetary Situation of the ECCC and Its Impact on Case 003, 5 June 2017, D249/2, paras 2-3.

⁷⁸ International Co-Prosecutor's Response (D272/1), paras 5-8.

⁷⁹ International Co-Prosecutor's Response (D272/1), para. 6.

⁸⁰ International Co-Prosecutor's Response (D272/1), para. 7.

⁸¹ These circumstances include the complexity of the case, the conduct of the Accused, as well as the conduct of the competent authorities, *see* International Co-Prosecutor's Response (D272/1), para. 7.

⁸² International Co-Prosecutor's Response (D272/1), para. 8.



36. The International Co-Prosecutor also challenges the Co-Lawyers' assessment of the complexity and seriousness of Case 003.⁸³ In particular, she asserts that the comparison between Cases 002 and 003 is unwarranted and misleading since the complexity of Case 003 must not be assessed in the light of Case 002,⁸⁴ but by examining the factual complexity of the case which the Co-Lawyers intentionally underestimate,⁸⁵ as well as its legal complexity.⁸⁶ With regard to the allegation that MEAS Muth did not cause any delay in the proceedings, the International Co-Prosecutor recalls in particular that, to the contrary, he initially refused to appear before the ECCC, forcing the International Co-Investigating Judge HARMON to charge him *in absentia*.⁸⁷

37. In addition to arguing that the Co-Lawyers do not substantiate their assertion that MEAS Muth has suffered from stigma for 13 years as a result of the proceedings before the ECCC,⁸⁸ the International Co-Prosecutor indicates that the Co-Lawyers are mistaken in speculating that potential future trial proceedings against MEAS Muth will result in a violation of his right to expeditious proceedings since a right cannot be said to be violated *before* such violation has taken place.⁸⁹ Finally, the International Co-Prosecutor challenges the Co-Lawyers' conclusions regarding international criminal jurisprudence on undue delay⁹⁰ and argues that a comparison of the practice of the International Criminal Tribunal for ex-Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Sierra Leone and the International Criminal Court shows that judicial proceedings with lengths of a similar range to that of Case 003 have not been found unduly delayed, despite the fact that those accused persons were in custody.⁹¹

⁸³ International Co-Prosecutor's Response (D272/1), para. 9.

⁸⁴ International Co-Prosecutor's Response (D272/1), para. 9.

⁸⁵ Stressing that the decision to exclude a number of facts came belatedly, the International Co-Prosecutor emphasises the complexity of the investigation that concerned the Kampuchean Revolutionary Army as a whole for crimes committed by the members of the DK Navy and Air Force throughout Cambodia, during the entire period of Democratic Kampuchea, *see* International Co-Prosecutor's Response (D272/1), para. 10.

⁸⁶ The International Co-Prosecutor mentions, for example, the multiple legal qualifications of the facts, the disagreements, the novel legal issues raised as well as the need to re-examine the evidence in Case 001/18-07-2007-ECCC ("Case 001") and Case 002/19-09-2007-ECCC ("Case 002"), *see* International Co-Prosecutor's Response (D272/1), para. 11.

⁸⁷ International Co-Prosecutor's Response (D272/1), para. 12.

⁸⁸ The International Co-Prosecutor explains that while MEAS Muth must comply with certain reporting formalities to the ECCC, he travelled regularly to Thailand without a passport for medical treatment, received a new passport in 2016 which he failed to declare to the ECCC and was even able to attend NUON Chea's funeral, *see* International Co-Prosecutor's Response (D272/1), para. 13 and footnotes 74-75.

⁸⁹ International Co-Prosecutor's Response (D272/1), para. 14.

⁹⁰ International Co-Prosecutor's Response (D272/1), para. 16.

⁹¹ International Co-Prosecutor's Response (D272/1), para. 16.



38. Thirdly, the International Co-Prosecutor argues that the Co-Lawyers are mistaken in concluding that the alleged abuse of process justifies the termination of the Case.⁹² She sustains that the Co-Lawyers invoke the “abuse of process” doctrine only because they are aware that the ECCC framework does not allow a termination (or permanent stay) of proceedings on any other applicable basis.⁹³ She further contends that the Co-Lawyers fail to genuinely appreciate the scope of the abuse of process doctrine and does not meet the “particularly high” abuse of process standard.⁹⁴ Referring to Internal Rule 21(1), the International Co-Prosecutor stated that the termination of the proceedings would be disproportionate to the alleged harm suffered, and stressed the need to strike a balance between the rights of *all* parties.⁹⁵ In conclusion, she asserts that terminating the proceedings for a reason unrelated to the merits of Case 003 would do nothing to protect MEAS Muth’s reputation, unlike a trial where he could challenge the allegedly unchallengeable indictment.⁹⁶

B. SUBMISSIONS OF THE PARTIES RELATING TO THE INTERNATIONAL CO-PROSECUTOR’S REQUEST

1. International Co-Prosecutor’s Request

39. In her Request, the International Co-Prosecutor contends that the Pre-Trial Chamber’s Considerations contain errors of law resulting in manifest injustice⁹⁷ and that the Chamber has once again placed the proceedings in judicial limbo for the following reasons.⁹⁸ In her view, the Pre-Trial Chamber is obliged (i) to reach a decision in order to conclude the pre-trial stage of Case 003 pursuant to the ECCC’s legal framework; (ii) to send Case 003 to the Trial Chamber in light of its unanimous conclusion that the Indictment is valid; and in the alternative, (iii) to seize the Trial Chamber with the Indictment pursuant to Internal Rule 77(13)(b).⁹⁹ On this basis, the International Co-Prosecutor requests the Pre-Trial Chamber to conclude the pre-trial stage of Case 003 by providing an agreed final determination confirming that MEAS Muth is indicted and ordering him to be sent for trial, and take all necessary administrative actions to

⁹² International Co-Prosecutor’s Response (D272/1), para. 17.

