



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

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

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Préliminaire

Disagreement N° 001/18-11-2008-ECCC/PTC

Before: Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

Date: 18 August 2009

**ANNEX I: PUBLIC REDACTED VERSION**  
**CONSIDERATIONS OF THE PRE-TRIAL CHAMBER REGARDING THE DISAGREEMENT**  
**BETWEEN THE CO-PROSECUTORS PURSUANT TO INTERNAL RULE 71**

Co-Prosecutors

CHEA Leang  
Robert PETIT

Office of Administration

KRANH Tony  
Knut ROSANDHAUG

**បានចម្លងត្រឹមត្រូវតាមច្បាប់ដើម**  
**Certified Copy/Copie Conforme**  
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ក្រឡាបញ្ជីនាយក/Chief of Greffier *Chamrath*



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of a disagreement between the Co-Prosecutors of the ECCC pursuant to Internal Rule 71(2), as the International Co-Prosecutor requests that two new Introductory Submissions to create Case Files 003/20-11-2008-ECCC/OCIJ and 004/20-11-2008-ECCC/OCIJ (“New Submissions”) and one Supplementary Submission in Case File 002/19-09-2007-ECCC/OCIJ be forwarded to the Co-Investigating Judges for judicial investigation and the National Co-Prosecutor disagrees (“Disagreement”).

## I. PROCEDURAL BACKGROUND

1. On 3 December 2008, the Office of Administration forwarded to the Pre-Trial Chamber the “International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2)” (“International Co-Prosecutor’s Statement”) in which the International Co-Prosecutor states that he “intends to submit two new Introductory Submissions [...] and a second Supplementary Submission in Case File 002”.<sup>1</sup> The International Co-Prosecutor requests that “the three submissions be forwarded to the Co-Investigating Judges for investigation”.<sup>2</sup> In his Statement, the International Co-Prosecutor reports that the National Co-Prosecutor “disagrees with prosecuting the crimes identified in the new submissions and therefore refuses to sign any additional submissions”.<sup>3</sup>
2. The National Co-Prosecutor filed her “Response to the International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2)” on 29 December 2008 (“National Co-Prosecutor’s Response”), after the Pre-Trial Chamber granted two applications for extension of time to file her Response.<sup>4</sup> In her Response, the National Co-Prosecutor sets out the reasons why she disagrees with the New Submissions.
3. On 6 February 2009, the Pre-Trial Chamber invited the Co-Prosecutors to file any further submissions in relation to their Disagreement by 27 February 2009.<sup>5</sup>

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

<sup>2</sup> International Co-Prosecutor’s Statement, para. 120.

<sup>3</sup> International Co-Prosecutor’s Statement, para. 4.

<sup>4</sup> Decision on National Co-Prosecutor’s Application for Extension of Time to File Response, 11 December 2008, Doc. No. 4; Decision on National Co-Prosecutor’s Application for Further Extension of Time to File Response, 19 December 2008, Doc. No. 6.

<sup>5</sup> Invitation to the Co-Prosecutors to Submit Further Submissions, 6 February 2009, Doc. No. 7.



4. In a response filed on 19 February 2009, the International Co-Prosecutor notified the Pre-Trial Chamber that “he has no further observations to make in addition to his submissions already contained in his filing of 1 December 2008”.<sup>6</sup>
5. The National Co-Prosecutor filed a series of documents in relation to the debates of the National Assembly of the Kingdom of Cambodia and the discussions between United Nations officials and the Royal Government of Cambodia about the establishment of the ECCC.
6. By a notification filed on 5 March 2009,<sup>7</sup> the International Co-Prosecutor withdrew his request for the Pre-Trial Chamber to adjudicate the disagreement over the Supplementary Submission related to Case File 002/19-09-2007/ECCC-OCIJ as, having conducted an investigation, he was satisfied with the evidence that the suspect was dead. The National Co-Prosecutor did not respond to this Notification. The withdrawal of the disagreement related to the Supplementary Submission was acknowledged by the Pre-Trial Chamber on 25 April 2009.<sup>8</sup>
7. On 7 April 2009, the National Co-Prosecutor submitted a Request to file further documents in respect of the debates before the National Assembly.<sup>9</sup> The International Co-Prosecutor did not oppose the Request, although he argued that the documents were filed out of time.<sup>10</sup> The Pre-Trial Chamber observes that the documents the National Co-Prosecutor requested to file are connected with and complete other documents already part of the Disagreement case file and that the International Co-Prosecutor had the possibility to comment on these. In these circumstances and considering that the Co-Prosecutor did not object, the Request is granted.
8. On 25 April 2009, the Pre-Trial Chamber issued its Directions to Provide Further Particulars and Scheduling Order (“Directions”), in which it submitted to the Co-Prosecutors a number of questions to be answered in writing and scheduled a hearing to be held on 5 June 2009,

<sup>6</sup> International Co-Prosecutor’s Response to the Pre-Trial Chamber’s Invitation to File Further Submissions, 19 February 2009, Doc. No. 9, para. 2.

<sup>7</sup> International Co-Prosecutor’s Notification of the Termination of the Preliminary Investigation and the Related Disagreement Process, Doc. No. 11, 5 March 2009.

<sup>8</sup> Directions to Provide Further Particulars and Scheduling Order, 25 April 2009, Doc. No. 14 (“Directions”), paras 6-7.

<sup>9</sup> National Co-Prosecutor’s Request to File More Documents in Response to the Pre-Trial Chamber’s Invitation to File Further Submissions, 7 April 2009, Doc. No. 13.

<sup>10</sup> International Co-Prosecutor’s Response to Directions of the Pre-Trial Chamber to Provide Further Particulars and Scheduling Order, 25 April 2009, Doc. No. 16 (“International Co-Prosecutor’s Response to Directions”), paras 58-62.



subject to cancellation, should the Pre-Trial Chamber be sufficiently informed by the responses filed by the Co-Prosecutors.<sup>11</sup>

9. Responses to the Directions were filed by both Co-Prosecutors on 22 May 2009, in accordance with the time limit provided for in the Directions.<sup>12</sup> By 29 May 2009, the Co-Prosecutors had, pursuant to the Directions, filed replies to the particulars each provided.<sup>13</sup> In their replies, both Co-Prosecutors have expressed the view that an oral hearing is neither necessary nor desirable and requested the Pre-Trial Chamber to determine the Disagreement on the basis of written submissions alone.

10. The Pre-Trial Chamber decided that it was sufficiently informed by the written submissions and that a hearing was not necessary to receive further information on the issues raised by the Parties and, consequently, cancelled the hearing scheduled for 5 June 2009.<sup>14</sup>

## II. RELEVANT LAW

11. The Pre-Trial Chamber notes that Articles 6(1) and (4) of the 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 dated 6 June 2003 ("Agreement") respectively provide:

"1. There shall be one Cambodian prosecutor and one international prosecutor competent to appear in both Chambers, serving as prosecutors. They shall be responsible for the conduct of the prosecutions."

[...]

4. The Co-Prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7."<sup>15</sup>

<sup>11</sup> Directions to Provide Further Particulars and Scheduling Order, 25 April 2009, Doc. No. 14.

<sup>12</sup> International Co-Prosecutor's Response to Directions; 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, 22 May 2009, Doc. No. 17 ("National Co-Prosecutor's Response to Directions").

<sup>13</sup> International Co-Prosecutor's Reply to the National Co-Prosecutor's Response to the Directions of the Pre-Trial Chamber to Provide Further Particulars, 27 May 2009, Doc. No. 18 ("International Co-Prosecutor's Reply to Directions"); National Co-Prosecutor's Reply to the International Co-Prosecutor's Response to the Pre-Trial Chamber's Directions to Provide Further Particulars, 29 May 2009, Doc. No. 19 ("National Co-Prosecutor's Reply to Directions").

<sup>14</sup> Decision to Determine the Disagreement on the Basis of Written Submissions Alone, 1 June 2009, Doc. No. 20.

<sup>15</sup> A similar provision can be found in Article 20(new) of the ECCC Law.



## 12. Article 7 of the Agreement further provides:

“Settlement of Differences between the co-investigating judges or the co-prosecutors

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and reasons for their different positions to the Director of the Office of Administration.
2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary General. Article 3, paragraph 3, shall apply to the judges.
3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statement to its members.
4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.”

## 13. Article 16 of 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 dated 27 October 2004 (“ECCC Law”) follows the provisions of the Agreement and provides:

“All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers.”

## 14. Article 20 (new) of the ECCC Law continues:

“The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is

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uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions:

The Co-Prosecutors shall submit written statements of fact and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration.”

15. Internal Rule 71 provides the mechanism for the settlement of a disagreement 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 Pre-Trial 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

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judges, with a copy to the other Co-Prosecutor. In such cases, the other Co-Prosecutor may submit a response within 10 (ten) days. The written statement of the facts and reasons for the disagreement shall not be placed on the case file. 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:
  - a) The hearing shall be held and the judgment handed down in camera. Remote participation may be organized, as necessary.
  - b) The Chamber may order the personal appearance of the Co-Prosecutors at its discretion, as well as the production of exhibits.
  - c) A decision of the Chamber requires 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 action or decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed.
  - d) All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. The Greffier of the Chamber shall forward such decisions to the Director of the Office of Administration, who shall notify the Co-Prosecutors. The Co-Prosecutors shall immediately proceed in accordance with the decision of the Chamber."

