



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D266/27 & D267/35

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

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

THE PRE-TRIAL CHAMBER

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

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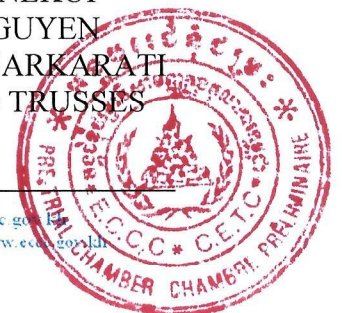


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TABLE OF ACRONYMS

Term	Abbreviation / Acronym
Extraordinary Chambers in the Courts of Cambodia	ECCC
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	ECCC Agreement
Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (as amended)	ECCC Law
Extraordinary African Chambers	EAC
Statute of African Extraordinary Chambers within the Courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990	EAC Statute
United Nations Human Rights Committee	HRC
International Covenant on Civil and Political Rights	ICCPR
International Criminal Tribunal for Rwanda	ICTR
International Criminal Tribunal for the Former Yugoslavia	ICTY
International Residual Mechanism for Criminal Tribunals	IRMCT
Special Court for Sierra Leone	SCSL
Special Tribunal for Lebanon	STL



United Nations	UN
Vienna Convention on the Law of Treaties	Vienna Convention
Code of Criminal Procedure	CCP
Communist Party of Kampuchea	CPK
Documentation Centre for Cambodia	DC-Cam
Democratic Kampuchea	DK
Joint Criminal Enterprise	JCE
Revolutionary Army of Kampuchea	RAK
Written Record of Interview	WRI



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of three Appeals against the two conflicting Closing Orders – the National Co-Investigating Judge’s Order Dismissing the Case against MEAS Muth (“Dismissal Order”)¹ and the International Co-Investigating Judge’s Closing Order, indicting MEAS Muth (“Indictment”).² These three Appeals are:

(1) National Co-Prosecutor’s Appeal against the International Co-Investigating Judge’s Closing Order in Case 003, filed on 5 April 2019 (“National Co-Prosecutor’s Appeal”);³

(2) International Co-Prosecutor’s Appeal of the Order Dismissing the Case against MEAS Muth (D266), filed on 8 April 2019 (“International Co-Prosecutor’s Appeal”);⁴

and

(3) MEAS Muth’s Appeal against the International Co-Investigating Judge’s Indictment, filed on 8 April 2019 (“MEAS Muth’s Appeal”).⁵

I. PROCEDURAL HISTORY

1. On 20 November 2008, the International Co-Prosecutor signed the Second Introductory Submission (“Introductory Submission”), requesting that a judicial investigation be conducted regarding the responsibility of SOU Met and MEAS Muth for crimes within the jurisdiction of the ECCC.⁶

2. On the same day, the International Co-Prosecutor brought a disagreement before the Pre-Trial Chamber, pursuant to Internal Rule 71(2),⁷ reporting that the National

¹ Case 003/07-09-2009-ECCC/OCIJ (“Case 003”), Order Dismissing the Case against MEAS Muth, 28 November 2018, D266 (“Dismissal Order (D266)”).

² Case 003, Closing Order, 28 November 2018, D267 (“Indictment (D267)”).

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

⁴ Case 003, International Co-Prosecutor’s Appeal of the Order Dismissing the Case against MEAS Muth (D266), 8 April 2019, D266/2 (“International Co-Prosecutor’s Appeal (D266/2)”).

⁵ Case 003, MEAS Muth’s Appeal against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4 (“MEAS Muth’s Appeal (D267/4)”).

⁶ Case 003, Co-Prosecutors’ Second Introductory Submission regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1 (“Introductory Submission (D1)”).

⁷ *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* (Rev.9), as revised 16 January 2015, (“Internal Rules”) 71(2).



Co-Prosecutor disagreed with prosecuting new crimes identified in additional submissions.⁸ On 18 August 2009, the Pre-Trial Chamber issued its considerations on this disagreement.⁹

3. On 7 September 2009, the Acting International Co-Prosecutor filed the Introductory Submission and submitted the Case File to the Co-Investigating Judges.¹⁰ Further allegations were submitted in a supplementary submission filed on 31 October 2014 (“Supplementary Submission”).¹¹

4. Confidential disagreements between the Co-Investigating Judges were registered on 7 February 2013, 22 February 2013, 17 July 2014, 16 January 2017 and 17 September 2018.¹² These disagreements were not brought before the Pre-Trial Chamber.

5. On 29 April 2011, the Co-Investigating Judges notified the Co-Prosecutors that they considered the Case 003 judicial investigation concluded (“2011 Rule 66(1) Notification”).¹³ On 9 October 2011, the International Co-Investigating Judge resigned,¹⁴ and on 2 December 2011, the Reserve International Co-Investigating Judge ordered the resumption of the judicial investigation.¹⁵

6. On 24 February 2012, the Reserve International Co-Investigating Judge notified SOU Met and MEAS Muth that they were suspects in Case 003 and informed them of their right to legal representation of their choice and to access to the Case File.¹⁶

⁸ Disagreement 001/18-11-2008-ECCC/PTC, International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1.

⁹ Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3.

¹⁰ Case 003, Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

¹¹ Case 003, International Co-Prosecutor’s Supplementary Submission regarding Crime Sites related to Case 003, 31 October 2014, D120 (“Supplementary Submission (D120)”).

¹² Indictment (D267), paras 5, 7, 15, 27.

¹³ Case 003, Notice of Conclusion of Judicial Investigation, 29 April 2011, D13 (“2011 Rule 66(1) Notification (D13)”).

¹⁴ See ECCC Press Release, “Statement by the International Co-Investigating Judge”, 10 October 2011, <https://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge> (accessed 7 April 2021).

¹⁵ Case 003, Order on Resuming the Judicial Investigation, 2 December 2011, D28 (“Order on Resuming the Judicial Investigation (D28)”).

¹⁶ Case 003, Notification of Suspect’s Rights [Rule 21(1)(d)], 24 February 2012, D30 (regarding MEAS Muth); Case 003, Notification of Suspect’s Rights [Rule 21(1)(d)], 24 February 2012, D31 (regarding SOU Met).



7. On 22 October 2013, the Co-Investigating Judges notified the Parties that SOU Met had died¹⁷ and, subsequently, the proceedings against SOU Met were terminated on 2 June 2015.¹⁸
8. On 26 November 2014, the International Co-Investigating Judge issued a summons against MEAS Muth for an initial appearance at the ECCC scheduled on 8 December 2014,¹⁹ which the Co-Lawyers for MEAS Muth (“Co-Lawyers”) challenged before the Co-Investigating Judges.²⁰ On 3 December 2014, the Pre-Trial Chamber recognised the validity of the summons.²¹
9. Following MEAS Muth’s failure to comply with the summons, the International Co-Investigating Judge issued two arrest warrants against him on 10 December 2014²² and 4 June 2015.²³
10. On 3 March 2015, the International Co-Investigating Judge charged MEAS Muth *in absentia* (“Decision to Charge *in Absentia*”)²⁴ and detailed the charges in an annex to the decision (“Notification of Charges”)²⁵ against which the Co-Lawyers appealed on 16 June 2015²⁶ and 12 June 2015,²⁷ respectively. On 3 February 2016 and 30 March 2016, the Pre-Trial Chamber issued its decision and considerations on these appeals.²⁸

¹⁷ Case 003, Notification of the Death of a Suspect in Case File 003, 22 October 2013, D86.

¹⁸ Case 003, Dismissal of Allegations against SOU Met, 2 June 2015, D86/3.

¹⁹ Case 003, Summons to Initial Appearance, 26 November 2014, A66.

²⁰ Case 003, Notice of Non-Recognition of Summons, dated 2 December 2014 and filed 3 December 2014, A67/1.1.

²¹ Case 003 (PTC13), Decision on MEAS Muth’s Appeal against the International Co-Investigating Judge’s Order on Suspect’s Request concerning Summons Signed by One Co-Investigating Judge, 3 December 2014, D117/1/1/2.

²² Case 003, Arrest Warrant of MEAS Muth, dated 10 December 2014 and filed 11 December 2014, C1.

²³ Case 003, Arrest Warrant of MEAS Muth, dated 4 June 2015 and filed 5 June 2015, C2.

²⁴ Case 003, Decision to Charge MEAS Muth *in Absentia*, 3 March 2015, D128.

²⁵ Case 003, Notification of Charges against MEAS Muth, Annex to Decision to Charge MEAS Muth *in Absentia* (D128), dated 3 March 2015 and filed 12 September 2018, D128.1.

²⁶ Case 003, MEAS Muth’s Appeal against Co-Investigating Judge HARMON’s Decision to Charge MEAS Muth *in Absentia*, 16 June 2015, D128/1/3.