⁹³ International Co-Prosecutor’s Response (D272/1), para. 17.

⁹⁴ International Co-Prosecutor’s Response (D272/1), para. 18.

⁹⁵ International Co-Prosecutor’s Response (D272/1), paras 19-20.

⁹⁶ International Co-Prosecutor’s Response (D272/1), para. 20.

⁹⁷ International Co-Prosecutor’s Request (D271/1), para. 11.

⁹⁸ International Co-Prosecutor’s Request (D271/1), para. 11.

⁹⁹ International Co-Prosecutor’s Request (D271/1), paras 10-31.



immediately forward the Considerations, Case 003 Indictment and the remaining Case File to the Trial Chamber.¹⁰⁰

40. First, the International Co-Prosecutor submits that the Pre-Trial Chamber is obliged to issue a final determination that decisively concludes the pre-trial stage of Case 003. She argues that the Pre-Trial Chamber erred by failing to render a final determination agreed upon by all five Pre-Trial Chamber Judges detailing the subsequent procedural steps in light of *all* the decisions made by the Pre-Trial Chamber Judges.¹⁰¹ According to the International Co-Prosecutor, the failure or refusal of the Pre-Trial Chamber to render a final decision has created a judicial impasse paralyzing the ECCC's judicial system.¹⁰²

41. The International Co-Prosecutor argues that *all* Case 003 Parties have the right to a just and timely judicial resolution of the pre-trial appeals filed during the pre-trial stage in order to bring legal clarity and certainty.¹⁰³ She points out that the Pre-Trial Chamber is the “sole and ultimate jurisdiction for pre-trial matters”¹⁰⁴ and that, as a result, it is subject to the universal judicial obligation to resolve all contested issues, no matter how complex, and to provide a legal remedy in a timely manner and in accordance with the applicable law, thereby avoiding a denial of justice.¹⁰⁵ The International Co-Prosecutor asserts that the Judges of the Pre-Trial Chamber therefore erred in law by issuing two separate opinions instead of a joint and conclusive final determination, thereby occasioning a manifest injustice.¹⁰⁶

42. Secondly, the International Co-Prosecutor argues that the Pre-Trial Chamber is obliged to send Case 003 to trial because the Pre-Trial Chamber unanimously confirmed the validity of the Indictment. The International Co-Prosecutor maintains that the absence of common reasoning for all the Pre-Trial Chamber Judges in no way detracts

¹⁰⁰ International Co-Prosecutor's Request (D271/1), para. 34.

¹⁰¹ International Co-Prosecutor's Request (D271/1), para. 12.

¹⁰² International Co-Prosecutor's Request (D271/1), para. 13.

¹⁰³ International Co-Prosecutor's Request (D271/1), para. 14 *referring to* Case 004/2, Decision on the 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 on the International Co-Prosecutor's Immediate Appeal (E004/2/1/1/2)”); Case 003, Decision on MEAS Muth's Request for Clarification of the Pre-Trial Chamber Considerations on Appeals against Closing Orders in Case 004/2, 3 November 2020, D266/24 and D267/32, para. 31; Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), paras 46, 51, 54, 68.

¹⁰⁴ International Co-Prosecutor's Request (D271/1), para. 15.

¹⁰⁵ International Co-Prosecutor's Request (D271/1), para. 15.

¹⁰⁶ International Co-Prosecutor's Request (D271/1), para. 17.



from the unanimous nature of the decision on the validity of the Indictment¹⁰⁷ since, firstly, the ECCC legal framework expressly allows for separate opinions and, secondly, the existence of common reasoning is not a prerequisite for a joint decision before international criminal tribunals.¹⁰⁸

43. With regard to the statement by the President of the Pre-Trial Chamber in Case 004/2 that only the joint disposition unanimously decided and signed by all five judges has binding effect, the International Co-Prosecutor points out that the Pre-Trial Chamber has previously issued mandatory decisions, including default decisions, in the absence of a unanimous joint disposition.¹⁰⁹ In any event, all five Pre-Trial Chamber Judges signed the portions of the Considerations in which they agreed the Indictment is valid.¹¹⁰ She adds that any interpretation of the Considerations which denies the express finding of the five Pre-Trial Chamber Judges that the Indictment is valid defies logic and elevates form over substance.¹¹¹ Consequently, the International Co-Prosecutor maintains that the Pre-Trial Chamber Judges have a duty to implement this unanimous finding by issuing a final determination confirming that MEAS Muth is indicted and sending him for trial before the Trial Chamber.¹¹²

44. Thirdly, the International Co-Prosecutor argues that, should the Pre-Trial Chamber ignore its own unanimous finding, the Chamber is nonetheless mandated to transfer Case 003 to the Trial Chamber for trial.¹¹³ Since the Indictment was not overturned by a supermajority of the Pre-Trial Chamber, it must refer the matter to the Trial Chamber in accordance with the default position that the investigation—or prosecution—shall proceed.¹¹⁴

45. The International Co-Prosecutor reaches this conclusion on the basis of several arguments. First, she states that the Pre-Trial Chamber considered that, in the present case, the “default position” was expressly intended to effectively resolve the unresolved disagreement between the Co-Investigating Judges over the issue of whether or not

¹⁰⁷ International Co-Prosecutor’s Request (D271/1), paras 18-19.