16. The Pre-Trial Chamber observes that the legal provisions mentioned above indicate that it was foreseen, from the time the Agreement was concluded, that disagreements might arise between the two Co-Prosecutors, however, there is a stated aim that they shall cooperate. Articles 6(1) and (4) of the Agreement, Articles 16 and 20(new) of the ECCC Law and Internal Rule 71(3) clearly indicate that one Co-Prosecutor can act without the consent of the other Co-Prosecutor if neither one of them brings the disagreement before the Pre-Trial Chamber within a specific time limit. It is further observed that only in cases



concern specifically identified in the Internal Rules would a disagreement prevent one Co-Prosecutor from proceeding with a given action pending a decision by the Pre-Trial Chamber. Amongst these matters of major concern is the filing of Introductory Submissions, which is currently at issue.

17. The Pre-Trial Chamber further notes that the affirmative vote of at least four judges of the Pre-Trial Chamber is required to reach a decision to block the execution of a decision which is the subject of a disagreement between the Co-Prosecutors. If this super-majority is not reached, the default decision is that the Introductory Submissions will be forwarded to the Co-Investigating Judges for judicial investigation.

### III. ADMISSIBILITY OF THE DISAGREEMENT

18. Whilst the International Co-Prosecutor does not indicate in his Statement when the Disagreement arose, the National Co-Prosecutor states in her Response:

“On 18 November 2008, a meeting was convened between the National and International Co-Prosecutors to discuss the prospect of additional prosecutions and suspects being forwarded to the Co-Investigating Judges to open investigations. The International Co-Prosecutor indicated during the discussion that he wished to submit a Second Supplementary Submission to be admitted into the Case File No. 002 and two new Introductory Submissions for Case File Nos. 003 and 004. The National Co-Prosecutor does not agree to the new and Supplementary Submissions. These are the points of the disagreement between the National and the International Co-Prosecutors.”<sup>16</sup>

19. The International Co-Prosecutor’s Statement is dated 20 November 2008 and was notified by the Office of Administration to the Pre-Trial Chamber on 3 December 2008. The Disagreement was brought before the Office of Administration within the 30 days time limit provided for in the Agreement, the ECCC Law and the Internal Rules and is therefore admissible.

### IV. ROLE AND SCOPE OF REVIEW OF THE PRE-TRIAL CHAMBER

<sup>16</sup> National Co-Prosecutor’s Response to the International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement Pursuant to Rule 71(2), 29 December 2008, Doc. No. 7 (“National Co-Prosecutor’s Response”).





20. The Agreement, the ECCC Law and the Internal Rules do not provide a clear indication as to how the Pre-Trial Chamber is to settle disagreements between the Co-Prosecutors. Internal Rules 71(4)(a) and (b) merely provide a mechanism by which the Pre-Trial Chamber may call upon the Co-Prosecutors to assist it through a hearing or by the production of documents. The position of the Pre-Trial Chamber in this matter is unique, with no other tribunal of its nature having a duty to resolve disputes between Co-Prosecutors.

21. In relation to the role that the Pre-Trial Chamber should play in these proceedings, the International Co-Prosecutor submits in his Statement that:

“16. The standard of review to be applied by the PTC is whether there is reason to believe that crimes within the jurisdiction of the ECCC have been committed. Rule 53(1) states that ‘if the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation...’ This is the only substantive requirement necessary for the opening of an investigation under Rule 53. Consequently, it is the only requirement that the PTC can review under Rule 71. [...]”

The International Co-Prosecutor further submits in his Reply to the Directions:

“13. In the International Co-Prosecutor’s submission these proceedings are in the nature of arbitration between two parties by an independent arbitral tribunal. The parties (in this case, the Co-Prosecutors) grant jurisdiction to the arbitral tribunal (here, the Pre-Trial Chamber) by seizing it of the disagreement. The scope of the proceedings is limited to the issues raised in the Statement of the claimant (here, the International Co-Prosecutor) and the Response Statement by the respondent (here, the National Co-Prosecutor). The arbitral tribunal determines the issues raised in the Statement and becomes *functus officio* upon such determination. [...]”

22. In her Response to the International Co-Prosecutor’s Statement, the National Co-Prosecutor “requests the Pre-trial Chamber to consider the disagreement between the National and International Co-Prosecutors not solely on the basis of Article 53 of the Internal Rules, but also to take into consideration the ECCC Law and the Agreement”.<sup>17</sup> She further contends:

<sup>17</sup> National Co-Prosecutor’s Response, para. 73.



“75. The International Co-Prosecutor does not recognise that the Pre-Trial Chamber has the right to assess the application of the Co-Prosecutor’s discretion in settling the present disagreement. The National Co-Prosecutor does not agree to this narrowing of the competence of the Pre-Trial Chamber, and requests the Pre-Trial Chamber to consider all of her arguments.

76. Disputes brought before the Pre-Trial chamber under Rule 71 almost necessarily involve prosecutorial discretion. The position of the International Co-Prosecutor that such discretion should not or only very restrictively be examined implies that the Pre-Trial Chamber could only intervene where one of the Co-Prosecutor’s has acted or intends to act contrary to a binding provision of procedural law. However, this narrow scope of dispute settlement competence unduly restricts the role of the Pre-Trial Chamber.”

23. Pursuant to Article 6 of the Agreement, the role of the Pre-Trial Chamber in this instance is to “settle a difference” between the Co-Prosecutors who “are unable to agree whether to proceed with a prosecution”. For this purpose, Internal Rule 71(1) provides that the Co-Prosecutors shall “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”. Internal Rule 71(2) further indicates that the Co-Prosecutor who decides to seise the Pre-Trial Chamber shall submit “a written statement of the facts and reasons for the disagreement”.

24. In light of these provisions, the Pre-Trial Chamber finds that the scope of its review is limited to settling the specific issues upon which the Co-Prosecutors disagree. To this end, the Pre-Trial Chamber shall only consider the facts and reasons raised before it by the Co-Prosecutors. Pursuant to Internal Rule 71(2), these shall be set out in the Written Statement of the International Co-Prosecutor and the Response of the National Co-Prosecutor. In addition to the information they provided in these submissions, the Co-Prosecutors were asked by the Pre-Trial Chamber to provide further clarification on their disagreement by the Directions to Provide Further Particulars dated 24 April 2009. In these circumstances, the Pre-Trial Chamber shall also take into consideration the facts and reasons set out in the Responses and Replies to the Directions filed by both Co-Prosecutors.

25. The Disagreement is based upon the intention of the International Co-Prosecutor to forward new Introductory Submissions to the Co-Investigating Judges for judicial investigation

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pursuant to Internal Rule 53(1), to create Case Files 003/20-11-2008/ECCC/OCIJ and 004/20-11-2008/ECCC/OCIJ. The National Co-Prosecutor objects.

26. Pursuant to Articles 6 (1) and (4) and 7(4) of the Agreement, Articles 16 and 20 (new) of the ECCC Law and Internal Rule 71(4)(c), the New Introductory Submissions will be forwarded to the Co-Investigating Judges unless at least four judges of the Pre-Trial Chamber are satisfied that the arguments raised by the National Co-Prosecutor shall preclude the forwarding of the New Submissions. Therefore, the Pre-Trial Chamber finds that it must examine the arguments raised by the National Co-Prosecutor and determine whether these shall prevent the New Submissions from being forwarded to the Co-Investigating Judges for judicial investigation. The Pre-Trial Chamber shall reach a decision on these arguments independently. Although the Pre-Trial Chamber is assisted by the arguments put forward by the International Co-Prosecutor, the International Co-Prosecutor does not bear any burden of persuasion to convince the Pre-Trial Chamber that the New Submissions shall be forwarded to the Co-Investigating Judges for judicial investigation or that the arguments raised by the National Co-Prosecutor shall be rejected.

27. Articles 6(1) and (4) of the Agreement and Articles 16 and 20 (new) (3) of the ECCC Law indicate that the International Co-Prosecutor could have forwarded the New Introductory Submissions after having given thirty days notice to the National Co-Prosecutor, if no disagreement had been put before the Pre-Trial Chamber. It was thus unexpected that the Disagreement was brought by the International Co-Prosecutor, who explained his understanding of the reasons why the National Co-Prosecutor objects to his decision to file the New Submissions. Although the proper procedure would have been for the National Co-Prosecutor, who raises objections to forwarding the New Submissions, to file her Written Statement first, the way the Disagreement was brought before it will not affect the way the Pre-Trial Chamber shall consider the matter.

## **V. OPINIONS OF THE NATIONAL CO-PROSECUTOR AND THE INTERNATIONAL CO-PROSECUTOR**

### **a. Opinion of the National Co-Prosecutor**

28. The arguments of the National Co-Prosecutor are stated in her Response to the International Co-Prosecutor's Statement and are further clarified in her Response and her Reply to the Directions. In this summary, the Pre-Trial Chamber has organised them in light of what

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understood to be the main issues raised by the National Co-Prosecutor. A summary of the response of the International Co-Prosecutor follows.