²⁷ Case 003, MEAS Muth’s Appeal against Co-Investigating Judge HARMON’s Notification of Charges against MEAS Muth, 12 June 2015, D128.1/1/3.

²⁸ Case 003 (PTC22), Decision on MEAS Muth’s Appeal against Co-Investigating Judge HARMON’s Notification of Charges against MEAS Muth, 3 February 2016, D128.1/1/11; Case 003 (PTC21), Considerations on MEAS Muth’s Appeal against Co-Investigating Judge HARMON’s Decision to Charge MEAS Muth *in Absentia*, 30 March 2016, D128/1/9 (“Considerations on Charging *in Absentia* (D128/1/9)”).



11. On 14 December 2015, at MEAS Muth's initial appearance, the International Co-Investigating Judge rescinded certain charges and modes of liability against him,²⁹ informed him of additional legal characterisations of genocide and rape, and charged him with additional counts of crimes against humanity, grave breaches of the Geneva Conventions, and violations of Articles 501 and 506 of the 1956 Penal Code.³⁰ The International Co-Investigating Judge announced that (i) the arrest warrant dated 10 December 2014 was moot and the arrest warrant of 4 June 2015 was rescinded; and that (ii) the statement of charges in 3 March 2015 Decision to Charge *in Absentia* was moot and the charges laid in the initial appearance represented the definitive version of the charges against MEAS Muth at this time.³¹

12. On 3 February 2016, the Co-Investigating Judges issued an order regarding the implementation of voluntary assurances given by MEAS Muth at the initial appearance of 14 December 2015.³²

13. On 10 January 2017, the International Co-Investigating Judge issued a first notice of conclusion of the judicial investigation ("First Rule 66(1) Notification").³³

14. On 10 January 2017, the International Co-Investigating Judge decided to reduce the scope of the investigation by excluding alleged facts pursuant to Internal Rule 66*bis* ("Rule 66*bis* Decision").³⁴

²⁹ See Case 003, Written Record of Initial Appearance of MEAS Muth, 14 December 2015, D174 ("Written Record of Initial Appearance (D174)"), p. 10 (The International Co-Investigating Judge announced that the charges of 1) torture at Wat Enta Nhien pursuant to Article 500 of the 1956 Cambodia Penal Code; 2) premeditated homicide in relation to the civilian cadres of Sector 505 in Kratie Province; 3) all crimes against humanity in relation to the civilian cadres of Sector 505 in Kratie Province; 4) grave breaches of the Geneva Conventions in relation to the purges of those regarded as enemies and traitors in Kampong Som; 5) grave breaches of the Geneva Conventions in relation to the purges in Kratie Province of both Division 117 and Sector 505 cadres; 6) grave breaches of the Geneva Conventions in relation to foreigners, other than the Vietnamese and Thai nationals; and 7) persecution on "ethnic" grounds were rescinded. The International Co-Investigating Judge further announced that the modes of liability of instigating and otherwise aiding and abetting were rescinded for all international and domestic crimes charged from the 3 March 2015 Decision).

³⁰ Written Record of Initial Appearance (D174), pp. 2-9.

³¹ Written Record of Initial Appearance (D174), p. 10.

³² Case 003, Order on Implementation of Voluntary Assurances Given by MEAS Muth at the Initial Appearance of 14 December 2015, 3 February 2016, D174/2 ("Order on Implementation of Voluntary Assurances (D174/2)").

³³ Case 003, Notice of Conclusion of Judicial Investigation against MEAS Muth, 10 January 2017, D225 ("First Rule 66(1) Notification (D225)").

³⁴ Case 003, Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66*bis*, 10 January 2017, D226.



15. On 24 May 2017, the International Co-Investigating Judge issued a second notice of conclusion of the judicial investigation (“Second Rule 66(1) Notification”).³⁵
16. On 25 July 2017, the International Co-Investigating Judge forwarded the Case File to the Co-Prosecutors, pursuant to Internal Rule 66(4), inviting them to file their final submission within three months (“Forwarding Order”).³⁶ The Forwarding Order was issued in English only.
17. On 8 August 2017, the International Co-Prosecutor requested the Co-Investigating Judges (i) for information on the expected date of notification of the Khmer translation of the Forwarding Order and (ii) to modify the schedule for the filing of his final submission.³⁷
18. On 14 August 2017, the Khmer translation of the Forwarding Order was notified.
19. On 4 September 2017, the Co-Investigating Judges issued a decision (“Scheduling Decision”), instructing (i) the International Co-Prosecutor to file his final submission in English alone within three months from the date of notification of the Forwarding Order in both English and Khmer, and (ii) the Co-Lawyers to file their response in English alone within six weeks from the date that the full translation of the International Co-Prosecutor’s Final Submission is notified.³⁸
20. On 18 September 2017, the Co-Investigating Judges informed the Parties that they considered separate and opposing closing orders based on a disagreement between them as permissible under the law applicable before the ECCC, and of the likely consequences for the appeal process under Internal Rule 77(13).³⁹

³⁵ Case 003, Second Notice of Conclusion of Judicial Investigation against MEAS Muth, 24 May 2017, D252 (“Second Rule 66(1) Notification (D252)”).

³⁶ Case 003, Forwarding Order pursuant to Internal Rule 66(4), 25 July 2017, D256 (“Forwarding Order (D256)”).

³⁷ Case 003, International Co-Prosecutor’s Request for Information on the Expected Date of the Notification of the Khmer Version of the Forwarding Order and a Request to Modify the Schedule for the Filing of the Final Submission, 8 August 2017, D256/1.

³⁸ Case 003, Decision on Schedule of Prosecution’s Final Submission and Defence Response, 4 September 2017, D256/3.

³⁹ Case 003, Order to Place Decisions regarding Disagreements onto Case File 003, 18 September 2017, D262 (“Order to Place Disagreements Decisions onto Case File 003 (D262)”).



21. On 28 September 2017, the Co-Lawyers requested the Co-Investigating Judges to reconsider the Scheduling Decision⁴⁰ and, on 5 October 2017, the International Co-Investigating Judge instructed the Co-Lawyers to file their response in English alone within 60 days from the date that the full translation of the International Co-Prosecutor's final submission is notified.⁴¹
22. On 14 November 2017, the National Co-Prosecutor filed a final submission requesting all allegations be dismissed,⁴² while, on the same day, the International Co-Prosecutor filed a final submission requesting MEAS Muth be indicted and sent to trial⁴³ ("Final Submission"). On 12 April 2018, the Co-Lawyers filed their response to the International Co-Prosecutor's Final Submission.⁴⁴
23. On 28 November 2018, the International Co-Investigating Judge issued his Indictment against MEAS Muth,⁴⁵ while the National Co-Investigating Judge issued his Dismissal Order⁴⁶ (collectively, "Closing Orders"). The Closing Orders were respectively filed in English and Khmer only, with translations to follow.
24. On 5 December 2018, the Co-Lawyers filed a notice of appeal against the International Co-Investigating Judge's Indictment.⁴⁷ The translations of the Closing Orders had not yet been notified.

⁴⁰ Case 003, MEAS Muth's Request for Reconsideration of the International Co-Investigating Judge's Decision on Schedule of Prosecution's Final Submission and Defence Response, 28 September 2017, D256/4.

⁴¹ Case 003, Decision on MEAS Muth's Request for Reconsideration on Schedule of Defence Response, 5 October 2017, D256/5.

⁴² Case 003, Final Submission concerning MEAS Muth pursuant to Internal Rule 66, 14 November 2017, D256/6.

⁴³ Case 003, International Co-Prosecutor's Rule 66 Final Submission, 14 November 2017, D256/7.

⁴⁴ Case 003, MEAS Muth's Response to the International Co-Prosecutor's Final Submission, 12 April 2018 (Correction filed on 30 August 2018), D256/11 (The Co-Lawyers requested the Co-Investigating Judges to permanently stay the proceedings or, alternatively, to issue a dismissal order). On 24 November 2017, following another Co-Lawyers' request (*see* Case 003, MEAS Muth's Request for Extension of Deadline to Respond to International Co-Prosecutor's Rule 66 Final Submission, initially filed on 16 November 2017 and corrected on 28 November 2017, D256/8), the International Co-Investigating Judge granted them a further 20-day extension to submit their response (*see* Case 003, Decision on MEAS Muth's Request for Extension of Deadline to Respond to International Co-Prosecutor's Final Submission, 24 November 2017, D256/9).

⁴⁵ Indictment (D267).

⁴⁶ Dismissal Order (D266).

⁴⁷ Case 003, MEAS Muth's Notice of Appeal against the International Co-Investigating Judge's Closing Order, 5 December 2018, D267/1.