¹⁰⁸ International Co-Prosecutor’s Request (D271/1), paras 18-19.

¹⁰⁹ International Co-Prosecutor’s Request (D271/1), para. 20.

¹¹⁰ International Co-Prosecutor’s Request (D271/1), para. 20.

¹¹¹ International Co-Prosecutor’s Request (D271/1), para. 21.

¹¹² International Co-Prosecutor’s Request (D271/1), para. 21.

¹¹³ International Co-Prosecutor’s Request (D271/1), para. 22.

¹¹⁴ International Co-Prosecutor’s Request (D271/1), paras 22-31.



MEAS Muth falls within the ECCC's personal jurisdiction.¹¹⁵ Moreover, she argues that the "default position" can ensure that the object and purpose of the ECCC is fulfilled, in accordance with Cambodia's international legal obligations to investigate and prosecute crimes committed during the Khmer Rouge era.¹¹⁶ Referring to the case law of the Pre-Trial Chamber, the International Co-Prosecutor insists that the ECCC legal framework does not permit that such disagreement be entrenched or sheltered from an effective resolution.¹¹⁷

46. Secondly, the International Co-Prosecutor states that, under the ECCC Agreement, "the primary function that is entrusted to the [Pre-Trial Chamber] is precisely to provide for an effective mechanism to conclusively resolve disagreements between [...] the [Co-Investigating Judges]".¹¹⁸ She argues that the Chamber has inherent powers to decide legal questions in the event that the ECCC legal framework does not expressly confer on it the power to rule, if those powers are compatible with (i) the functions entrusted to it by the ECCC legal texts in the interests of justice; (ii) its obligation to "safeguard the interests of a Charged Person and ensure legal certainty and 'fair and adversarial' proceedings"; and (iii) the imperative need to ensure good and fair administration of justice.¹¹⁹ The International Co-Prosecutor concludes that the Pre-Trial Chamber has an obligation to resolve disagreements between the Co-Investigating Judges, irrespective of the form in which the disagreement is submitted to it (through a formal disagreement or by way of the Parties' appeals).¹²⁰

47. Furthermore, the International Co-Prosecutor asserts that the current situation presents the same predicament as an even-numbered chamber in other international tribunals in which there is a "default mechanism" triggered by the judges when the

¹¹⁵ International Co-Prosecutor's Request (D271/1), para. 24.

¹¹⁶ International Co-Prosecutor's Request (D271/1), para. 25.

¹¹⁷ International Co-Prosecutor's Request (D271/1), para. 26 *referring to* Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 101; Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), paras 119 and 123.

¹¹⁸ International Co-Prosecutor's Request (D271/1), para. 27.

¹¹⁹ International Co-Prosecutor's Request (D271/1), para. 27. *See also* International Co-Prosecutor's Request (D271/1), para. 28 (where, in support of her analysis, the International Co-Prosecutor notes that the *Chambre d'accusation spéciale* of the Special Criminal Court in the Central African Republic is similarly expected to find a rapid and definitive resolution of the disagreements between the Co-Investigating Judges).

¹²⁰ International Co-Prosecutor's Request (D271/1), para. 27.



requisite majority cannot be achieved.¹²¹ In no instance does the absence of agreement between the judges result in the automatic dismissal of a case within these courts.¹²²

48. In light of the above, the International Co-Prosecutor states that National Judges were not permitted to ignore the “default position”.¹²³ Recalling that the Cambodian Code of Criminal Procedure limits the causes of extinction of criminal action, as well as the case law of the Trial Chamber and the Supreme Court Chamber on this subject, the International Co-Prosecutor argues that the presumption of innocence and the principle of *in dubio pro reo* cannot lead to the dismissal of the case, particularly in view of the validity of the Indictment.¹²⁴ The International Co-Prosecutor concludes that, in the event that the Pre-Trial Chamber fails to carry out its judicial duties in accordance with law, it would render the ECCC judicial mechanism impotent and give MEAS Muth an unjustified benefit of impunity for the most egregious crimes.¹²⁵

2. Co-Lawyers’ Response

49. In their Response, the Co-Lawyers argues that the International Co-Prosecutor’s Request cannot be granted since the Pre-Trial Chamber did not unanimously uphold the Indictment,¹²⁶ and that at best, the National Pre-Trial Chamber Judges remained ambiguous in their intentions.¹²⁷ Indeed, the Co-Lawyers argues that (i) the unanimous confirmation of the Indictment by the Pre-Trial Chamber is questionable and (ii) even if the Chamber unanimously upheld the Indictment, the ECCC’s legal framework does not establish that it prevails over the Dismissal Order and results in the case being referred to the Trial Chamber.¹²⁸ They therefore ask the Chamber to end the current *analysis paralysis* that violates MEAS Muth's rights to a fair trial and undermines the integrity of the ECCC’s proceedings and legacy.¹²⁹ Although, in their view, the Request is inadmissible and should be summarily dismissed,¹³⁰ the Co-Lawyers do not object to the Pre-Trial Chamber examining it in light of the current judicial blockage, but submit that

¹²¹ International Co-Prosecutor’s Request (D271/1), para. 29.

¹²² International Co-Prosecutor’s Request (D271/1), para. 29.

¹²³ International Co-Prosecutor’s Request (D271/1), para. 30.

¹²⁴ International Co-Prosecutor’s Request (D271/1), para. 30.