### **Necessity of the New Submissions (“First Issue”)**

29. The National Co-Prosecutor submits that the New Submissions are not necessary. The facts and crimes specified in the New Submissions are already under the investigative competence of the Co-Investigating Judges as they are covered by the first Introductory Submission dated 18 July 2007, and a new Introductory Submission may only be issued when “new facts emerge that are not in an existing investigation”.<sup>18</sup> Specifically, the National Co-Prosecutor rejects all the New Introductory Submissions on the following ground:

“50. The Introductory Submission dated 18 July 2007 mentioned, inter alia, the following crimes:

- Forced evacuations;
- Forced labor;
- Enslavement;
- Inhumane living conditions;
- Arrest and illegal detentions;
- Physical and mental abuses;
- Tortures; and
- Murders.

The submission goes on to say that these crimes have occurred in all over Cambodia, and there were over 1.7 million of victims who died during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979.

51. As shown in paragraph 50 above, the Co-Prosecutors have already filed their submissions for prosecution to the Co-Investigating Judges to conduct their investigation into these facts, which relate the whole story of crimes during the period of Democratic Kampuchea. These facts relate to the deaths of 1.7 million, which occurred in various security offices all over Cambodian territory, in all forced labor sites or were caused by starvation and untreated illness, throughout the country. [REDACTED]

[REDACTED]

[REDACTED]

<sup>18</sup> National Co-Prosecutor’s Response, paras 52 and 54. See also National Co-Prosecutor’s Response to Directions, paras 48, 84-85; National Co-Prosecutor’s Reply to Directions, paras 13-14, 18.



52. Pursuant to the above paragraph 51, it could be said that the totality of these crimes during the period of Democratic Kampuchea are already under the investigative power of the Co-Investigating Judges. Thus, the Co-Prosecutors should not conduct any other supplementary or new investigation on the same facts.
53. A Supplementary Submission is to be made when old facts in an existing investigation lead to new facts and these new facts have not been submitted in the previous submission. The National Co-Prosecutor therefore submits that this Supplementary Submission of the International Co-Prosecutor is not necessary.<sup>19</sup>
54. A New Submission is to be made only when new facts emerge that are not in an existing investigation. The National Co-Prosecutor therefore submits that these New Submissions of the International Co-Prosecutors are not necessary.<sup>20</sup>

30. The National Co-Prosecutor further asserts that the Co-Prosecutors do not need to open new investigations as the Co-Investigating Judges may extend their investigation to new suspects, even if the new suspects were not named in the Introductory Submission.<sup>21</sup>

#### **Exercise of prosecutorial discretion (“Second Issue”)**

31. Moreover, the National Co-Prosecutor disagrees with the New Introductory Submissions and the Supplementary Submission on the basis that the ECCC Law and the Agreement require selective prosecutions as the ECCC is mandated to bring to trial only senior leaders of Democratic Kampuchea and those most responsible for the crimes committed during the period from 17 April 1975 to 6 January 1979.<sup>22</sup> She finds that the ECCC was neither intended to – nor is it able to – fulfil the principle of perfect justice and bring to trial all those who committed crimes, due to the ECCC’s limited personal and temporal jurisdiction.<sup>23</sup> She submits that the selection of individuals for prosecution must reflect the purpose and spirit of the ECCC Law, the Agreement and the Preamble of the Internal Rules: to promote national unity, reconciliation, stability, security and peace in Cambodia.<sup>24</sup> These goals should take precedence over Internal Rule 53, and thus prosecutions should not be

<sup>19</sup> The Pre-Trial Chamber is not seized anymore of the Disagreement regarding the Supplementary Submission but this paragraph is quoted to explain the whole reasoning of the National Co-Prosecutor in relation to the filing new introductory submissions and supplementary submissions.

<sup>20</sup> Emphasis added. See also National Co-Prosecutor’s Response to Directions, paras 82-85; National Co-Prosecutor’s Reply to the Directions, paras 14, 17-18.

<sup>21</sup> National Co-Prosecutor’s Response to Directions, paras 84, 85 and 86(D); National Co-Prosecutor’s Reply to Directions, paras 8 and 18.

<sup>22</sup> See ECCC Law, Arts 1 and 2; Agreement, Art. 6(3).

<sup>23</sup> National Co-Prosecutor’s Response, paras 8-11.

<sup>24</sup> National Co-Prosecutor’s Response, para. 12; National Co-Prosecutor’s Response to Directions, para. 12.



initiated in every case where there is “reason to believe” crimes have been committed.<sup>25</sup> Exercising her “prosecutorial discretion”, the National Co-Prosecutor disagrees with forwarding the New Submissions for the three following reasons.

32. First, the National Co-Prosecutor is of the view that the suspects identified in the new Introductory Submissions are not senior leaders or those most responsible because of their comparatively lower rank in the Democratic Kampuchea regime, and thus they do not fall within the jurisdiction of the ECCC (“Jurisdiction Argument”).<sup>26</sup>
33. Second, the National Co-Prosecutor submits that current considerations of peace, stability and national reconciliation in Cambodia argue against initiating new prosecutions, particularly given that the role of a prosecutor is to bring criminal action in “the public interest of the Cambodian society” (“Public Interest Argument”).<sup>27</sup>
34. In particular, the National Co-Prosecutor argues that the ECCC proceedings have not yet led to hostile or violent reactions by former Khmer Rouge officials because of the public “perception that the ECCC’s mandate is limited to senior leaders and those most responsible”.<sup>28</sup> If prosecutions of lower-ranking officials were to be initiated, as the New Submissions propose, this perception would change and “ex-members and those who have allegiance to the Khmer Rouge leaders may commit violent acts”.<sup>29</sup> Lower-ranking ex-Khmer Rouge officials would also be hesitant to act as witnesses out of fear that they too might be subject to investigation by the ECCC.<sup>30</sup> If investigations could be extended to all such low-ranking suspects, there “would be many more suspects of this level to be prosecuted”, which could “adversely affect the stability of Cambodia”<sup>31</sup> and cause a “frightening situation of unrest in Cambodian society”, particularly among those holding equivalent ranks.<sup>32</sup>
35. According to the National Co-Prosecutor, the ECCC Law and the Agreement recognise that “achieving national reconciliation is the most essential factor for Cambodian society” because they provide for selective prosecution against senior leaders and those most

<sup>25</sup> National Co-Prosecutor’s Response, para. 12; National Co-Prosecutor’s Response to Directions, para. 64.

<sup>26</sup> National Co-Prosecutor’s Response to Directions, paras 40, 62-63; National Co-Prosecutor’s Reply to Directions, para. 6. See also International Co-Prosecutor’s Statement, para. 7.

<sup>27</sup> National Co-Prosecutor’s Response to Directions, para. 17.

<sup>28</sup> National Co-Prosecutor’s Response, para. 15.

<sup>29</sup> National Co-Prosecutor’s Response, para. 15.

<sup>30</sup> National Co-Prosecutor’s Response, para. 66.

<sup>31</sup> National Co-Prosecutor’s Response to Directions, para. 62.

<sup>32</sup> National Co-Prosecutor’s Response, para. 64.



responsible.<sup>33</sup> National unity was only achieved in Cambodia in 1996, through the integration of Khmer Rouge leaders and armed forces into Cambodian society and the Royal Government of Cambodia.<sup>34</sup> Initiating new prosecutions would not further and may even hinder this fragile national unity and continued national reconciliation, a “vital” component of peace and stability in Cambodia.<sup>35</sup>

36. The National Co-Prosecutor further argues that additional prosecutions would threaten Cambodia’s national security, given the current border problems near Preah Vihear “in which former [Khmer Rouge] soldiers are at the forefront of protecting [Cambodia’s] territorial integrity”<sup>36</sup> [REDACTED]

[REDACTED]<sup>37</sup>

37. Third, the National Co-Prosecutor submits that initiating new prosecutions would require a significant amount of funds, resources and time and “would inevitably cause uncertainty”. Devoting the limited resources currently available to the ECCC to new prosecutions would place the existing trials “in jeopardy”.<sup>38</sup> The limited financial and human resources of the ECCC, as well as the need to conclude trials “within an appropriate period of time”, are considerations which support selective prosecution and argue against the New Submissions.(“Resources Argument”).<sup>39</sup>

### **Illegality of the preliminary investigation (“Third Issue”)**

38. In her Response and her Reply to the Directions, the National Co-Prosecutor argues that the International Co-Prosecutor conducted the preliminary investigation leading to the issuance of the new Introductory Submissions without her knowledge or assistance.<sup>40</sup> She submits that the unilateral preliminary investigation leading to the New Submissions violated the ECCC Law and the Internal Rules, so the New Submissions must be rejected.<sup>41</sup>

<sup>33</sup> National Co-Prosecutor’s Response, para. 14.

<sup>34</sup> National Co-Prosecutor’s Response, para. 13; National Co-Prosecutor’s Response to Directions, paras 67-68.

<sup>35</sup> National Co-Prosecutor’s Response to Directions, para. 79.

<sup>36</sup> National Co-Prosecutor’s Response, para. 15.

<sup>37</sup> National Co-Prosecutor’s Response, para. 63; National Co-Prosecutor’s Response to Directions, para. 81.

<sup>38</sup> National Co-Prosecutor’s Response, para. 16.

<sup>39</sup> National Co-Prosecutor’s Response, paras 70-71.

<sup>40</sup> National Co-Prosecutor’s Response to Directions, para. 19; National Co-Prosecutor’s Reply to Directions, paras 22-25.

25.

<sup>41</sup> National Co-Prosecutor’s Reply to Directions, para. 20.