25. On 29 January 2019, the Pre-Trial Chamber authorised the Parties to file their submissions on appeal within 60 days from the notification of translations of both Closing Orders and to file 100-page submissions.⁴⁸

26. The Khmer translation of the International Co-Investigating Judge's Indictment was notified on 6 February 2019.

27. On 7 February 2019, the International Co-Prosecutor filed a notice of appeal against the National Co-Investigating Judge's Dismissal Order.⁴⁹

28. On 14 February 2019, the National Co-Prosecutor filed a notice of appeal against the International Co-Investigating Judge's Indictment.⁵⁰

29. On 15 March 2019, the corrected English translation of the National Co-Investigating Judge's Dismissal Order was notified.

30. On 5 April 2019, the National Co-Prosecutor filed her submissions on appeal against the Indictment⁵¹ in Khmer. On 8 April 2019, the International Co-Prosecutor and the Co-Lawyers filed their submissions on appeal, respectively, against the Dismissal Order⁵² and against the Indictment⁵³ in English.

31. On 10 May 2019, the Pre-Trial Chamber authorised the Parties to file 50-page responses within 45 days from the notification of translation of each appeal and to file 30-page replies within 25 days from the notification of translation of each response.⁵⁴

⁴⁸ Case 003, Decision on MEAS Muth's Request for Extension of Time and Page Limits to Appeal the International Co-Investigating Judge's Closing Order & Request to File His Appeal in English with the Khmer Translation to Follow, 29 January 2019, D267/1/3 ("Decision on Request for Time and Page Extension (D267/1/3)").

⁴⁹ Case 003, International Co-Prosecutor's Notice of Appeal against the Order Dismissing the Case against MEAS Muth (D266), 7 February 2019, D266/1.

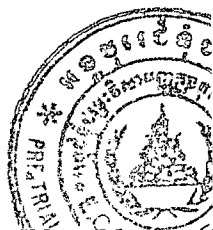
⁵⁰ Case 003, National Co-Prosecutor's Notice of Appeal against the ICIJ's Closing Order (Indictment), 14 February 2019, D267/2.

⁵¹ National Co-Prosecutor's Appeal (D267/3).

⁵² International Co-Prosecutor's Appeal (D266/2).

⁵³ MEAS Muth's Appeal (D267/4).

⁵⁴ Case 003, Decision on Requests for Extension of Time and Page Limits for Responses and Replies relating to the Appeals against the Closing Orders in Case 003, 10 May 2019, D266/4 and D267/6 ("Second Decision on Request for Time and Page Extension (D266/4 and D267/6)").



32. The English translation of the National Co-Prosecutor's Appeal was notified on 30 April 2019, while the Khmer translations of the International Co-Prosecutor's Appeal and MEAS Muth's Appeal were notified on 8 May 2019 and 16 May 2019, respectively.

33. On 24 June 2019, the Co-Lawyers responded to the International Co-Prosecutor's Appeal ("MEAS Muth's Response")⁵⁵ in English, while the International Co-Prosecutor responded to the National Co-Prosecutor's Appeal ("International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal")⁵⁶ and MEAS Muth's Appeal ("International Co-Prosecutor's Response to MEAS Muth's Appeal")⁵⁷ in English on 14 June 2019 and 28 June 2019, respectively. The National Co-Prosecutor did not file any response.

34. The Khmer translations of the International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal and Response to MEAS Muth's Appeal were notified on 28 June 2019 and 18 July 2019, respectively, while the Khmer translation of MEAS Muth's Response was notified on 15 July 2019.

35. On 16 August 2019, the International Co-Prosecutor replied to MEAS Muth's Response ("International Co-Prosecutor's Reply")⁵⁸ in English and on 19 August 2019, the Co-Lawyers replied to the International Co-Prosecutor's Response to MEAS Muth's Appeal ("MEAS Muth's Reply")⁵⁹ in English. The Khmer translations of the International Co-Prosecutor's Reply and MEAS Muth's Reply were notified on 28 August 2019 and 2 September 2019, respectively.

⁵⁵ Case 003, MEAS Muth's Response to the International Co-Prosecutor's Appeal of the Dismissal Order, 24 June 2019, D266/5 ("MEAS Muth's Response (D266/5)").

⁵⁶ Case 003, International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 003 Indictment, 14 June 2019, D267/9 ("International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9)").

⁵⁷ Case 003, International Co-Prosecutor's Response to MEAS Muth's Appeal against the International Co-Investigating Judge's Indictment (D267), 28 June 2019, D267/10 ("International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10)").

⁵⁸ Case 003, International Co-Prosecutor's Reply to MEAS Muth's Response to the Appeal of the Order Dismissing the Case against MEAS Muth (D266), dated 9 August 2019 and filed 16 August 2019, D267/11 ("International Co-Prosecutor's Reply (D267/11)").

⁵⁹ Case 003, MEAS Muth's Reply to the International Co-Prosecutor's Response to MEAS Muth's Appeal against the International Co-Investigating Judge's Indictment, 19 August 2019, D266/7 and D267/12 ("MEAS Muth's Reply (D266/7 and D267/12)").



36. On 24 October 2019, after having heard the Parties,⁶⁰ the Pre-Trial Chamber issued a Scheduling Order setting a date for the Hearing on the Appeals.⁶¹ Following the public reading of the Report of the Case and Appeals on behalf of the whole Pre-Trial Chamber,⁶² oral arguments on the Appeals were heard *in camera* on 27, 28 and 29 November 2019.⁶³

II. JOINDER

37. As noted above,⁶⁴ the Pre-Trial Chamber is currently seised of three Appeals against the two Closing Orders concluding the investigation of Case 003.

38. Article 12(1) of the ECCC Agreement⁶⁵ and Internal Rule 2 provide that where in the course of proceedings a question arises which is not addressed by the ECCC legal texts, the Chambers shall decide in accordance with Cambodian law. In this respect, the Pre-Trial Chamber recalls⁶⁶ that Article 299 of the Cambodian Code of Criminal Procedure states that “[w]hen the court has been seised with several related cases, it may issue an order to join them.”⁶⁷

39. In this case, the Pre-Trial Chamber is not seised with several related cases. Rather, it is seised of one case characterised by the issuance of two conflicting Closing Orders, giving rise to different but related appeal proceedings. Considering the Chamber’s power to issue an order to join several related cases, its obligation to ensure

⁶⁰ Case 003, Pre-Trial Chamber’s Notice to the Parties by Email, 5 September 2019, D266/9.1.1.

⁶¹ Case 003, Scheduling Order for the Pre-Trial Chamber’s Hearing on Appeals against Closing Orders, 24 October 2019, D266/12 and D267/17.

⁶² Case 003, Report of the Case and Appeals, 27 November 2019, D266/15 and D267/20 (“Case Report”).

⁶³ The public session of the Hearing included the Introduction and the reading of the Case Report on 27 November 2019 as well as the Questions by the Judges to the Parties on 29 November 2019. *See* Case 003, Transcript of Appeal Hearing in Case 003, dated 27 November 2019 and filed on 11 February 2020 (CS), D266/16.1 and D267/21.1; Case 003, Transcript of Appeal Hearing in Case 003, dated 28 November 2019 and filed on 11 February 2020 (CS), D266/17.1 and D267/22.1; Case 003, Transcript of Appeal Hearing, dated 29 November 2019 and filed on 11 February 2020 (CS), D266/18.1 and D267/23.1; Case 003, Transcript of Appeal Hearing, dated 29 November 2019 and filed on 11 February 2020, D266/18.2 and D267/23.2 (“29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D267/23.2)”).

⁶⁴ *See supra* p. 1; para. 30.

⁶⁵ *Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003, entered into force 29 April 2005 (“ECCC Agreement”), Art. 12(1).

⁶⁶ Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”) (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 & D360/33 (“Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33)”), para. 25.

⁶⁷ *Code of Criminal Procedure of the Kingdom of Cambodia* (7 June 2007) (“Cambodian Code of Criminal Procedure”), Art. 299.



fair and expeditious administration of justice, and the approach previously adopted in Case 004/2,⁶⁸ the Pre-Trial Chamber finds that a joinder is warranted in Case 003.

40. Consequently, the Pre-Trial Chamber orders a joinder of the appeal proceedings in this case and will jointly address the Appeals against both Closing Orders in these Considerations.

III. STANDARD OF REVIEW

41. In this section, the Pre-Trial Chamber reaffirms the standard applicable to its review of grounds of appeal submitted by the parties against the Co-Investigating Judges' closing orders. The Chamber stresses that the standard discussed hereafter only governs the review of pre-trial appeals and does in no way constrain the other powers it may deem necessary to exert.

42. Internal Rule 75(4) requires that the submissions on appeal shall contain "the reasons of fact and law upon which the appeal is based". The exact substantiation that is required from a party depends on the type of errors alleged.