¹²⁵ International Co-Prosecutor’s Request (D271/1), para. 32.

¹²⁶ Co-Lawyers’ Response (D271/3), p. 1.

¹²⁷ Co-Lawyers’ Response (D271/3), p. 1.

¹²⁸ Co-Lawyers’ Response (D271/3), paras 6-35.

¹²⁹ Co-Lawyers’ Response (D271/3), para. 35.

¹³⁰ Co-Lawyers’ Response (D271/3), para. 5.



the Pre-Trial Chamber rejects it and terminates Case 003, seals the Case File, and archives it.¹³¹

50. In the first branch of their Response, the Co-Lawyers argue that the International Co-Prosecutor is mistaken in claiming that the Chamber must send Case 003 to trial following its “unanimous” finding that the Indictment is valid.¹³² By considering the separate opinion of the Pre-Trial Chamber’s National Judges and the unanimous Considerations, the Co-Lawyers question whether the National Judges totally understood and appreciated the full content and context of the unanimous findings.¹³³ The Co-Lawyers notes that, on fundamental and decisive points, the separate opinion of the National Judges is irreconcilable with the unanimous Considerations and indicate that the Pre-Trial Chamber’s National Judges must clarify these inconsistencies.¹³⁴

51. Firstly, the Co-Lawyers question the intention of the National Judges of the Pre-Trial Chamber when they accused the Co-Investigating Judges of obstruction of justice by purposely evading the dispute resolution mechanism, their view that the conflicting Closing Orders constitute an unresolved disagreement, as well as their participation in the deliberations and drafting of the “unanimous” Considerations.¹³⁵

52. Secondly, the Co-Lawyers question the National Judges’ view on the application of Internal Rule 77(13) to conflicting Closing Orders.¹³⁶ They note that in Case 003, the National Judges found that “[i]n the light of [...] Rule 77(13), the two Closing Orders [were] of the same value and st[oo]d valid”¹³⁷ but provide no reasons for departing from their approach in Case 004/2 in which they simply upheld the Dismissal Order as “the most appropriate solution” given the lacuna in Internal Rule 77(13).¹³⁸

¹³¹ Co-Lawyers’ Response (D271/3), para. 35.

¹³² Co-Lawyers’ Response (D271/3), para. 6 *referring to* the International Co-Prosecutor’s Request (D271/1), paras 12-21.

¹³³ Co-Lawyers’ Response (D271/3), para. 6.

¹³⁴ Co-Lawyers’ Response (D271/3), paras 6–25.

¹³⁵ Specifically, the Co-Lawyers note that the separate opinion of the National Judges did not repeat the vitriolic language used in the unanimous Considerations and that they decided, noting the Co-Investigating Judges’ decision to keep their disagreement internally, that the Pre-Trial Chamber could not “apply its competence as provided for in Internal Rule 72”, concluding that the two Closing Orders are of the same value and still stand, *see* Co-Lawyers’ Response (D271/3), paras 7-10.

¹³⁶ Co-Lawyers’ Response (D271/3), paras 11–14.

¹³⁷ Co-Lawyers’ Response (D271/3), para. 12 *referring to* Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 115.

¹³⁸ Co-Lawyers’ Response (D271/3), paras 12-14.



53. Thirdly, the Co-Lawyers argue that the approach of the National Judges to apply the *in dubio pro reo* principle is inconsistent.¹³⁹ Despite the Chamber's unanimous finding rejecting the application of this principle in Case 003 Considerations,¹⁴⁰ the Co-Lawyers maintain that the National Judges seemingly applied the principle of *in dubio pro reo* by concluding that Case 003 should be archived.¹⁴¹

54. Fourthly, the Co-Lawyers question whether the National Judges really intended to uphold the Indictment since they consider that the ECCC does not have personal jurisdiction over MEAS Muth.¹⁴² In the absence of a unanimous conclusion on the matter of personal jurisdiction and without any analysis of this issue on their part,¹⁴³ the Co-Lawyers assert that, nevertheless, the National Judges reiterated during the investigation that the ECCC lacks personal jurisdiction over MEAS Muth and rejected all Civil Party Applicants in Case 003.¹⁴⁴

55. In light of these inconsistencies, the Co-Lawyers argue that the National Judges must clarify their understanding of the Considerations.¹⁴⁵ Specifically, they argue that in the event that the National Judges were to agree that the Dismissal Order cannot be set aside, there would be *analysis paralysis* which must be solved by terminating, sealing and archiving Case 003.¹⁴⁶

56. In the second branch of their Response, the Co-Lawyers argue that the International Co-Prosecutor erroneously claims that (i) the Pre-Trial Chamber is required to refer Case 003 to the Trial Chamber for trial based on the Pre-Trial Chamber's unanimous finding that the Indictment is valid, and also that (ii) the referral is mandated, even if the Pre-Trial Chamber decides to ignore its own unanimous

¹³⁹ Co-Lawyers' Response (D271/3), paras 15, 21.

¹⁴⁰ Co-Lawyers' Response (D271/3), para. 15 *referring to* Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 77.

¹⁴¹ Relying on the allegations of the Co-Investigating Judges, the Co-Lawyers claim that the National Judges have, in fact, followed their arguments that (i) the Pre-Trial Chamber may not exercise its jurisdiction as provided for in Internal Rule 72; (ii) in light of Internal Rule 77(13), both Closing Orders have the same value and are both valid; and (iii) that the principle of *in dubio pro reo*, as a corollary of the principle of presumption of innocence, does not allow the Pre-Trial Chamber to rule that any act of any Co-Investigating Judge has preponderance, *see* Co-Lawyers' Response (D271/3), paras 15-20.