Considerations regarding the Disagreement between the Co-Prosecutors



**b. Opinion of the International Co-Prosecutor**

39. The International Co-Prosecutor raises a preliminary objection to the admissibility of the First and Third Issues, as well as to the Jurisdiction Argument pertaining to the Second Issue. He submits that these issues were raised “extremely late in the proceedings and clearly as an afterthought” as they were mentioned for the first time by the National Co-Prosecutor in her Response to the Directions, thus after the Disagreement crystallised on 18 November 2008.<sup>42</sup> As a consequence, he requests the Pre-Trial Chamber to either ignore or dismiss these belatedly raised issues.
40. The International Co-Prosecutor further argues that the Third Issue is inadmissible on the ground that the regularity of the preliminary investigation is not germane to the determination of these proceedings as the sole issue for determination is whether the New Submissions should be forwarded to the Co-Investigating Judges. Thus, the Pre-Trial Chamber lacks jurisdiction to entertain this objection.<sup>43</sup>
41. On the merit of the issues raised by the National Co-Prosecutor, the International Co-Prosecutor responds that “the only criteria by which to determine whether a submission is valid or not under Rule 53 is the ‘reason to believe’ standard”. As the National Co-Prosecutor has agreed that there is a reason to believe that crimes have been committed, the investigation shall proceed. The International Co-Prosecutor argues that the arguments raised by the National Co-Prosecutor are irrelevant in light of Internal Rule 53. They are also inconsistent with the primary purpose of the ECCC, which is bringing to justice senior leaders and those persons who were the most responsible for the crimes that were committed in Democratic Kampuchea between 1975 and 1979.<sup>44</sup>
42. In relation to the First Issue pertaining to the necessity of the New Submissions, the International Co-Prosecutor more specifically argues:

“17. [...] The inference of the National Co-Prosecutor seems to be that either the new submissions are redundant (being subsumed under the first introductory submission), or the Co-Prosecutors are powerless to seek these new investigations, as they have already seized the Co-Investigating Judges of those facts.

<sup>42</sup> International Co-Prosecutor’s Reply to Directions, para. 5.

<sup>43</sup> International Co-Prosecutor’s Reply to Directions, paras 11-15.

<sup>44</sup> International Co-Prosecutor’s Statement, paras 11-12.





18. [...] The Co-Prosecutors categorically asserted in their first introductory submission that they were seizing the Co-Investigating Judges only of the twenty-five set of criminal facts identified in that submission. This understanding of the Co-Prosecutors was underlined by their subsequent periodic seizing of the Co-Investigating Judges with new facts and/or crimes, for example, those pertaining to a new security centre, the crime of forced marriages, etc. Indeed, owing to this understanding, the Co-Prosecutors empowered the Co-Investigating Judges to investigate facts throughout Cambodia only to establish the jurisdictional criteria for the charged crimes.”<sup>45</sup>

43. In relation to the Third Issue, pertaining to the alleged illegality of the preliminary investigation, the International Co-Prosecutor asserts that the preliminary investigation was valid and permissible as it was principally done on the basis of an in-house analysis of documents collected prior to 18 July 2007 and with the consent of the National Co-Prosecutor. In any event, assuming that the preliminary investigation was “unilateral”, he argues that “it is permissible under the Rules as long as the disagreement crystallized at the state of the signing of the Introductory and Supplementary Submissions”.<sup>46</sup>

## VI. EXPRESSION OF OPINION

44. After extensive deliberations, the Pre-Trial Chamber has not reached a super-majority of votes on a decision concerning this Disagreement. It has unanimously decided on how to express the approach taken by the Chamber in these “Considerations of the Pre-Trial Chamber”. As Internal Rule 71(4)(d) provides that decisions on disagreements shall be reasoned and in order to ensure transparency, the Pre-Trial Chamber finds it necessary to express the opinions of its various members, which are attached to these Considerations.

## VII. CONCLUSION

45. As the Pre-Trial Chamber has not reached a decision on the Disagreement brought before it, Internal Rule 74(1) 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.

<sup>45</sup> International Co-Prosecutor’s Reply to Directions, paras 17-18.

<sup>46</sup> International Co-Prosecutor’s Reply to Directions, para. 16.

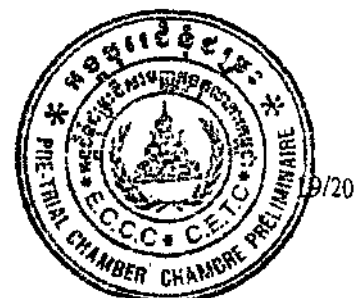


### VIII. CONSIDERATIONS REGARDING CONFIDENTIALITY

46. The Pre-Trial Chamber notes that, pursuant to Internal Rule 71(2), the “written statement of the facts and reasons for the disagreement shall not be placed on the case file”. Internal Rule 54 provides that “Introductory, Supplementary and Final Submissions filed by the Co-Prosecutors shall be confidential documents”. Internal Rule 56(1) further provides that “[i]n order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality”. In accordance with these provisions, all the documents related to the Disagreement have been classified by the Pre-Trial Chamber as “strictly confidential”.
47. The Pre-Trial Chamber further notes that contrary to the spirit of this obligation of confidentiality, the Office of the Co-Prosecutors issued a public “Statement of the Co-Prosecutors” on 8 December 2008. They informed the public that a Disagreement between them had been filed and further describe the nature of their Disagreement. The Office of the Co-Prosecutors issued a second public statement on 5 January 2009 which described in detail the International and National Co-Prosecutors’ reasons for the Disagreement. By so doing, the Co-Prosecutors have drawn the attention of the media and the public to the fact that new suspects might be prosecuted, generating a great deal of interest and giving an indirect notice to the potential suspects that there might be further prosecutions.
48. The International Co-Prosecutor released a third press statement on 24 April 2009 in relation to the “Directions to Provide Further Particulars and Scheduling Order”, prompting the Pre-Trial Chamber to issue a Reminder of the obligation of confidentiality to both Co-Prosecutors.
49. The Pre-Trial Chamber notes that Article 7(1) of the Agreement and Article 20(new) (7) of the ECCC Law provide that a decision on a disagreement between the Co-Prosecutors “shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors”. By contrast, Internal Rule 71(4)(a) provides that the judgement “shall be handed down *in camera*”. Sub-paragraph (d) of the same rule further provides that “[t]he greffier of the Chamber shall forward such decisions to the Director of the Office of Administration, who shall notify the Co-Prosecutors”, without mentioning that the decision shall be published.



50. In addition, Internal Rule 78, concerning the Publication of Pre-Trial Chamber Decisions, provides that “[a]ll decisions and default decisions of the Chamber, including any dissenting opinions, shall be published in full, except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation”.
51. Regarding the confidentiality and publication of a decision on a disagreement, the Pre-Trial Chamber notes that the Articles of the Agreement and ECCC Law, when compared with the Internal Rules, appear inconsistent with respect to whether a decision on a disagreement shall be published. It is noted that the Agreement does not specify to whom and when a decision shall be published. The Agreement, ECCC Law and Internal Rules all provide that the Director of Administration shall notify the Co-Prosecutors of the decision on a disagreement. This should be done immediately, as the above-mentioned provisions prescribe that the Co-Prosecutors shall immediately proceed in accordance with the decision.
52. Pursuant to Internal Rule 78, the Pre-Trial Chamber may determine that a decision shall not be published in full, if doing so would compromise the integrity of a preliminary or judicial investigation. The current Disagreement relates to the forwarding of Introductory Submissions to the Co-Investigating Judges for the opening of new judicial investigations. Given the press releases already issued by the Co-Prosecutors concerning their Disagreement, the publication of a redacted version of the Considerations of the Pre-Trial Chamber will not have an adverse impact upon the confidentiality of the investigation that may be undertaken by the Co-Investigating Judges. Therefore, the Pre-Trial Chamber suggests that the Director of the Office of Administration of the Court publish the redacted version of these Considerations, attached in Annex I.
53. The Pre-Trial Chamber notes that publication of the Considerations of the Pre-Trial Chamber is at the discretion of the Director of the Office of Administration. The New Submissions might be forwarded to the Co-Investigating Judges by the International Co-Prosecutor alone before any publication of the Considerations of the Pre-Trial Chamber. For the purpose of filing the Introductory Submissions by the International Prosecutor alone, an Excerpt is attached to these Considerations in Annex II.



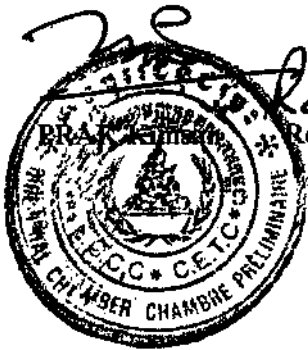
**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:**

- 1) DECLARES the Disagreement admissible;
- 2) DECLARES that it had not assembled an affirmative vote of at least four judges on a decision on the Disagreement.