43. In this case, the International Co-Prosecutor⁶⁹ appeals against the National Co-Investigating Judge's Dismissal Order, which finds that MEAS Muth does not fall within the ECCC's personal jurisdiction,⁷⁰ and the National Co-Prosecutor⁷¹ as well as the Co-Lawyers⁷² appeal against the International Co-Investigating Judge's Indictment for having identified sufficient charges and concluding that the ECCC could exercise its personal jurisdiction over him as one of those "most responsible" for the crimes perpetrated by the Khmer Rouge.⁷³

44. The Pre-Trial Chamber has previously held that the Co-Investigating Judges' findings on whether or not a person is among those "most responsible" is a discretionary

⁶⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 24-27.

⁶⁹ See International Co-Prosecutor's Appeal (D266/2).

⁷⁰ Dismissal Order (D266), para. 429.

⁷¹ See National Co-Prosecutor's Appeal (D267/3).

⁷² See MEAS Muth's Appeal (D267/4).

⁷³ Indictment (D267), para. 456.



decision,⁷⁴ which must be examined according to the standard of review applicable to discretionary decisions.⁷⁵

45. The Pre-Trial Chamber has consistently found that the discretion enjoyed by the Co-Investigating Judges in making determination of the ECCC's personal jurisdiction is a judicial one that does not permit arbitrary action, but should rather be exercised in accordance with well-settled legal principles.⁷⁶ In this regard, the terms "senior leaders" and "most responsible" represent the limits of the ECCC's personal jurisdiction of which legal determination rests with the judicial bodies of the ECCC.⁷⁷

46. As the Pre-Trial Chamber has previously held, while the Co-Investigating Judges have some discretion in ascertaining the ECCC's personal jurisdiction, their discretion in making determination as to whether or not a person falls within the categories of "senior leaders" and "most responsible" is not unlimited and may be subject to this Chamber's appellate judicial review.⁷⁸ The Pre-Trial Chamber examines whether this personal jurisdiction requirement was given appropriate legal effect by the Co-Investigating Judges in the ECCC context.

47. In this light, the Pre-Trial Chamber has determined that the Co-Investigating Judges' finding that a person falls or does not fall within the ECCC's personal jurisdiction may be reversed at a party's request when this party demonstrates that such finding was: (i) based on an incorrect interpretation of the governing law (error of law)

⁷⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 28, 333; Case 004/1/07-09-2009-ECCC/OCIJ ("Case 004/1") (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 ("Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20)"), para. 20.

⁷⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 28-29. *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 20-21 *referring to, inter alia*, Case 004/07-09-2009-ECCC/OCIJ ("Case 004") (PTC52), Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5 ("Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5)"), para. 15.

⁷⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 28. *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20 *referring to* International Military Tribunal, Judgment of 1 October 1946, Trial of the Major War Criminals before the International Military Tribunal, Vol. I, pp. 171-367 at p. 256.

⁷⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 28. *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20 *referring to* ECCC Agreement, Art. 2(1); *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 10 August 2001, NS/RKM/1004/006, as amended 27 October 2004 ("ECCC Law"), Art. 2*new*.

⁷⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 28; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20.



invalidating the decision, and/or (ii) based on a patently incorrect conclusion of fact (error of fact) occasioning a miscarriage of justice, and/or (iii) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion to force the conclusion that the Judges failed to exercise their discretion judiciously.⁷⁹

48. In conclusion, the Pre-Trial Chamber reaffirms that when the Chamber finds, upon its appellate review of the Co-Investigating Judges' closing order, that the errors and/or abuses alleged by the parties were indeed committed by the Co-Investigating Judges, the Chamber may remit the decision back to the Co-Investigating Judges for reconsideration⁸⁰ or substitute it with its own decision⁸¹ and issue a new or revised closing order.⁸²

IV. ADMISSIBILITY

A. FORMAL ADMISSIBILITY

49. Considering firstly Internal Rule 75, governing the filing of appeals before the Pre-Trial Chamber, and secondly that the Notices of Appeal and the Submissions were filed within the requisite time limits and in accordance with the Chamber's instructions in this case, the Pre-Trial Chamber finds that the three Appeals lodged against the two Closing Orders are formally admissible.⁸³ The Chamber will now assess whether each of the Appeals falls within its scope of appellate review.

⁷⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 29; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 21 *referring to, inter alia*, Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 15.

⁸⁰ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 30; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22. *See, e.g.*, Case 002/19-09-2007-ECCC-OCIJ ("Case 002") (PTC52), Decision on Appeal of Co-Lawyers for Civil Parties against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 16; Case 002 (PTC46), Decision on NUON Chea's Appeal against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7, paras 19, 26.

⁸¹ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 30; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22 *referring to* Case 002 (PTC67), Decision on Reconsideration of Co-Prosecutor's Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Person's Knowledge of the Crimes, 27 September 2010, D365/2/17, para. 67.

⁸² See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 30 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22 *referring to* Case 001/18-07-2007-ECCC/OCIJ ("Case 001") (PTC02), Decision on Appeal against Closing Order Indicting KAING Guek Eav *alias* "Duch", 5 December 2008, D99/3/42 ("Case 001 Decision on Closing Order Appeal (D99/3/42)").

⁸³ Decision on Request for Time and Page Extension (D267/1/3); Second Decision on Request for Time and Page Extension (D266/4 and D267/6).



B. THE NATIONAL CO-PROSECUTOR'S APPEAL

50. The National Co-Prosecutor appeals the International Co-Investigating Judge's Indictment under Internal Rules 67(5), 73(a) and 74(2).⁸⁴ The International Co-Prosecutor does not challenge the admissibility of this Appeal.⁸⁵

51. The Pre-Trial Chamber notes that pursuant to Internal Rules 67(5), 74(2) and 73(a), the Indictment is subject to appeal, the Co-Prosecutors have a general right to appeal all orders by the Co-Investigating Judges, and the Pre-Trial Chamber has jurisdiction over such appeal. Accordingly, the Chamber finds that the National Co-Prosecutor's Appeal is admissible.

C. THE INTERNATIONAL CO-PROSECUTOR'S APPEAL

52. The International Co-Prosecutor appeals the National Co-Investigating Judge's Dismissal Order pursuant to Internal Rules 67(5) and 74(2).⁸⁶ The Co-Lawyers do not challenge the admissibility of this Appeal.⁸⁷

53. The Pre-Trial Chamber notes that pursuant to Internal Rules 67(5), 74(2) and 73(a), the Dismissal Order is subject to appeal, the Co-Prosecutors have a general right to appeal all orders by the Co-Investigating Judges, and the Pre-Trial Chamber has jurisdiction over such appeal. Accordingly, the Chamber finds that the International Co-Prosecutor's Appeal is admissible.

D. THE CO-LAWYERS' APPEAL

54. The Co-Lawyers appeal the International Co-Investigating Judge's Indictment pursuant to Internal Rules 74(3)(a) and 21.⁸⁸ The International Co-Prosecutor submits that this Appeal is not admissible under these Rules,⁸⁹ but does not object to MEAS Muth making submissions on the issues raised by his Appeal.⁹⁰

55. The Pre-Trial Chamber notes that the Indictment is subject to appeal pursuant to

⁸⁴ National Co-Prosecutor's Appeal (D267/3), para. 6.

⁸⁵ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9). The Co-Lawyers did not file a response.

⁸⁶ International Co-Prosecutor's Appeal (D266/2), paras 3, 5.

⁸⁷ MEAS Muth's Response (D266/5). The National Co-Prosecutor did not file a response.

⁸⁸ MEAS Muth's Appeal (D267/4), para. 1.

⁸⁹ International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10), para. 7.

⁹⁰ International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10), para. 6. The National Co-Prosecutor did not file a response.



Internal Rule 67(5) and that the Pre-Trial Chamber has jurisdiction over appeals filed pursuant to Internal Rule 74. The Chamber also notes that Internal Rule 74(3) allows a charged person or an accused to lodge only limited types of pre-trial appeals,⁹¹ including appeals filed under sub-rule 74(3)(a) against the Co-Investigating Judges' orders "confirming the jurisdiction of the ECCC". This Chamber determined that the broadening of this right of appeal through Internal Rule 21 is ascertained on a case-by-case basis⁹² and granted only in exceptional cases.⁹³ The Chamber will now determine whether MEAS Muth's Appeal is admissible.

1. Submissions

56. The Co-Lawyers raise two grounds of appeal regarding an opinion the International Co-Investigating Judge expressed in his Indictment that should there be no supermajority in the Pre-Trial Chamber for upholding one of the conflicting Closing Orders, both or only the Indictment would stand under Internal Rule 77(13).⁹⁴ The Co-Lawyers firstly clarify the reasons for which they consider their appeal admissible before elaborating on the substance of their grounds of appeal (Grounds A and B).