¹⁴² Co-Lawyers' Response (D271/3), paras 22-24.

¹⁴³ Co-Lawyers' Response (D271/3), paras 22-23.

¹⁴⁴ Co-Lawyers' Response (D271/3), para. 23.

¹⁴⁵ Co-Lawyers' Response (D271/3), para. 25.

¹⁴⁶ Co-Lawyers' Response (D271/3), para. 25.



finding.¹⁴⁷ Relying on ECCC case law,¹⁴⁸ they allege that the National Judges consider that the default principle does not apply in this case since they have stated that the Pre-Trial Chamber cannot apply its competence pursuant to Internal Rule 72.¹⁴⁹ The Co-Lawyers conclude that the two Closing Orders would therefore stand in violation of MEAS Muth's right to a fair trial and that the Indictment would remain unchallengeable, which is incompatible with the basic demands of the rule of law.¹⁵⁰ They add that the Parties to the ECCC Agreement certainly did not agree on a default position sending the case to trial on the basis of an indictment when a dismissal order was issued simultaneously, since doing so would strip the ECCC proceedings of the constitutional principle of *in dubio pro reo*.¹⁵¹

57. In addition, the Co-Lawyers claim that Internal Rule 77(13) does not apply when the Co-Investigating Judges issue two conflicting Closing Orders.¹⁵² They argue that a combined application of Internal Rules 77(13)(a) and 77(13)(b) leads to an absurd result and causes irreparable harm to MEAS Muth's fair trial rights since both Closing Orders would hang over him in perpetuity.¹⁵³

58. Instead, the Co-Lawyers challenge an interpretation of Internal Rule 77(13) according to which an Indictment would automatically prevail over a Dismissal Order, as this would impede the application of the principle of *in dubio pro reo* and would subordinate the National Co-Investigating Judge to the International Co-Investigating Judge.¹⁵⁴ Moreover, they maintain that, since the Pre-Trial Chamber did not find by supermajority that the National Co-Investigating Judge had committed errors or abuses fundamentally determinative of his exercise of discretion that would impede the application of the principle of *in dubio pro reo*, the Dismissal Order must prevail over the Indictment.¹⁵⁵

¹⁴⁷ Co-Lawyers' Response (D271/3), para. 26 referring to the International Co-Prosecutor's Request (D271/1), para. 22.

¹⁴⁸ Co-Lawyers' Response (D271/3), para. 27 referring to Case 001, Appeal Judgement, 3 February 2012, F28, para. 65; Case 002 (PTC75) Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 274.

¹⁴⁹ Co-Lawyers' Response (D271/3), para. 27 referring to Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 113.

¹⁵⁰ Co-Lawyers' Response (D271/3), para. 28.

¹⁵¹ Co-Lawyers' Response (D271/3), para. 29.

¹⁵² Co-Lawyers' Response (D271/3), para. 30.

¹⁵³ Co-Lawyers' Response (D271/3), para. 30.

¹⁵⁴ Co-Lawyers' Response (D271/3), para. 30.

¹⁵⁵ Co-Lawyers' Response (D271/3), para. 31.



59. Finally, the Co-Lawyers argue that the Pre-Trial Chamber has the authority and duty to terminate, seal and archive the Case.¹⁵⁶ Referring to the Supreme Court Chamber's judgment,¹⁵⁷ the Co-Lawyers argue that the absence of agreement between the judges *may* result in the termination of the proceedings.¹⁵⁸ They add that in the event of a lasting impediment in the conduct of the proceedings, Cambodian law provides for the power to suspend or stay proceedings.¹⁵⁹ Considering that the disagreement in this case constitutes an intractable impediment to the conduct of the proceedings, the Co-Lawyers claim that, by sending the case to the Trial Chamber, the Pre-Trial Chamber would be knowingly and wilfully engaging in the sort of abuse of process it claimed the Co-investigating Judges committed.¹⁶⁰

3. National Co-Prosecutor's Response

60. In her Response, the National Co-Prosecutor disagrees with the International Co-Prosecutor's Request,¹⁶¹ and submits that the Pre-Trial Chamber terminates Case 003, seals Case File 003 and places it in the ECCC archives, pursuant to Internal Rule 69(2)(b), which requires the case file to be archived after a Dismissal Order is issued¹⁶².

61. First of all, she points out that the National Judges of the Pre-Trial Chamber stated that Case File 003 should be held in the ECCC archives and that the Co-Lawyers filed a request to terminate, seal and archive Case File 003.¹⁶³ She further argues, contrary to the Co-International Prosecutor's Request, that "Case 003 is similar to Case file 004/2" because part of the common dispositions of the Considerations in Case 003 and Case 004/2 are in fact identical.¹⁶⁴ She also highlights that: (i) the Pre-Trial Chamber did not order its Greffier to forward the Case File,¹⁶⁵ (ii) the Co-Investigating Judges decided to seal and archive the Case File on the basis of a decision which constitutes

¹⁵⁶ Co-Lawyers' Response (D271/3), para. 32.

¹⁵⁷ Co-Lawyers' Response (D271/3), para. 32 *referring to* Case 004/2, Decision on the International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2 (E004/2/1/1/2), paras 53, 67-68, 71.

¹⁵⁸ Co-Lawyers' Response (D271/3), para. 32.