Phnom Penh, **18** August 2009

President

Pre-Trial Chamber



*Rowan Downing*  
Rowan DOWNING

*NEY Thol*  
NEY Thol

*Katinka Lahuis*  
Katinka LAHUIS

*HOOT Vuthy*  
HOOT Vuthy

**OPINION OF JUDGES: PRAK KIMSAN, NEY THOL AND HUOT VUTHY**

**A. ILLEGALITY OF THE PRELIMINARY INVESTIGATION**

1. The National Co-Prosecutor, in her response dated 22 May 2009, stated that in accordance with the Internal Rules the term “Co-Prosecutors” is used to refer to those persons in leading preliminary investigation and prosecutions. If one of the Co-Prosecutors acts on his/her own without delegation of power from other the Co-Prosecutor, his/her action will be contrary to the provisions of the ECCC Internal Rules, which state that except for action that must be taken jointly under the ECCC Law and the Internal Rules, the Co-Prosecutors may delegate power to one of them, by a joint written decision, to accomplish such action individually. Therefore, the work related to the Second and Third Introductory Submissions was done by the International Co-Prosecutor and his staff without a request from or discussion with the National Co-Prosecutor.<sup>1</sup>
  
2. According to the ECCC Law, for prosecution to be conducted on legal merit, both Co-Prosecutors, namely the National Co-Prosecutor and the International Co-Prosecutor, must agree with each other to prosecute, whether at their own discretion or on the basis of a complaint. The Agreement and the ECCC Law specify that the ECCC shall have two prosecutors, known as the Co-Prosecutors, who must cooperate with each other in order to fulfil their duties. Therefore, it is seen that the National Co-Prosecutor did not participate in the International Co-Prosecutor’s preliminary investigation to obtain evidence related to new suspects, nor did the National Co-Prosecutor delegate power to her staff to participate in such an investigation.<sup>2</sup>
  
3. The National Co-Prosecutor and her staff never participated and/or supported the preliminary investigations aimed at identifying suspects for prosecution, as mentioned in the Second and Third Introductory Submissions carried out by the International Co-Prosecutor. It was only after the preliminary investigation had been conducted by the International Co-Prosecutor and his staff that there was unofficial information communicated about the fact that the international

<sup>1</sup> Document 17, para.19.

<sup>2</sup> National Co-Prosecutor’s Response to the Direction, para.20.



side had conducted preliminary investigations related to a number of affairs and that the investigations had already ended. After receiving this information, the National Co-Prosecutor went to meet with the International Co-Prosecutor. However, the International Co-Prosecutor was absent that day; so the National Co-Prosecutor went to meet with the International Deputy Co-Prosecutor, Mr William SMITH. When asked about the preliminary investigations, Mr William SMITH told the National Co-Prosecutor that preliminary investigations had indeed been conducted, as the National Co-Prosecutor had learned. Also, Mr William SMITH said “sorry” that the preliminary investigations were carried out unilaterally and promised to inform the National Co-Prosecutor if further investigations were to be conducted.<sup>3</sup>

4. It was the International Co-Prosecutor alone who decided to initiate this preliminary investigation. The National Co-Prosecutor was not aware of it.<sup>4</sup>
5. The International Co-Prosecutor, in his response dated 22 May 2009, asserted that the preliminary investigation pertaining to the First, Second and Third Introductory Submissions was principally done on the basis of an in-house analysis of documents collected from the Documentation Centre of Cambodia (DC-Cam) that were obtained prior to 18 July 2007, i.e. before the filing of the First Introductory Submission. Most of the authorisations for preliminary investigation, whenever given by any or both the Co-Prosecutors, were oral, which is permitted by law.<sup>5</sup>
6. The Office of the Co-Prosecutors commenced its operation on 10 July 2006. Based on information available to the Office at that time, its investigators had, by 21 July 2006, identified a list of [REDACTED] potential suspects who, on the basis of publicly available evidence, were involved in crimes within the jurisdiction of this Court, and who potentially fell within the personal jurisdiction of this Court. On that day, however, one of the potential suspects died. Consequently, the list of potential suspects was reduced to [REDACTED], and, at the direction of the Co-Prosecutors, the Office launched preliminary investigations into [REDACTED] suspects.<sup>6</sup>

<sup>3</sup> National Co-Prosecutor’s Response to the Direction, para.22.

<sup>4</sup> National Co-Prosecutor’s Response to the Direction, para.28.

<sup>5</sup> International Co-Prosecutor’s Response to the Direction, para.50.

<sup>6</sup> International Co-Prosecutor’s Response to the Direction, para.51.  
Opinion of Judges: PRAK Kimsan, NEY Thol and HUOT Vuthy



7. By 20 September 2006, the Office had produced draft introductory submissions for these [REDACTED] suspects. These drafts submission were circulated and reviewed by the Co-Prosecutors. They determined that additional preliminary investigation would be required for [REDACTED] suspects. The Co-Prosecutors then made the decision to prioritise the suspects based on two independent criteria: (1) whether the Office had adequate evidence in hand to satisfy the “reason to believe” criterion for a particular suspect within a relatively brief time frame, and (2) the rank of the suspect in the Communist Party of Kampuchea hierarchy. This evaluation resulted in a list of [REDACTED] who would be the subjects of the First Introductory Submission, and a list of [REDACTED] suspects with respect to whom preliminary investigations would be continued as time and resources permitted.<sup>7</sup>
8. By the beginning of July 2007, the Office had developed an advanced draft of an introductory submission naming six suspects: NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan, DUCH, and [REDACTED]. On the very date of the proposed filing of the first introductory submission, the National Co-Prosecutor found that the evidence against [REDACTED] did not satisfy the “reason to believe” criterion.<sup>8</sup>
9. After 18 July 2007, the Office resumed preliminary investigations on the remaining [REDACTED] suspects. In early 2008, however, the Office learned that one of the [REDACTED] suspects had recently died of accidental causes, leaving the Office seized with [REDACTED] suspects. In the course of further preliminary investigations during 2008, the Co-Prosecutors determined that crimes which may have been committed by [REDACTED] of the additional suspects either were not adequately severe to fall within the jurisdiction of the Court, or that evidence implicating these suspects in such crimes could not be developed within a reasonable time frame given the investigative resources available to the Office. Preliminary investigations continued on the remaining [REDACTED] suspects.<sup>9</sup>
10. During the preliminary investigations conducted from July 2007 to November 2008, teams of National and International staff members of the Office continued to analyse the evidence. Based on the results of those investigations in October 2008 draft additional submissions charging new crimes and naming [REDACTED] suspects were prepared. Advance copies of those submissions were provided, in Khmer, to the National Co-Prosecutor, who, only on 18 November 2008,

<sup>7</sup> International Co-Prosecutor’s Response to the Direction, para.52.

<sup>8</sup> International Co-Prosecutor’s Response to the Direction, para.53.

<sup>9</sup> International Co-Prosecutor’s Response to the Direction, para.54.  
Opinion of Judges: PRAK Kimsan, NEY Thol and HUOT Vuthy



stated her unwillingness to forward them to the Co-Investigating Judges, hence crystallising this disagreement.<sup>10</sup>

11. Furthermore, in the International Co-Prosecutor's Reply to the National Co-Prosecutor's Response to the Pre-Trial Chamber's Directions to Provide Further Particulars, the International Co-Prosecutor stated:

"The regularity of the preliminary investigation, as raised in paragraph 1(C) above, is not germane to the determination of this disagreement. The International Co-Prosecutor respectfully reiterated that the sole issue in these proceedings is whether the two new introductory submissions and one supplementary submission should be forwarded to the Co-Investigating Judges for judicial investigation. The issue of regularity of the preliminary investigation, if at all valid, lies only in the jurisdiction of the Co-Investigating Judges who can grant the moving party the appropriate remedy of annulment under Rule 76. The Pre-Trial Chamber, therefore, at this stage and in these proceedings, lacks the jurisdiction to entertain this objection. In any event, the preliminary investigation leading to the new submissions was validly conducted."<sup>11</sup>

12. While the National Co-Prosecutor had not made a consequential argument, the International Co-Prosecutor assumed that she wished to argue that this unilateral preliminary investigation vitiates the new submissions and, consequently, they should be dismissed.<sup>12</sup>
13. The International Co-Prosecutor reiterated the preliminary objection that the National Co-Prosecutor had raised this issue extremely late and as an afterthought. In any event, the International Co-Prosecutor submitted that the regularity of the preliminary investigation is not germane to the determination of these proceedings. The sole issue for determination here is whether the new submissions should be forwarded to the Co-Investigating Judges. The issue of regularity of the preliminary investigation, even if validly challenged, is in the jurisdiction of the Co-Investigating Judges who can grant the moving party the remedy of annulment under Rule 76. The Pre-Trial Chamber, therefore, at this stage and in these proceedings, lacks the jurisdiction to entertain this objection.<sup>13</sup>

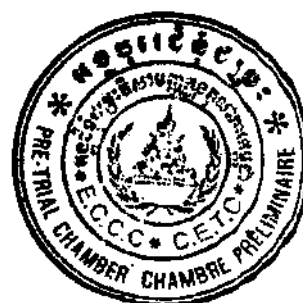
<sup>10</sup> International Co-Prosecutor's Response to the Direction, para.55.

<sup>11</sup> International Co-Prosecutor's Reply, para.3.

<sup>12</sup> International Co-Prosecutor's Reply, para.10.

<sup>13</sup> International Co-Prosecutor's Reply, para.11.