57. Regarding the admissibility of their Appeal, the Co-Lawyers firstly argue that their petition validly challenges, under Internal Rule 74(3)(a), the International Co-Investigating Judge's confirmation of the ECCC's personal jurisdiction over MEAS Muth.⁹⁵ They reason that the International Co-Investigating Judge's Indictment confirmed the ECCC's personal jurisdiction over MEAS Muth by firstly suggesting,

⁹¹ The difference between the Prosecution's and the Defence's right to pre-trial appeals has been affirmed in different contexts. *See, e.g.*, Case 002 (PTC104), Decision on KHIEU Samphân's Appeal against the Closing Order, 21 January 2011, D427/4/15 ("Case 002 Decision on Closing Order Appeal (KHIEU Samphân) (D427/4/15)"), para. 14; Case 002 (PTC43), Decision on Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Dated 31 December 2009, 20 May 2010, D313/2/2 ("Case 002 Decision on Request to Place Additional Evidentiary Material on the Case File (D313/2/2)"), para. 13.

⁹² *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 147; Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30 ("Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30)"), para. 48.

⁹³ *See* Case 004 (PTC19), Considerations on IM Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her *in Absentia*, 1 March 2016, D239/1/8 ("Case 004 Considerations on Charging *in Absentia* (D239/1/8)"), para. 17; Case 003 (PTC23), Considerations of the Pre-Trial Chamber on MEAS Muth's Urgent Request for a Stay of Execution of Arrest Warrant, 23 September 2015, C2/4, Opinion of Judges BEAUVALLET and BWANA, para. 9.

⁹⁴ *See* MEAS Muth's Appeal (D267/4), paras 2, 32, footnotes 179, 233 referring to Indictment (D267), para. 19, footnote 26 citing Case 004/2, Decision on AO An's Urgent Request for Disclosure of Documents relating to Disagreements, 18 September 2017, D355/1 ("Case 004/2 Decision on Disclosure concerning Disagreement (D355/1)"), para. 16 and Indictment (D267), para. 579.

⁹⁵ MEAS Muth's Appeal (D267/4), para. 2.



through his interpretation of Internal Rule 77(13), that both Closing Orders or only the Indictment would stand unless the Pre-Trial Chamber upholds one of them by supermajority. They claim that such confirmation was also made by secondly failing to conclude that the Dismissal Order should prevail over the Indictment according to the principle of *in dubio pro reo*, unless this Chamber finds by supermajority that the National Co-Investigating Judge committed errors or abuses fundamentally determinative of his exercise of discretion in concluding that MEAS Muth does not fall within the ECCC's jurisdiction.⁹⁶

58. To further support the admissibility of their Appeal, the Co-Lawyers allege that Internal Rule 21 requires that the ECCC framework always be interpreted so as to safeguard MEAS Muth's interests and, consequently, mandates a broad interpretation of the right to appeal provided by Internal Rule 74(3)(a). They contend that the exceptional circumstances warranting such broad interpretation in this case are that: (i) the Internal Rules do not contemplate the current opposing closing orders scenario, (ii) their Appeal raises matters that the Trial Chamber cannot rectify and (iii) preventing MEAS Muth from appealing the Indictment would irreparably deprive him of his guaranteed fair trial rights.⁹⁷

59. Regarding the substance of their Appeal, the Co-Lawyers contend in Ground A that the International Co-Investigating Judge erred in law by interpreting that Internal Rule 77(13) dictates that both Closing Orders or only the Indictment would stand unless the Pre-Trial Chamber upholds one of them by supermajority. First, the Co-Lawyers argue that the Royal Government of Cambodia and the United Nations ("UN") did not intend for a case to proceed to trial on the basis of an indictment when a dismissal order is simultaneously issued.⁹⁸ Second, the Co-Lawyers assert that applying Internal Rule 77(13) to conflicting closing orders would result in an illogical outcome which would infringe upon MEAS Muth's fair trial rights and violate the Cambodian Constitution and the ECCC legal framework.⁹⁹

60. Under Ground B, the Co-Lawyers allege that the principle of criminal law of *in dubio pro reo* dictates that any doubt regarding the facts and the law must benefit the

⁹⁶ MEAS Muth's Appeal (D267/4), para. 2.

⁹⁷ MEAS Muth's Appeal (D267/4), paras 3-4.

⁹⁸ MEAS Muth's Appeal (D267/4), paras 33-40.

⁹⁹ MEAS Muth's Appeal (D267/4), paras 41-46.



charged person, in this case, MEAS Muth, unless errors or abuses fundamentally determinative of the National Co-Investigating Judge's discretion in issuing his Dismissal Order were to be found by supermajority by the Pre-Trial Chamber.¹⁰⁰ Further, the Co-Lawyers assert that both Co-Investigating Judges investigated the factual allegations they were seized of and made the necessary legal findings in reasoned Closing Orders.¹⁰¹ Therefore, the Co-Lawyers argue that in the absence of the errors or abuses mentioned above, the Dismissal must prevail as a result of the application of *in dubio pro reo*.¹⁰²

61. Whereas the International Co-Prosecutor does not object to MEAS Muth making submissions on the consequences of the issuance of opposing closing orders,¹⁰³ she submits that MEAS Muth's Appeal is inadmissible under Internal Rule 74(3)(a)¹⁰⁴ and does not call for a broad interpretation through Internal Rule 21.¹⁰⁵ She argues that the Appeal lies outside the Indictment since the Co-Lawyers do not raise any error or abuse of discretion the International Co-Investigating Judge would have committed in the Indictment.¹⁰⁶ The International Co-Prosecutor submits that MEAS Muth's Appeal relates solely to the consequences of the issuance of two conflicting Closing Orders, a matter that was only incidentally addressed in the Indictment and which rests exclusively with the Pre-Trial Chamber.¹⁰⁷

62. The Co-Lawyers reply that the International Co-Prosecutor misapprehends Internal Rule 74(3)(a), in that the International Co-Investigating Judge implicitly confirmed the ECCC's jurisdiction over MEAS Muth by erroneously interpreting Internal Rule 77(13).¹⁰⁸ The Co-Lawyers add that their Appeal deliberately refrains from challenging the International Co-Investigating Judge's personal jurisdiction determination for judicial economy reasons, and that they rather reserve MEAS Muth's right to challenge the related findings of law and fact should the case proceed to trial.¹⁰⁹ The Co-Lawyers further submit that the International Co-Prosecutor, by generally

¹⁰⁰ MEAS Muth's Appeal (D267/4), paras 50-51.

¹⁰¹ MEAS Muth's Appeal (D267/4), paras 52-61.

¹⁰² MEAS Muth's Appeal (D267/4), paras 62-65.

¹⁰³ International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10), para. 6.

¹⁰⁴ International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10), para. 7.

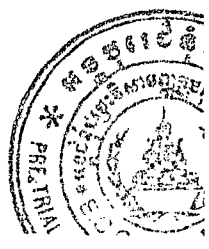
¹⁰⁵ International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10), para. 8.

¹⁰⁶ International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10), paras 7-8.

¹⁰⁷ International Co-Prosecutor's Response to MEAS Muth's Appeal (D267/10), para. 8.

¹⁰⁸ MEAS Muth's Reply (D266/7 and 267/12), paras 9-11.

¹⁰⁹ MEAS Muth's Reply (D266/7 and 267/12), para. 8.



asserting that the interpretative aid of Internal Rule 21 is unnecessary because there is no doubt that MEAS Muth's Appeal is inadmissible under Internal Rule 74(3)(a), evades addressing the exceptional circumstances warranting a broader interpretation of MEAS Muth's right to appeal.¹¹⁰ Finally, the Co-Lawyers argue that the interests of justice and procedural fairness militate in favour of admitting MEAS Muth's Appeal in this case.¹¹¹

2. Discussion

63. The parties' right to appeal and the admissible grounds for pre-trial appeals are governed by Internal Rule 74. As exposed below, the Pre-Trial Chamber has declared that an appeal filed by a charged person or an accused is admissible under Internal Rule 74(3)(a) if it pertains, *inter alia*, to: (i) subject matter jurisdiction under sub-rule 74(3)(a); (ii) personal jurisdiction under sub-rule 74(3)(a); and/or (iii) exceptional fair trial rights issues, examined case-by-case, which may require the broadening of the right of appeal afforded by sub-rule 74(3)(a) in light of Internal Rule 21. In this case, the Co-Lawyers seek to appeal pursuant to Internal Rules 74(3)(a) and 21, whose scope the Chamber will examine hereafter.