¹⁵⁹ Co-Lawyers' Response (D271/3), para. 33.

¹⁶⁰ Co-Lawyers' Response (D271/3), para. 34.

¹⁶¹ National Co-Prosecutor's Response (D271/4), para. 18.

¹⁶² National Co-Prosecutor's Response (D271/4), paras 19-20.

¹⁶³ National Co-Prosecutor's Response (D271/4), paras 12-13 *referring to* Co-Lawyers' Request (D272).

¹⁶⁴ National Co-Prosecutor's Response (D271/4), para. 14.

¹⁶⁵ National Co-Prosecutor's Response (D271/4), para. 15.



“Case 004/2 jurisprudence”,¹⁶⁶ and (iii) the Trial Chamber stated “that there will be no trial [...] now or in the future.”¹⁶⁷

C. DISCUSSION ON ADMISSIBILITY

1. Respective Roles of the Office of the Co-Investigating Judges and the Pre-Trial Chamber

62. In assessing the admissibility of the Requests, the Pre-Trial Chamber reminds the Parties of the Office of the Co-Investigating Judges and the Pre-Trial Chamber’s respective roles. At the outset, the Pre-Trial Chamber observes that the Co- Investigating Judges¹⁶⁸ and the Applicants rely on its intervention on the basis of its additional jurisdiction, whereas the Chamber’s primary jurisdiction in the event of a disagreement was conscientiously avoided by the Co-Prosecutors¹⁶⁹ and the Co-Investigating Judges.¹⁷⁰

63. Here, the Chamber refers to its constant analysis of the illegality of the situation caused by two conflicting Closing Orders being issued at the same time,¹⁷¹ and will in the present case focus on the effects of that situation at the current stage of the investigation.

64. At the outset, the Pre-Trial Chamber recalls that “two investigating judges, one Cambodian and another foreign [...] shall follow existing procedures in force.”¹⁷² Thus, the Co-Investigating Judges are seised of the judicial investigation at the ECCC and jointly responsible for its proper conduct.¹⁷³ Consequently, the Chamber, in spite of its powers as the equivalent of the Cambodian Investigation Chamber, intervenes only as

¹⁶⁶ National Co-Prosecutor’s Response (D271/4), para. 16 *referring to* Case 004/2, Order Sealing and Archiving Case File 004/2, 14 August 2020, D363/3.

¹⁶⁷ Cambodian Co-Prosecutor’s Response (D271/4), para. 17.

¹⁶⁸ Decision on the Request to Forward Case File 003 to the Trial Chamber (D270/7), para. 43.

¹⁶⁹ Internal Rule 71(3) and by contrast the procedural anomalies noted in particular in Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 88.

¹⁷⁰ *See* Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), para. 123 (“[the Co-Investigating Judges] nonetheless decided to shield their disagreements from the most effective dispute settlement mechanism available under the ECCC legal framework to ensure a way out of procedural stalemates”); Considerations for Appeals from Closing Orders (D266/27 and D267/35), para. 107.

¹⁷¹ Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), paras 121, 122; Considerations on Appeals against Closing Orders (D266/27 and D267/35), paras 104, 105.

¹⁷² ECCC Law, Art. 23*new*.

¹⁷³ Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 79.



the second instance court in order to verify due process, in accordance with the applicable rules.¹⁷⁴

65. The Chamber reiterates its observation that:

[The Co-Investigating Judges] knew that, by refusing to refer their disagreement to the Pre-Trial Chamber, any matters over which they disagreed, including the key issue of whether or not [MEAS] Muth falls within the ECCC's jurisdiction, would have to be addressed only as part of appellate proceedings before this Chamber, instead of through the procedural mechanism specifically provided for under the ECCC legal framework to conclusively settle disagreements between them. The Co-Investigating Judges were aware of the difficulties their actions would be causing not only on appeal, but beyond the pre-trial appellate stage of the Case 003 proceedings.¹⁷⁵

66. The Pre-Trial Chamber notes that the International Co-Prosecutor now argues that the Chamber is required to issue a decision terminating the judicial investigation pursuant to the ECCC legal framework.¹⁷⁶ Furthermore, the International Co-Prosecutor finds that the Pre-Trial Chamber failed to perform its duty and thereby caused a manifest injustice.¹⁷⁷ The Co-Lawyers agree with this reasoning¹⁷⁸ and call on the Pre-Trial Chamber not to abdicate its responsibilities.¹⁷⁹ The Co-Investigating Judges have also discussed the so-called "requirement" for a joint decision of the Chamber.¹⁸⁰

67. The Pre-Trial Chamber is not persuaded by such an argument and, at the outset, recalls that, as a matter of principle, one Co-Investigating Judge can validly act alone.¹⁸¹ The Pre-Trial Chamber therefore regrets that the Co-Investigating Judges did not make proper use of their individual judicial powers, either by issuing a closing order or by referring the matter to the Pre-Trial Chamber, in order to resolve the disagreement

¹⁷⁴ See Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33) paras 38-43; Considerations on Appeals against Closing Orders (D266/27 and D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 125.

¹⁷⁵ Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 107. See also Decision on Request for Disclosure of Documents Relating to Disagreements (D262.2), paras 15 and 16.

¹⁷⁶ International Co-Prosecutor's Request (D271/1), paras 12-17.

¹⁷⁷ International Co-Prosecutor's Request (D271/1), paras 12-17.

¹⁷⁸ Co-Lawyers' Request (D272), paras 36, 47, 60-69.

¹⁷⁹ Co-Lawyers' Request (D272), para. 47.