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14. The scope of the proceedings is limited to the issues raised in the Statement of the claimant (here, the International Co-Prosecutor) and the Response Statement by the respondent (here, the National Co-Prosecutor). The International Co-Prosecutor submits that an arbitral tribunal determines the issues raised in the Statement and becomes *functus officio* upon such determination. Parties raising new issues at an advanced stage that are beyond the scope of the original disagreement have to cross a very high threshold for acceptance of those arguments or raise those issues as fresh disagreement. The International Co-Prosecutor observes that here the National Co-Prosecutor has raised fresh issues in her response to interrogatories by the Pre-Trial Tribunal and has not shown good cause why her fresh arguments should replace her Response Statement which raised none of them. He concludes that her new arguments should, therefore, be ignored or dismissed.<sup>14</sup>
15. Without prejudice to the preceding, the International Co-Prosecutor submits that the regularity of the preliminary investigation leading to the filing of the new submissions is beyond the scope of these disagreement proceedings.<sup>15</sup>
16. Furthermore, he submits that the issue of regularity of the preliminary submission is not so inextricably linked to the issue of the New Submissions such that the determination of the Second may be contingent on the determination of the First. These are distinct issues amenable to independent determination. In any event, the regularity of any action during the investigation can be challenged by a party under Rule 76. Therefore, if a party can make a valid case that a “unilateral” preliminary investigation has vitiated the proceedings; it can seek annulment of any or all resultant actions.<sup>16</sup>
17. The International Co-Prosecutor notes that most of the authorisations for preliminary investigation, whenever given by one or both the Co-Prosecutors, were oral, which is permitted by law. In any event, while the founding documents of this Court envisage a joint action by the Co-Prosecutors to effectuate their mandate, the International Co-Prosecutor submits that those documents also envisage that the Co-Prosecutors shall carry out their day-to-day functions jointly or severally. Assuming, therefore, that the preliminary investigation of the International Co-Prosecutor was indeed “unilateral” it is permissible under the Rules as long as the

<sup>14</sup> International Co-Prosecutor’s Reply, para.13.

<sup>15</sup> International Co-Prosecutor’s Reply, para.14.

<sup>16</sup> International Co-Prosecutor’s Reply, para.15.



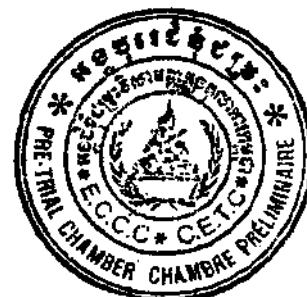
disagreement crystallised at the stage of the signing of the Introductory and Supplementary Submissions.<sup>17</sup>

18. We are of the view that on the basis of the arguments by the Co-Prosecutors, there was no discussion or provision of information relevant to the preliminary investigation of the both Co-Prosecutors before drafting the Second and Third Introductory Submissions. We, therefore, find that the preliminary investigation was conducted unilaterally by the International Co-Prosecutor. In the meantime, the apology by Deputy Prosecutor William SMITH, which was not denied by the International Co-Prosecutor, is a more vivid manifestation of the failure to notify the National Co-Prosecutor about the preliminary investigation.
19. Pursuant to Articles 16 of the ECCC Law and 6(1) of the Agreement, we are of the opinion that on the matter of the disagreement, the preliminary investigation is a significant starting point which validates the Introductory Submission. The International Co-Prosecutor's preliminary investigation without prior notification or discussion in terms of cooperation with the National Co-Prosecutor 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.

## B. NECESSITY OF THE NEW SUBMISSIONS

20. The main cause for disagreement relating to the Second and Third Introductory Submissions lies in the facts leading to the constitution of crimes committed during the period of Democratic Kampuchea between 17 April 1975 and 6 January 1979. The question is whether the facts described in the Second and Third Introductory Submissions initiated by the International Co-Prosecutor are the same facts mentioned in the Introductory Submission dated 18 July 2007.
21. In response to the above question, we have to examine whether the facts and alleged crimes described in the Second and Third Introductory Submissions existed in the First Introductory Submission which is under investigation by the Co-Investigating Judges.

<sup>17</sup> International Co-Prosecutor's Reply, para.16.  
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22. The facts mentioned in the Second Introductory Submission are:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED].

23. The alleged crimes mentioned in the Second Introductory Submission are:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED].

24. The facts described in the Third Introductory Submission are:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED].

25. The alleged crimes mentioned in the Third Introductory Submission are:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED].





- [REDACTED]  
[REDACTED]  
[REDACTED];
  - [REDACTED]  
[REDACTED]
27. Based on the foregoing examination, we find that the facts and offences described in the Second and Third Introductory Submission dated 20 November 2008 initiated by the International Co-Prosecutor were already mentioned in the First Introductory Submission dated 18 July 2007.
28. We examine and find that during the investigation of Case 002/19-09-2007/ECCC/OCIJ, the Co-Prosecutors issued three additional submissions or Supplementary Submissions:
- Document D83, "Co-Prosecutors' Supplementary Submission Regarding [REDACTED] [REDACTED]" dated 26 March 2008;
  - Document D98/1, "Co-Prosecutors' Response to the Co-Investigating Judges' Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submission" dated 13 August 2008;
  - Document D146/3, "Co-Prosecutors' Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission" dated 30 April 2009.
29. We will make further examinations on the facts and alleged crimes mentioned in the Supplementary Submission by the Co-Prosecutors which are relevant to the three documents mentioned above:
- a. The [REDACTED] Security Centre (Document D83): The facts related to the [REDACTED] Security Centre have been recognised by the Co-Prosecutors in paragraph 40 of the Final Submission on the criminal acts committed in [REDACTED] [REDACTED] along with paragraph 36 in which the Co-Investigating Judges have investigated more than [REDACTED] throughout the country. Therefore, the Supplementary Submission by the Co-Prosecutors related to the [REDACTED] does not contain new facts. Those facts constitute the following alleged crimes:



- [REDACTED]
- [REDACTED];
- [REDACTED]

These crimes were already mentioned in the First Introductory Submission.

- b. Regarding Document D98/I, the Co-Prosecutors clarified that the judicial investigation requested is not limited to the facts specified in paragraphs 37 to 72 of the Introductory and paragraphs 5 to 20 of the Supplementary Submission. Thus, in reference to point (a), these facts were already mentioned in the First Introductory Submission.
- c. Regarding Document D146, there are certain civil party applications from persons who claim that Angkar forced them to marry and they received death threats if they refused to have sexual relations with their spouses.<sup>18</sup> These facts are not new since they were mentioned in the First Introductory Submission from paragraphs 49 to 72 and these facts are defined and punishable under Article 5 of the ECCC Law, which includes [REDACTED].

30. Accordingly, we find that the facts and alleged crimes 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. Those facts and crimes were also recognized by the Co-Prosecutors in paragraphs 15 to 45 of the Final Submission, which contradicts with the International Co-Prosecutor's argument in paragraph 4 of its reply dated 27 May 2009 that the Introductory Submission was restricted to the [REDACTED] identified sets of crimes.

In the light of the above interpretation, we find that there is no reason for the International Co-Prosecutor to issue the Second and Third Introductory Submissions due to the fact that the judicial investigation into Case 002 is not closed yet, pending the judicial investigation by the Co-Investigating Judges. We, therefore, find the arguments raised by the National

<sup>18</sup> Document D146, p.2.  
Opinion of Judges: PRAK Kimsan, NEY Thol and HUOT Vuthy




Prosecutor sufficient to block forwarding the Second and Third Introductory Submissions. Considering this finding, we find that it is not necessary to reason on the other arguments raised by the National Co-Prosecutor.

Phnom Penh, 17 August 2009



  
NEY Thol  
Judge

  
HUOT Vuthy  
Judge

## OPINION OF JUDGES LAHUIS AND DOWNING

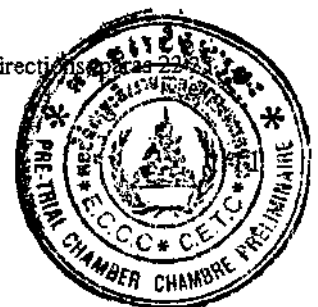
1. We note that our colleagues' conclusion that the New Submissions shall not be forwarded to the Co-Investigating Judges for judicial investigation relies upon their findings on the First and Third Issues raised by the National Co-Prosecutor. We will thus express our views on these two issues.

### I. ILLEGALITY OF THE PRELIMINARY INVESTIGATION

2. We note that the National Co-Prosecutor did not raise any argument pertaining to the illegality of the preliminary investigation in her Response to the International Co-Prosecutor's Statement filed on 29 January 2009. On 25 April 2009, the Pre-Trial Chamber issued its Directions to Provide Further Particulars, asking the Co-Prosecutors to provide more information in respect of the rationale behind their decision to prosecute new suspects or to oppose such prosecutions and to know whether they had developed a policy on prosecutions in practice or in writing. In response to these Directions, the National Co-Prosecutor stated that the preliminary investigation has been conducted by the International Co-Prosecutor without her knowledge and consent.<sup>1</sup> The unilateral preliminary investigation leading to the new submissions violated the ECCC Law and the Internal Rules so, in her view, the New Submissions must be rejected.<sup>2</sup>
  
3. Article 6(4) of the Agreement provides that the Co-Prosecutors shall cooperate with a view to arriving at a common approach to the prosecutions. As discussed in paragraph 16 of the Considerations of the Pre-Trial Chamber, one of the Co-Prosecutors can act without the consent of the other if neither of them brings the disagreement before the Pre-Trial Chamber within thirty days. When a disagreement is brought before the Pre-Trial Chamber, a Co-Prosecutor can still proceed with the contested action pending a decision of the Pre-Trial Chamber unless one of the specific matters of concern identified in Internal Rule 71(3) is involved. A preliminary investigation pursuant to Internal Rule 50(1) is not one of these matters.