64. Firstly, the notion of jurisdictional challenge is generally understood to be a plea against the ECCC's competence *rationae personae, materiae, temporis* and/or *loci*,¹¹² as defined by Articles 2^{new} to 8 of the ECCC Law.¹¹³ As previously stated, Internal Rule 74(3) affords the Charged Person or Accused a right to appeal only those orders and decisions enumerated under this provision.¹¹⁴ These include, pursuant to sub-rule 74(3)(a), orders or decisions of the Co-Investigating Judges "confirming the jurisdiction of the ECCC".¹¹⁵ On this basis, the Pre-Trial Chamber has determined that an indictment is "clearly subject to appeal on jurisdictional issues decided by the Co-Investigating Judges."¹¹⁶

¹¹⁰ MEAS Muth's Reply (D266/7 and 267/12), para. 12.

¹¹¹ MEAS Muth's Reply (D266/7 and 267/12), para. 13.

¹¹² Case 004 Considerations on Charging *in Absentia* (D239/1/8), para. 22.

¹¹³ ECCC Law, Chapter II, Arts 2^{new}-8; Case 002 (PTC 145 and 146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15 and D427/3/15 ("Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 and D427/3/15)", para. 63. *See also* ECCC Agreement, Arts 1, 9.

¹¹⁴ Case 002 Decision on Closing Order Appeal (KHIEU Samphân) (D427/4/15), para. 14.

¹¹⁵ Internal Rule 74(3)(a).

¹¹⁶ Case 002 Decision on Closing Order Appeal (KHIEU Samphân) (D427/4/15), para. 14 (footnote omitted). *See also* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 44-45; Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 and



65. Regarding personal jurisdiction challenges, the Pre-Trial Chamber recalls that the ECCC's personal jurisdiction is confined to "senior leaders" and to "those who were most responsible" for the crimes within the ECCC's jurisdiction.¹¹⁷ The Chamber further notes that although the term "most responsible" is not defined by the ECCC Agreement or the ECCC Law, guidance for its interpretation can be discerned by looking, *inter alia*, to international jurisprudence in light of the object and purpose of the Court's founding instruments.¹¹⁸ As numerous Chambers of the ECCC have found, international jurisprudence establishes that the identification of those falling into the "most responsible" category includes a quantitative and qualitative assessment of both the gravity of the crimes (alleged or charged) and the level of responsibility of the suspect,¹¹⁹ which necessarily involves mixed questions of law and facts.¹²⁰

66. As the Co-Investigating Judges acknowledged,¹²¹ the Pre-Trial Chamber is the only judicial entity legally entitled to review the Co-Investigating Judges' closing order itself as well as the legal consequences of it. In this case, the Pre-Trial Chamber considers that the challenged parts of the Indictment are where the International Co-Investigating Judge provided his observations on the validity of his own unprecedented action.¹²² Therefore, the Chamber finds that these are mere speculations, expressed beyond his judicial mandate, which have no judicial effect and thus are not a judicial decision or order subject to an appeal under Internal Rule 74.

67. Moreover, the Pre-Trial Chamber notes that the Co-Lawyers reserve MEAS

D427/3/15), paras 59-60; Case 002 (PTC38), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9 ("Case 002 Decision on JCE (D97/15/9)"), paras 19, 21.

¹¹⁷ ECCC Agreement, Art. 2(1); ECCC Law, Art. 2*new*.

¹¹⁸ See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980 ("Vienna Convention"), Art. 31(1)(2) (providing that the terms of an instrument shall primarily be interpreted in their context, which comprises, *inter alia*, the instrument's text, in light of its object and purpose); ECCC Agreement, Art. 12(1) (providing that in the case of a *lacunae* in the applicable law, "guidance may also be sought in procedural rules established at the international level"); ECCC Law, Art. 23*new* (providing that the Co-Investigating Judges may seek guidance in procedural rules at the international level). See also Case 002, Decision on Appeals against Order of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 58-60.

¹¹⁹ See, e.g., Case 001, Judgement, 26 July 2010, E188 ("Case 001 Trial Judgment (E188)"), para. 22 and footnotes 28-30; Case 001, Appeal Judgement, 3 February 2012, F28 ("Case 001 Appeal Judgment (F28)"), para. 71; Case 003, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect MEAS Mut[h], 2 May 2012, D48, para. 15 and footnote 25; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

¹²⁰ Case 001 Appeal Judgment (F28), para. 37.

¹²¹ Case 004/2 Decision on Disclosure concerning Disagreement (D355/1), para. 16.

¹²² MEAS Muth's Appeal (D267/4), paras 32, 49 referring to Indictment (D267), para. 19, footnote 26 and para. 579.



Muth's right to challenge the International Co-Investigating Judge's legal and factual findings at trial should the case proceed.¹²³ In this regard, the Chamber notes that while as a general principle, mixed questions of law and facts are non-jurisdictional in nature and should be dealt with primarily at trial,¹²⁴ personal jurisdiction is an "absolute jurisdictional element",¹²⁵ which should be subject to an effective right of pre-trial appeal. In the instant case, the effectiveness of this right is entwined with the rationale behind the right of appeal granted by sub-rule 74(3)(a), which aims to promote the orderly and efficient administration of justice by allowing the defence to avoid a trial for which the Court has no jurisdiction over and by preventing a waste of resources.¹²⁶

68. Therefore, the Pre-Trial Chamber finds that considering the interests of the accused and victims as well as the necessity of legal certainty and transparency of proceedings,¹²⁷ allowing subject matter jurisdiction challenges concerning only points of law, as defined in prior decisions,¹²⁸ is sufficient to safeguard the accused's effective right to appeal at the pre-trial stage – that is, to ensure that he or she is not sent to trial for crimes for which the Court has no jurisdiction over. Conversely, the Chamber finds that since the determination of the ECCC's personal jurisdiction intrinsically involves mixed questions of law and facts, the right to appeal against orders making such determination can only be effective if the defence engages with those mixed questions in the appeal it brings before the Pre-Trial Chamber.

69. In this sense, the Pre-Trial Chamber recalls that when facing challenges to personal jurisdiction regarding "those who were most responsible", this Chamber shall limit its evaluation to matters crucial to the determination and assessment of personal jurisdiction – that is, the gravity of crimes and/or level of responsibility of the accused.¹²⁹ Accordingly, this Chamber has already concluded that a challenge to personal jurisdiction regarding "those who were most responsible" is admissible insofar as it is

¹²³ MEAS Muth's Reply (D266/7 and 267/12), para. 8.

¹²⁴ *See, e.g.*, Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 46.

¹²⁵ Case 001 Appeal Judgment (F28), para. 31.

¹²⁶ By analogy with Internal Rule 89(1), which serves the same purpose (*see* Case 001 Appeal Judgment (F28), para. 28).

¹²⁷ Internal Rule 21(1).

¹²⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 137 and footnote 224 referring to Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 and D427/3/15), para. 60; Case 002 Decision on JCE (D97/15/9), paras 23-24.

¹²⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 144.



aimed at the gravity of crimes and/or level of responsibility of the accused.¹³⁰ The Pre-Trial Chamber reaffirms that challenges involving matters beyond this limitation cannot be framed as challenges to personal jurisdiction and are thus inadmissible on such basis pursuant to Internal Rule 74(3)(a) alone.¹³¹

70. Turning to the relationship of the right to pre-trial appeal with Internal Rule 21, the Pre-Trial Chamber previously held that in light of Article 33^{new} of the ECCC Law, providing that “trials are fair” and conducted “with full respect for the rights of the accused”, and Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”),¹³² applied to all stages of ECCC’s proceedings, “[t]he overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a).”¹³³ The Chamber hence noted that “where the facts and circumstances of an appeal require it”, the Pre-Trial Chamber “has competence to consider grounds raised by the [accused] that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a Charged Persons’ [sic] right to appeal in light of Internal Rule 21.”¹³⁴

71. Relatedly, and contrary to the Co-Lawyers’ claim in this case,¹³⁵ the Pre-Trial Chamber finds that procedural differences between the Co-Prosecutors’ and the accused’s rights of appeal do not, *per se*, constitute a breach of fairness. Firstly, the Co-Lawyers’ Appeal, in the Chamber’s view, does not challenge the International

¹³⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 145.

¹³¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 145.

¹³² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976 (“ICCPR”), Art. 14.

¹³³ Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 49 *quoting* Case 002 (PTC42), Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, 10 August 2010, D264/2/6 (“Case 002 Decision on Abuse of Process (D264/2/6)”), paras 13-14; Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 and D427/3/15), para. 71 *referring to* Case 002 Decision on Abuse of Process (D264/2/6), paras 13-14. *See also* Case 002 (PTC58), Decision on Appeal against OCIJ Order on NUON Chea’s Eighteenth Request for Investigative Action, 10 June 2010, D273/3/5, para. 10.