¹⁸⁰ Decision Denying the Request to Forward Case 003 to the Trial Chamber (D270/7), para. 3.

¹⁸¹ See Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33) para. 105; Case 004/1 (PTC20), Decision on IM Chaem's Appeal against the International Co-Investigating Judge's Decision on Her Motion to Reconsider and Vacate Her Summons Dated 29 July 2014, 9 December 2014, D236/1/1/8, para. 30; Case 004/1 (PTC09), Decision on IM Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 August 2014, A122/6.1/3, para. 14.



between them. On the other hand, while the Co-Investigating Judges have the unilateral power to terminate the judicial investigation alone in accordance with the ECCC's applicable law, the Pre-Trial Chamber does not have this ability.

68. Indeed, the Pre-Trial Chamber recalls that it is a collegial organ where decisions are taken in accordance with the law set out in the ECCC Agreement, the ECCC Law and the Internal Rules. In other words, unlike the rules applicable to the Office of the Co-Prosecutors and the Office of Co-Investigating Judges, the Chamber is under no obligation to render a unanimous decision. On the contrary, it is the duty of each judge to rule alone and in good conscience, and to give the reasons for his or her personal opinion.¹⁸² There is no text requiring the Pre-Trial Chamber to reach a unanimous decision and Internal Rule 77 (14) runs counter the arguments put forward by the Applicants. It is therefore legally incorrect to require a unanimous decision from a collegiate body on the basis of a chimeric legal obligation which was specifically incumbent upon the Co-Investigating Judges. Their failure to do so jeopardised the functioning of the ECCC,¹⁸³ in particular by preventing the Pre-Trial Chamber to settle the disagreement pursuant to Internal Rule 72, thereby obstructing the legal presumptions attached to it, including the interpretative rules of the Pre-Trial Chamber decisions or considerations.¹⁸⁴

2. The Pre-Trial Chamber Fulfilled Its Duty in Case 003

69. In accordance with Article 12(1) of the ECCC Agreement and Article 261 of the Cambodian Code of Criminal Procedure, the Pre-Trial Chamber, in its capacity of Cambodian Investigating Chamber within the ECCC, has final jurisdiction in the

¹⁸² See Internal Rules 71(4)(d), 72(4)(e) (Settlement of Disagreements); Internal Rule 77(14) (concerning appeals and requests for annulment).

¹⁸³ Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33) para. 123; Considerations on Appeals against Closing Orders (D266/27 and D267/35), para. 108.

¹⁸⁴ The Co-Investigating Judges expressly admitted that they deliberately decided not to refer their disagreement to the Pre-Trial Chamber because they knew the “*foregone* conclusion” of such a referral, given the longstanding disagreement on personal jurisdiction within the Chamber. They considered that the Chamber’s Judges would not “*miraculously* change their minds”, even if properly seised by referral (see Decision on Denying the Request to Forward Case File 003 to the Trial Chamber (D270/7), para. 15 (emphasis added)). With this awareness, it is beyond doubt that the Co-Investigating Judges also knew the foregone outcome of the potential referral—one that would inevitably trigger the default position. Indeed, the supermajority rule and the normal operation of the default position, which could only operate without incident in case of a single closing order, was paralysed with the issuance of two conflicting Closing Orders. Their illegal agreement precipitated a *fait accompli* and is the root cause of the current “legal limbo” at the ECCC.



pre-trial investigation phase,¹⁸⁵ including over any request related to the pre-trial stage, after the Office of the Co-Investigating Judges is unseised.¹⁸⁶

70. Furthermore, requests submitted to the Co-Investigating Judges are subject to Internal Rule 55(10), which provides that “at any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful.”

71. The Pre-Trial Chamber first notes that this text does not authorise the filing of requests insofar as the judicial investigation came to an end on 7 April 2021, with the issuance of the Considerations in Case 003.

72. The Pre-Trial Chamber further observes that the Applicants’ demands have already been met in the Considerations in Case 003. Indeed, the Co-Investigating Judges were notified of the operative part of the Pre-Trial Chamber’s Considerations and are responsible for processing the case in accordance with Internal Rules 77(13) and (14). By having notified its Considerations, the Pre-Trial Chamber effectively fulfilled its duty.¹⁸⁷ It is now the Co-Investigating Judges’ responsibility to comply with the Considerations immediately. In this regard, the reinstatement of the Co-Investigating Judges¹⁸⁸ puts the Office of the Co-Investigating Judges in a position to carry out its duty, unlike after the Considerations in Case 004/2 were issued.

73. Finally, and fundamentally, the Pre-Trial Chamber has already twice before, and now once again, pronounced the illegal character of the situation caused by the two Co-Investigating Judges’ accord not to refer the disagreement to the Chamber through legal venues and, instead, to issue opposing Closing Orders.

¹⁸⁵ Case 004/2, Considerations on Appeals against Closing Orders (D359/24 and D360/33), paras 40-41; Case 004/1, Considerations on the International Co-Prosecutor’s Appeal of Closing Order (D308/3/1/20), para. 22. *See also* Case 001, Decision on the Appeal against Closing Order Indicting KAING Guek Eav *alias* “Duch”, 9 December 2008, D99/3/42 para. 41; Case 001, Decision on Appeal against Provisional Detention Order of KAING Guek Eav *alias* “Duch”, 3 December 2009, C5/45, para. 7.

¹⁸⁶ *See, e.g.*, Case 004/2 (PTC59), Decision on AO An’s Urgent Request for Redaction and Interim Measures, 5 September 2018, D360/3, paras 5, 13; Considerations on Appeals against Closing Orders (D266/27 and D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 132.