<sup>1</sup> National Co-Prosecutor's Response to Directions, para. 19; National Co-Prosecutor's Reply to Directions, para. 22.

<sup>2</sup> National Co-Prosecutor's Reply to Directions, para. 20.





4. It is noted that the facts related to the conduct of the preliminary investigation are stated differently by the International Co-Prosecutor.<sup>3</sup> In any event, we observe that based on her own assertions, the National Co-Prosecutor would have first known of the preliminary investigation conducted pursuant to Internal Rule 50(1) when a meeting was held on 18 November 2008 to discuss the filing of the New Submissions, as set out in paragraph 1 of her Response. In the alternative, she would have had more precise details of the matter on 3 December 2008, when the International Co-Prosecutor's Statement was notified through the ECCC's system. Considering that this issue was brought by the National Co-Prosecutor before the Pre-Trial Chamber on 22 May 2009 in her Response to the Directions as an answer to questions of a different nature, we find that this argument cannot be considered as being part of the Disagreement of which the Pre-Trial Chamber has been seised. This fact alleged by the National Co-Prosecutor cannot be considered other than as relevant background information. As this conclusion has been reached on the basis of the assertions of the National Prosecutor herself, a discussion on whether she knew or not that preliminary investigations were conducted is unnecessary.

## II. NECESSITY OF THE NEW SUBMISSIONS

5. Pursuant to the ECCC Law, the Co-Prosecutors "are responsible for the conduct of the prosecutions" while the Co-Investigating Judges are "responsible for the conduct of investigations".<sup>4</sup> By filing Introductory and Supplementary Submissions, the Co-Prosecutors define the scope of the judicial investigation, as appears from Internal Rules 53 and 55(2) and (3).
6. According to the Glossary of the Internal Rules, the Introductory Submission "refers to the written submission by the Co-Prosecutors requesting the Co-Investigating Judges to open an investigation into a crime and proposing charges". Pursuant to Internal Rules 53(1) and (3), to be valid an Introductory Submission shall contain:

- "a) a summary of the facts;
- b) the type of offence(s) alleged;

<sup>3</sup> International Co-Prosecutor's Response to Directions, paras 50-55; International Co-Prosecutor's Reply to Response to Directions, para. 16.

<sup>4</sup> Agreement, arts. 5 and 6.



- c) the relevant provisions of the law that defines and punishes the crimes;
- d) the name of any person to be investigated, if applicable; and
- e) the date and signature of both Co-Prosecutors.”

7. It is the facts set out in the Introductory and Supplementary Submissions that define the scope of a judicial investigation, as emphasised by the Pre-Trial Chamber in its Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “Duch” dated 5 December 2008 (“Decision on Duch’s Closing Order”).<sup>5</sup> An Introductory or Supplementary Submission is to refer to specific facts concerning alleged criminal acts, the legal categorisation of which has led the Co-Prosecutors to have reason to believe that crimes within the jurisdiction of the ECCC have been committed. It shall be precise enough and set out specific criminal acts, defined by their time and location.<sup>6</sup>
8. An Introductory Submission so broad that it would include all the legal offences within the jurisdiction of the ECCC committed throughout Cambodia between 17 April 1975 and 6 January 1979, without any reference to precise factual situations, would not be specific enough to meet the requirements of Internal Rule 53(1).
9. In application of the principles set out above, the Co-Prosecutors expressly state at paragraph 122 of the First Introductory Submission that they decided to “open a judicial investigation against NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and KANG Guek Eav (DUCH) into the facts specified in paragraphs 37 to 72”. Paragraphs 37 to 72 of the First Introductory Submission set out twenty-five sets of criminal acts that allegedly occurred at different locations throughout Cambodia, which are specifically identified. [REDACTED]
10. By a Forwarding Order issued on 8 August 2008, the Co-Investigating Judges requested the Co-Prosecutors to clarify the scope of the investigation by indicating “whether the judicial investigation should be limited to the facts specified in paragraphs 37 to 72 of the Introductory

<sup>5</sup> Case File 001/18-07-2007-ECCC/OCLJ (PTC02), KAING Guek Eav alias “Duch”, Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “Duch”, 5 December 2008, D99/3/42 (“Decision on Duch’s Closing Order”), paras 35-39, 44 and 125.

<sup>6</sup> The French system, upon which Cambodian Law is largely based, has been used to assist the Pre-Trial Chamber in its interpretation of the Internal Rules. See Cass. Crim., 22 November 1994, Inédit n° 93-84843; Christian Guénin, *La procédure préparatoire*, Rép. pén. Dalloz, January 2008, para. 97.



Submission and paragraphs 5 to 20 of the Supplementary Submission or extended to all facts, whether referred to or not in the Introductory Submission and Supplementary Submission, provided that they assist in investigating whether the factual situations specified in the above-mentioned paragraphs constitute crimes within the jurisdiction of the ECCC or assist in investigating the liability of any individual for any such crimes”.<sup>7</sup>

11. The Co-Prosecutors significantly responded as follows:

“The Co-Prosecutors clarify that the judicial investigation requested is not limited to the facts specified in paragraphs 37 to 72 of the Introductory Submission and paragraphs 5 to 20 of the Supplementary Submission but extends to all facts, referred to in these Submissions, *provided* these facts assist in investigating:

- a. the jurisdictional elements necessary to establish whether the factual situations, specified in paragraphs 37 to 72 and 5 to 20 respectively, constitute crimes within the jurisdiction of the ECCC or
- b. the mode of liability of the Suspects named in the Introductory Submission.”

12. On two occasions, the Co-Prosecutors filed Supplementary Submissions to request the Co-Investigating Judges to investigate new facts that were not covered by the First Introductory Submission.<sup>8</sup> It is worth noting that in their Supplementary Submission [REDACTED] [REDACTED] (“First Supplementary Submission”), the Co-Prosecutors state:

“These new facts have been referred to the Co-Prosecutors by the Co-Investigating Judges in their Forwarding Order dated 29 February 2008 requesting the Co-Prosecutors to advise them as to whether they should investigate the contents of the Civil Party Applications [REDACTED]

[REDACTED]. The Co-Prosecutors request that this crime site become part of Case No. 002/19-09-2007/ECCC/OCIJ, which is currently being investigated by the Co-Investigating Judges.”

13. We find that it is clear from these documents, which were filed jointly by the two Co-Prosecutors, that the judicial investigation in Case File 002/19-09-2007-ECCC/OCIJ covers, at

<sup>7</sup> Forwarding Order, 8 August 2008, D98.

<sup>8</sup> Co-Prosecutors' Supplementary Submission [REDACTED], 26 March 2008, D83; Co-Prosecutors' Response to the Forwarding Order of the Co-Investigating Judge and Supplementary Submission [REDACTED], 2009, D146/3 (“Second Supplementary Submission”).



this moment, only the factual situations set out in paragraphs 37 to 72 of the First Introductory Submission, paragraphs 5 to 20 of the First Supplementary Submission and paragraph 2 of the Second Supplementary Submission (“Facts under Investigation”). If “the whole story of crimes during the period of Democratic Kampuchea” was included in the First Introductory Submission, as asserted by the National Co-Prosecutor,<sup>9</sup> there would have been no need for Forwarding Orders issued by the Co-Investigating Judges or for Supplementary Submissions filed by the Co-Prosecutors. In our view, the position of the National Co-Prosecutor is inconsistent with the past practice adopted jointly by the two Co-Prosecutors, the ECCC Law, and the Internal Rules.

14. We further note that the argument raised by the National Co-Prosecutor, as set out in paragraphs 50 and 51 of her Response to the International Co-Prosecutor’s Statement, relies upon a confusion between the legal characterisation of alleged criminal acts and the facts concerning alleged criminal acts that are forwarded for investigation. While the legal characterisation proposed by the Co-Prosecutors provides guidance to the Co-Investigating Judges in understanding the scope of their investigation,<sup>10</sup> the scope of an investigation is itself defined by the specific facts concerning criminal acts alleged in an Introductory or Supplementary Submission, as explained above.
15. Having identified the Facts under Investigation, we will now examine whether the facts set out in the New Submissions are already covered by the judicial investigation in Case File 002.
16. It is noted that the International Co-Prosecutor has declared that the New Submissions are the result of a preliminary investigation done by the Office of the Co-Prosecutors principally on the basis of an in-house analysis of documents collected prior to 18 July 2007, i.e. before the filing of the First Introductory Submission.<sup>11</sup> These New Submissions were not triggered by a Forwarding Order from the Co-Investigating Judges.
17. We observe that the First, Second and Third Introductory Submissions are structured differently as they focus on the liability of different suspects.

<sup>9</sup> National Co-Prosecutor’s Response, para. 51.

<sup>10</sup> Decision on Duch’s Closing Order, para. 35.

<sup>11</sup> International Co-Prosecutor’s Response to the Directions, paras 50 and 55; International Co-Prosecutor’s Directions, para. 16.



- The First Introductory Submission is organised according to the type of legal offence allegedly committed. For each legal offence, specific crime sites located throughout the country of Cambodia are identified. It is completed by the First Supplementary Submission, which covers criminal acts allegedly committed [REDACTED], and the Second Supplementary Submission, which covers [REDACTED].
- The Second Introductory Submission is organised according to the [REDACTED] within which alleged criminal acts occurred. The Second Introductory Submission focuses exclusively [REDACTED].
- The Third Introductory Submission is organised according to location, and focuses on a number of specific crime sites used during [REDACTED].