¹³⁴ Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 49; Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 and D427/3/15), para. 71. *See also* Case 002 Decision on JCE (D97/15/9), para. 30; Case 003 (PTC29), Considerations on MEAS Muth’s Appeal against the International Co-Investigating Judge’s Decision to Charge MEAS Muth with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, D174/1/4 (“Considerations on Appeal against Charging Decision (D174/1/4)”), Opinion of Judges BEAUVALLET and BAIK, para. 19; Case 004 (PTC05), Considerations of the Pre-Trial Chamber on TA An’s Appeal against the Decision Denying His Requests to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014, D121/4/1/4, Opinion of Judges CHUNG and DOWNING, para. 4.

¹³⁵ MEAS Muth’s Reply (D266/7 and 267/12), para. 13. *See also* Case 003 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D367/23.2), at ERN (EN) 01639987-01639988, pp. 16:20 to 17:04.



Co-Investigating Judge's reasoning leading to the Indictment. Therefore, the Chamber is not convinced of the admissibility of such appeal should it have been brought by the Co-Prosecutors under their general right of appeal. More importantly, at the ECCC, the applicable rules set different procedural rights of appeal for each party and “the case-by-case examination of appeals for admissibility, under Internal Rule 21, is precisely aimed at safeguarding the rights of all parties.”¹³⁶ The Pre-Trial Chamber has consistently stressed that Internal Rule 21 does not open an automatic avenue for appeal even where an appeal raises fair trial rights issues.¹³⁷ The moving party must demonstrate that particular circumstances of its case require the Chamber’s intervention at the stage where the appeal is filed to avoid irremediable damage to the fairness of proceedings or fundamental fair trial rights.¹³⁸ In this case, the Chamber must assess whether the Co-Lawyers discharged this burden, showing that particular circumstances require a broad interpretation of Internal Rule 74(3)(a) in light of Internal Rule 21.

72. In this respect, the Pre-Trial Chamber recalls that when an appeal filed against an indictment under Internal Rule 74(3) raises a matter which cannot be rectified by the Trial Chamber and denying the appeal would “irreparably harm the fair trial rights of the accused”, Internal Rule 21 may warrant a broadening of Internal Rule 74(3).¹³⁹ On this point, the Chamber notes that in Case 004/2, it found admissible a challenge to the legality of the issuance of two separate and conflicting closing orders based on Internal Rule 21.¹⁴⁰ In that case, the defence submitted on appeal a claim that the issuance of an indictment in conjunction with a dismissal order constituted an error of law.¹⁴¹ The Chamber observes that this argument was directed against the issuance of the indictment, alleging the errors of law based on which the International Co-Investigating Judge confirmed the personal jurisdiction over the accused in the indictment.¹⁴² By contrast, the Co-Lawyers in the instant case submit that the International Co-Investigating Judge’s

¹³⁶ Case 004 (PTC46), Decision on YIM Tith’s Appeal against the Decision on YIM Tith’s Request for Adequate Preparation Time, 13 November 2017, D361/4/1/10 (“Case 004 Decision on Request for Adequate Preparation Time (D361/4/1/10)”), para. 19.

¹³⁷ See, e.g., Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 and D427/3/15), para. 73; Case 004 Considerations on Charging *in Absentia* (D239/1/8), para. 17; Considerations on Charging *in Absentia* (D128/1/9), para. 20.

¹³⁸ See, e.g., Case 004 Considerations on Charging *in Absentia* (D239/1/8), para. 17; Considerations on Charging *in Absentia* (D128/1/9), para. 20; Considerations on Appeal against Charging Decision (D174/1/4), Opinion of Judges BEAUVALLET and BAIK, para. 19.

¹³⁹ Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 48.

¹⁴⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 149.

¹⁴¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 304.

¹⁴² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), footnote 211.



interpretation of the consequences of two conflicting Closing Orders being upheld by the Pre-Trial Chamber is an error of law. Moreover, such argument is presented alone, without any other arguments directed against the factual or the legal findings pertaining to the personal jurisdiction matters in the Indictment. For these reasons, the Chamber considers that its previous ruling made in Case 004/2 does not provide a precedent relevant for the case at hand.

73. The Pre-Trial Chamber will now determine whether MEAS Muth's two grounds of appeal are admissible pursuant to Internal Rules 74(3)(a) and 21.

a. Ground A

74. The Co-Lawyers, in Ground A of their Appeal, contend that the International Co-Investigating Judge's interpretation of Internal Rule 77(13) – to the effect that both Closing Orders or only the Indictment would stand should the Pre-Trial Chamber fail to uphold one of them by supermajority – implicitly confirmed the ECCC's personal jurisdiction over MEAS Muth.¹⁴³ The Pre-Trial Chamber observes, at the outset, that this argument touches upon the issues already settled in substance by its Case 004/2 Considerations.¹⁴⁴ The Chamber further notes that Ground A only challenges, as the Co-Lawyers themselves admit,¹⁴⁵ an International Co-Investigating Judge's opinion, speculating on matters within the Pre-Trial Chamber's sole purview¹⁴⁶ and therefore in itself does not affect the proceedings nor MEAS Muth's rights. Consequently, the Chamber finds that this Ground cannot be admitted as a valid personal jurisdiction challenge under Internal Rule 74(3)(a). Furthermore, the Chamber finds that the broadening of this right of appeal through Internal Rule 21 is not warranted in this case given that the Pre-Trial Chamber already clarified the law governing the matter at stake and considering that the purpose of Ground A is, in essence, to seek the correction of an inconsequential speculation that has no prejudicial effect on MEAS Muth's rights. Accordingly, the Pre-Trial Chamber finds that Ground A is not admissible under

¹⁴³ See MEAS Muth's Appeal (D267/4), para. 2; MEAS Muth's Reply (D266/7 and 267/12), para. 9.

¹⁴⁴ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 88-124, 170-302, 304-329.

¹⁴⁵ MEAS Muth's Appeal (D267/4), para. 32 (“[O]pinion on an appellate issue not within his jurisdiction, the [International Co-Investigating Judge] suggested that unless the [Pre-Trial Chamber] upholds one Closing Order by supermajority under Rule 77(13), either both Closing Orders or only his Indictment would stand”); MEAS Muth's Reply (D266/7 and 267/12), para. 11.

¹⁴⁶ See *supra* para. 66.



Internal Rules 74(3)(a) and 21.

b. Ground B

75. The Co-Lawyers, in Ground B of their Appeal, claim that the International Co-Investigating Judge implicitly confirmed the ECCC's jurisdiction over MEAS Muth by failing to state that unless the Pre-Trial Chamber finds by supermajority that the National Co-Investigating Judge committed errors or abuses fundamentally determinative of his exercise of discretion in finding that MEAS Muth does not fall within the ECCC's personal jurisdiction, the Dismissal Order prevails over the Indictment according to the principle of *in dubio pro reo*.¹⁴⁷

76. The Co-Lawyers further argue that Grounds A and B of their Appeal are "intertwined".¹⁴⁸ However, the Pre-Trial Chamber finds that these Grounds are not indivisible insofar as they raise two distinct questions.¹⁴⁹ On the one hand, Ground A challenges the speculative interpretation the International Co-Investigating Judge gave of Internal Rule 77(13) governing proceedings before the Pre-Trial Chamber. Ground B, on the other hand, develops convoluted arguments ultimately implying that doubt purportedly arises over whether MEAS Muth falls within the ECCC's personal jurisdiction as a result of the divergent determinations the Co-Investigating Judges made of this issue in their respective Closing Orders.¹⁵⁰

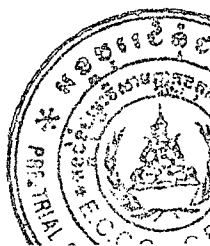
77. The Pre-Trial Chamber recalls that the Co-Lawyers' Appeal does not engage the International Co-Investigating Judge's findings determining the gravity of crimes and/or level of responsibility alleged against MEAS Muth. The Chamber notes that the Co-Lawyers' Ground B rather addresses a situation where, in their view, the discrepancies between the two Closing Orders of legal and factual findings therein with respect to whether MEAS Muth falls within the ECCC's personal jurisdiction evidence doubt on key jurisdictional issues that the International Co-Investigating Judge should have addressed by referring to the principle of *in dubio pro reo* in his assessment of the

¹⁴⁷ See MEAS Muth's Appeal (D267/4), paras 2, 49-66, 71, p. 46; MEAS Muth's Reply (D266/7 and 267/12), paras 4-6, 55-70, 73.

¹⁴⁸ Case 003 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D367/23.2), at ERN (EN) 01639988, pp. 17:22 to 18:02 ("[...] Grounds A and B of our Appeal are intertwined. Not only did the International Co-Investigating Judge err in interpreting Rule 77.13 so as to suggest that either his Indictment stand[s] or both Closing Orders stands [*sic*], but he also failed to apply the principle of *in dubio pro reo*").