¹⁸⁷ *See* Considerations for Appeals from Closing Orders (D266/27 and D267/35), Disposition, p. 40.

¹⁸⁸ *See* ECCC Declaration, “International Co-Investigating Judge Reinstated”, 24 April 2020, available at Statement: International Co-Investigating Judge Reinstated | Drupal (eccc.gov.kh) (last accessed: 8 September 2021) announcing the Office of the Co-Investigating Judges’ reinstatement on 22 April 2020.



74. The Chamber underlines the embarrassing situation in which the Co-Investigating Judges are struggling to address the consequences of their malpractices and deliberate violation of the ECCC legal framework. Indeed, no one better than the Co-Investigating Judges themselves has described their attempt to evade the consequences of their own errors, while keeping with their incoherent practices, since: 1) notwithstanding their legal duty upon Internal Rule 77(13) and (14), the Co-Investigating Judges rendered a decision¹⁸⁹ on the International Co-Prosecutor's Request to *Forward* Case File 003 to the Trial Chamber¹⁹⁰; 2) that decision is motivated by an alleged lack of jurisdiction to decide the outcome of Case 003, although the Co-Investigating Judges have already ruled on "the fate of the case" in the event it were to come back before them;¹⁹¹ and (3) they nevertheless encourage the International Co-Prosecutor to appeal their own decision.¹⁹² The Pre-Trial Chamber finds that this is the "foregone situation" the Co-Investigating Judges have created in refusing to strictly follow the law, including Internal Rule 72.

75. In this regard, the Pre-Trial Chamber also questions the reasoning of an Investigating Judge who, after having ordered the trial of an accused person for genocide, crimes against humanity, war crimes and other crimes under Cambodian law, and after ten years of investigation, now declares himself, on imaginary legal grounds,¹⁹³ unable to forward the case to the Trial Chamber¹⁹⁴ and potentially ready to archive it.¹⁹⁵

76. The Pre-Trial Chamber, having fulfilled all its duties in accordance with the ECCC's legal framework, including the Cambodian Code of Criminal Procedure, intends to stand by its Considerations. It categorically refuses to be associated, through the actions of confused Co-Investigating Judges or requests that have already been granted, with malpractices that have provoked such a failure that it now seems insurmountable to those who have caused it.

¹⁸⁹ Decision Denying the Request to forward Case 003 to the Trial Chamber (D270/7), p. 19.

¹⁹⁰ Case 003, International Co-Prosecutor Request to the Co-Investigating Judges to Forward Case 003 to the Trial Chamber, 19 April 2021, D270 (emphasis added).

¹⁹¹ Decision Denying the Request to forward Case 003 to the Trial Chamber (D270/7), para. 40.

¹⁹² Decision Denying the Request to forward Case 003 to the Trial Chamber (D270/7), para. 43.

¹⁹³ Decision Denying the Request to forward Case 003 to the Trial Chamber (D270/7), para. 35, *compare with* Internal Rule 67(3).

¹⁹⁴ Decision Denying the Request to forward Case 003 to the Trial Chamber (D270/7), para. 35.

¹⁹⁵ Decision Denying the Request to forward Case 003 to the Trial Chamber (D270/7), para. 37.



77. Finally, the Pre-Trial Chamber recalls its consistent case law that it may reject an appeal or motion that is unnecessary and that creates a potential for endless litigation.¹⁹⁶ This is the case when the motion challenges an issue, which is essentially the same (in fact and in law) as a question already considered by the Chamber in respect of the same party, on which it could not reach a supermajority of four votes to render a decision, and over which judges may be expected to maintain similar views.¹⁹⁷ In the instant case, the Pre-Trial Chamber has already ruled on the points raised by the Requests in the disposition of its Considerations in Case 003.¹⁹⁸

78. Consequently, the Pre-Trial Chamber declares the International Co-Prosecutor's Request and the Co-Lawyers' Request inadmissible.

¹⁹⁶ Case 004/2, Decision on Ta An's Appeal against International Co-Investigating Judge's Decision Denying Requests for Investigative Actions, 30 September 2014, D190/1/2 ("Decision on Appeal against Decision Denying Ta An's Investigative Actions' Requests (D190/1/2)"), para. 20; Case 004/2, Decision on Ta An's Appeal against International Co-Investigating Judge's Decision Denying Annulment Motion, 13 October 2014, D185/1/1/2 ("Decision on Appeal against Decision Denying Ta An's Annulment Motion (D185/1/1/2)"), paras 14 and 15.

¹⁹⁷ Decision on Appeal against Decision Denying Ta An's Investigative Actions' Requests (D190/1/2), para. 20; Decision on Appeal against Decision Denying Ta An's Annulment Motion (D185/1/1/2), paras 14, 15.

¹⁹⁸ Considerations on Appeals against Closing Orders (D266/27 and D267/35), Disposition, p. 40.



V. DISPOSITION**FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY:**

- **DECLARES** that the Requests are inadmissible.

In accordance with Internal Rule 77, the present decision cannot be appealed.

In accordance with Internal Rule 77(14), the Co-Investigating Judges, the Co-Prosecutors and the other Parties shall be notified of this decision by the Greffier of the Pre-Trial Chamber.

Phnom Penh, 8 September 2021

Pre-Trial Chamber



PRAK Kimsan

Olivier BEAUVALLET

NEY Thol

Kang Jin BAIK

HUOT Vuthy