18. We note that it is indicated in the Second Introductory Submission that this submission contains both facts overlapping with the ones identified in the First Introductory Submission and the First Supplementary Submission and new facts that are not currently part of the judicial investigation:

"5. This request relates to the suspects' involvement in both criminal acts that were identified in the Introductory Submission filed on 18 July 2007 (the First Introductory Submission) and the Supplementary Submission filed on 26 March 2008 and criminal acts that were not identified in the earlier submissions. The crimes included in this Second Introductory Submission that overlap with the crimes described in the previous Introductory and Supplementary Submission occurred at the following locations:

- (1) [REDACTED];
- (2) [REDACTED];
- (3) [REDACTED];
- (4) [REDACTED];
- (5) [REDACTED];
- (6) [REDACTED]; and



(7) [REDACTED].

6. The crimes falling outside of the First Introductory and Supplementary Submission occurred at the following locations:

- (1) [REDACTED];
- (2) [REDACTED];
- (3) [REDACTED];
- (4) [REDACTED];
- (5) [REDACTED]; and
- (6) [REDACTED]

19. After having compared the two submissions, we find that this statement accurately describes the relationship between the Second Introductory Submission and the First Introductory Submission.

20. The Third Introductory Submission similarly identifies two crime sites that have been mentioned in the First Introductory Submission:

“ [REDACTED]  
 [REDACTED]  
 [REDACTED] ”<sup>12</sup>  
 “ [REDACTED]  
 [REDACTED] ”<sup>13</sup>

In addition to these two crime sites, we note that the [REDACTED] overlap, at least to some extent, with the ones mentioned in the First Introductory Submission.<sup>14</sup>

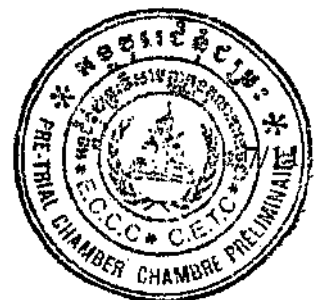
21. We note that the other crime sites mentioned in the Third Introductory Submission do not overlap with the ones identified in the First Introductory Submission, including:

- (1) [REDACTED]  
 [REDACTED]  
 [REDACTED]

<sup>12</sup> Third Introductory Submission, para. 73.

<sup>13</sup> Third Introductory Submission, para. 78.

<sup>14</sup> First Introductory Submission, para. 68; Third Introductory Submission, para. 60.



[REDACTED]

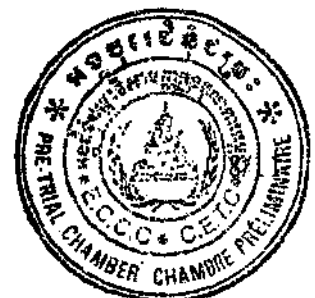
(2) [REDACTED];

(3) [REDACTED]

(4) [REDACTED].

22. After having compared the New Submissions with the First Introductory Submission and its Supplementary Submissions, we conclude that the New Submissions refer to both new facts as well as facts that overlap with the ones already encompassed in the scope of the judicial investigation in Case File 002. Pursuant to Internal Rule 55(2), these new facts could not be investigated by the Co-Investigating Judges until a new Introductory or a Supplementary Submission was filed by the Co-Prosecutors.

23. It is observed that Internal Rule 53(1) provides 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”. By contrast, Internal Rule 50(1) provides that “[t]he Co-Prosecutors may conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed”. Internal Rule 53(1) uses the obligatory “shall”, as opposed to the discretionary “may”, as is found in Internal Rule 50(1). In light of these provisions, we are of the opinion that there is no discretion to be exercised by the Co-Prosecutors under Internal Rule 53(1), contrary to what is asserted by the National Co-Prosecutor. Once the conclusion is drawn that there is “reason to believe that crimes within the jurisdiction of the ECCC have been committed”, then the Co-Prosecutors are obliged to open a judicial investigation by sending an Introductory Submission.



24. In the current case, the International Co-Prosecutor aimed at covering the liability of additional suspects for both new facts and some facts overlapping with an ongoing investigation. He decided to file new Introductory Submissions. As the New Submissions contain some facts overlapping with an ongoing investigation, a question arises as to whether the International Co-Prosecutor could file new Introductory Submissions or if he had to proceed by filing Supplementary Submissions as the Co-Investigating Judges were already partly seized of the matter.
25. Pursuant to Internal Rule 53(1), the Co-Prosecutors shall open a judicial investigation by filing an Introductory Submission, as defined in paragraph 6 above, if “they have reason to believe that crimes within the jurisdiction of the ECCC have been committed”. There is no other procedural requirement specified in the Internal Rules or in Cambodian Law for filing an Introductory Submission.
26. The expression “Supplementary Submission” is defined in the Glossary of the Internal Rules as “a written submission by the Co-Prosecutors requesting the Co-Investigating Judges to issue an order or undertake further action in an ongoing investigation”. There is no clear indication in the Internal Rules as to the conditions for filing a Supplementary Submission. While Internal Rule 55(3) suggests that the Co-Prosecutors can add new facts to an ongoing investigation by filing a Supplementary Submission, the Internal Rules do not prevent them from choosing to rather file a new Introductory Submission.<sup>15</sup> In this regard, we note that the last sentence of IR 55(3), which mentions that “[w]here such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary

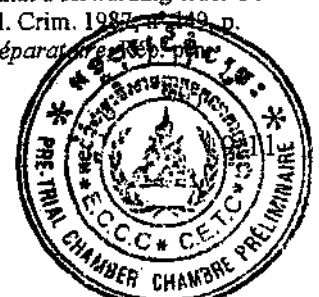
<sup>15</sup> The French system has been used to interpret the Internal Rules, more particularly Article 80(3) of the French Code of Criminal Procedure which provides:

“Article 80(3):

Where an offence not covered by the prosecution submissions is brought to the knowledge of the investigating judge, he must communicate forthwith to the district prosecutor the complaints or the official records which establish its existence. The district prosecutor may then require the investigating judge, by an additional submission, to investigate the additional facts, or require him to open a separate investigation, or send the case to the trial court, or order an inquiry, or decide to drop the case, or proceed to one of the measures provided for in articles 41-1 to 41-3, or to transfer the complaint or the official reports to the district prosecutor who is territorially competent. If the district prosecutor requires the opening of a separate investigation, this may be entrusted to the same investigating judge, designated under the conditions set out in the first paragraph of article 83.”

It is noted that the French Court of Cassation found that, despite this wording, it is not necessary that a forwarding order be sent by the investigating judge for this provision to apply. See Cass. Crim., 31 March 1987, Bull. Crim. 1987, n° 449, p. 405; Cass. Crim., 27 June 2001, Bull. Crim. 2001, n° 163, p. 512; Christian Guéry, *Instruction préparatoire*, *Revue de Droit Pénal*, Dalloz, January 2008, para. 82.

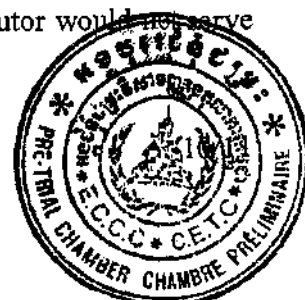
Opinion of Judges Lahuis and Downing





Submission”, is to be seen as a limitation on the power of the Co-Investigating Judges to independently extend the scope of the investigation to new facts rather than an obligation for the Co-Prosecutors to proceed by a Supplementary Submission.

27. In light of Internal Rules 53(1), 55(2), 55(3) and the definition provided in the Glossary, we find that the choice between filing an Introductory Submission or a Supplementary Submission is, at this stage, left to the discretion of the Co-Prosecutors. 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 should prevent him from filing a new Introductory Submission, even if some facts are, to some extent, already being investigated in another case.
28. We would foresee problems in including the new facts that the International Co-Prosecutor wants to be investigated in the Case File 002 investigation. Given that the Co-Investigating Judges have conducted the investigation in Case File 002 for almost two years, during which time four (4) Charged Persons have been kept in provisional detention, adding new facts of the scope contained within the New Submissions would risk delaying the proceedings and, as a consequence, might infringe upon the Charged Persons’ right to be tried within a reasonable time. It is further noted that including new suspects in an investigation opened almost two years ago might violate the new suspects’ rights, as they would not have been given the opportunity to participate actively in the prior investigative proceedings.
29. In light of the potential problems which may have been raised by filing additional Supplementary Submissions, issues which should have also been taken into consideration by the International Co-Prosecutor, we find the reasoning supporting the argument that the New Submissions are not necessary, as set out by the National Co-Prosecutor, not sufficient to block forwarding the New Submissions to the Co-Investigating Judges.
30. The three other judges are of the opinion that it is not necessary to file new Introductory Submissions. This being, in their view, a sufficient reason to block the forwarding of the New Submissions, they consider that it is not necessary to discuss the other arguments raised by the National Co-Prosecutor. Considering this position of the three other judges, a discussion by only two judges on the other arguments raised by the National Co-Prosecutor would not serve



any purpose, as this will not allow the Pre-Trial Chamber to attain a majority of four votes on a decision on the Disagreement.

Phnom Penh, 6 August 2009

  
Rowan DOWNING  
Judge



  
Katinka LAHUIS  
Judge