¹⁴⁹ See MEAS Muth's Appeal (D267/4), p. 2.

¹⁵⁰ See, e.g., MEAS Muth's Reply (D266/7 and 267/12), paras 49-66.



law governing the Court's jurisdiction. Therefore, the Pre-Trial Chamber finds that this challenge cannot be framed and admitted as a valid challenge to personal jurisdiction under Internal Rule 74(3)(a). Furthermore, the Co-Lawyers challenge the International Co-Investigating Judge's failure to conclude that the Dismissal Order prevails over the Indictment according to the principle of *in dubio pro reo*, which has already been determined as an issue that falls outside his jurisdiction.¹⁵¹ In addition, the Chamber considers that the situation in which two independent judges issue contradictory decisions on whether to indict does not entail the application of *in dubio pro reo* principle because the principle stems from the presumption of innocence¹⁵² according to which MEAS Muth remains innocent even after being indicted and will remain as such until proven guilty. Consequently, the Chamber does not deem its intervention necessary in order to avoid any irreparable harm to the Accused's fair trial rights and finds that the broadening of MEAS Muth's right of appeal through Internal Rule 21 is not warranted in this case. Accordingly, the Pre-Trial Chamber finds that Ground B is inadmissible under Internal Rules 74(3)(a) and 21.

V. THE SIMULTANEOUS ISSUANCE OF TWO CONFLICTING CLOSING ORDERS

78. In the present case, the Co-Investigating Judges could not reach a common position on the key issue of whether MEAS Muth falls within the ECCC's personal jurisdiction and decided to simultaneously issue two conflicting Closing Orders on 28 November 2018. Instead of referring their disagreement to the Pre-Trial Chamber or abiding by the default position, the National Co-Investigating Judge issued the Dismissal Order, dismissing all charges against MEAS Muth,¹⁵³ while the International Co-Investigating Judge issued the Indictment, sending him to trial.¹⁵⁴ The Pre-Trial Chamber must determine whether the action of simultaneously issuing two conflicting orders in one single case is permitted under the ECCC legal framework. To this end, the Chamber will (i) recall the law governing this matter, (ii) assess the legal reasons

¹⁵¹ See *supra* para. 66.

¹⁵² *Constitution of Cambodia* (24 September 1993) ("1993 Constitution"), Art. 38. See also, e.g., Case 002, Decision on Immediate Appeal by KHIEU Samphân on Application for Release, 6 June 2011, E50/3/1/4, para. 31; International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeals Chamber, Judgement, 27 September 2007, para. 21.

¹⁵³ Dismissal Order (D266).

¹⁵⁴ Indictment (D267).



provided by the Co-Investigating Judges to justify the issuance of conflicting Closing Orders and (iii) discuss the case at hand.

A. APPLICABLE LAW

79. Regarding the law generally governing the matter under consideration, the Pre-Trial Chamber firstly recalls the importance of the joint responsibility of the two Co-Investigating Judges in conducting judicial investigations at the ECCC, as Article 14^{new}(1) of the ECCC Law, in relevant part, states that “[these] judges shall attempt to achieve unanimity in their decisions.” More specifically, Article 23^{new} of the ECCC Law provides:

All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, [...], and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

80. Regarding the issuance of closing orders by the Co-Investigating Judges, the Pre-Trial Chamber recalls that Internal Rule 67, in relevant part, provides:

Rule 67. Closing Orders by the Co-Investigating Judges

1. The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors’ submissions.

2. The Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.

3. The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances:

- a) The acts in question do not amount to crimes within the jurisdiction of the ECCC;
- b) The perpetrators of the acts have not been identified; or
- c) There is not sufficient evidence against the Charged Person or persons of the charges.

4. The Closing Order shall state the reasons for the decision. [...].



81. Concerning disagreements between the Co-Prosecutors and/or between the Co-Investigating Judges, the Pre-Trial Chamber recalls that Articles 5(1), (4) and 7 of the ECCC Agreement, in relevant part, state:

Article 5: Investigating judges

1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.

[...]

4. The co-investigating judges shall cooperate with a view to arriving at a common approach to investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

Article 7: 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 [...], they shall submit written statements of facts and the 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 [...].

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 statements 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.

82. Internal Rule 72 specifies the disagreement settlement procedures as follows:

Rule 72. Settlement of Disagreements between the Co-Investigating Judges

1. In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by



the Greffier of the Co-Investigating Judges.

2. Within 30 (thirty) days, either Co-Investigating Judges may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges, with a copy to the other Co-Investigating Judge. [...] The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases [where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs]. The Greffier of the Co-Investigating Judges shall forward a copy of the case file to the Chamber immediately.

3. Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However, the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning:

- a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs;
- b) notification of charges; or
- c) an Arrest and Detention Order,

in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.

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

[...]

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

83. Finally, the Pre-Trial Chamber recalls that Article 12(1) of the ECCC Agreement and Internal Rule 2 require that the procedure before the ECCC must be in accordance with both Cambodian law and international standards. In this respect, Article 1(1) of the Cambodian Code of Criminal Procedure, *inter alia*, provides that this Code “aims at defining the rules to be strictly followed and applied in order to clearly determine the



existence of any criminal offense.” Articles 20^{new}, 23^{new}, 33^{new} and 37^{new} of the ECCC Law all make it clear that ECCC organs must follow all existing procedures in force. The Chamber already determined that these provisions “aim to guarantee the legality, fairness and effectiveness of ECCC proceedings.”¹⁵⁵

B. THE CO-INVESTIGATING JUDGES’ REASONS FOR ISSUING CONFLICTING CLOSING ORDERS

84. Regarding the legal reasons provided by the Co-Investigating Judges to justify the issuance of conflicting Closing Orders in this case, the Pre-Trial Chamber firstly notes that the Case 003 procedure was subject to several confidential disagreements between the Co-Investigating Judges, including a disagreement registered on 17 September 2018 “regarding the issuance of separate and opposing closing orders”.¹⁵⁶ None of the disagreements was brought before this Chamber, but on 18 September 2017, the Co-Investigating Judges informed the Parties in this case that they considered the issuance of conflicting closing orders “based on a disagreement between them” to be permissible under the law applicable before the ECCC.¹⁵⁷ The Chamber considers that the Co-Investigating Judges’ filing of separate and conflicting Closing Orders in this case evidences an unresolved disagreement between them over at least the issue of whether or not MEAS Muth falls within the ECCC’s personal jurisdiction.

85. With respect specifically to the reasons the Co-Investigating Judges provided for issuing conflicting Closing Orders in this case, the Pre-Trial Chamber firstly notes that the National Co-Investigating Judge stated in his Dismissal Order that “[t]he [ECCC] Law and Agreement do not bar the Co-Investigating Judges from issuing two separate closing orders” and that “[t]he lack of such rules does not make issuance of two closing orders illegal.”¹⁵⁸ The National Co-Investigating Judge added that “[Internal] Rule 72 only describes the disagreements related to investigative acts” and that “[t]he two Co-Investigating Judges are of the view that this settlement mechanism [...] does not mean for disagreements on the type and choice of issuing the closing orders.”¹⁵⁹ In their respective Closing Orders, the two Co-Investigating Judges referred to reasons they had

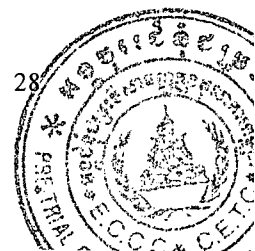
¹⁵⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 95.

¹⁵⁶ Indictment (D267), para. 27. *See also* Dismissal Order (D266), para. 7.

¹⁵⁷ Case 003, Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2 (“Decision on Disclosure concerning Disagreements (D262.2)”), para. 14. *See* Order to Place Disagreements Decisions onto Case File 003 (D262), para. 7.

¹⁵⁸ Dismissal Order (D266), para. 7.

¹⁵⁹ Dismissal Order (D266), para. 7.



stated in previous decisions, originally issued in Case 004/2 and then placed onto the Case File 003,¹⁶⁰ finding (i) that the filing by the Co-Prosecutors of separate and conflicting final submissions is legal under the ECCC legal framework (“Decision on Request for Clarification”),¹⁶¹ (ii) which also permits in their view the filing of separate and opposing closing orders (“Decision on Disclosure concerning Disagreements”).¹⁶² The Chamber deems it relevant to reproduce large excerpts of these reasons, starting with the Decision on Disclosure concerning Disagreements:

14. To pre-empt any future litigation [...] and in order to save the Parties time, we hereby state that we consider separate and opposing closing orders as generally permitted under the applicable law, for very much the same reasons which we found regarding opposing final submissions. [...]

15. We are aware of the problem this raises at the appeals stage. Internal Rule 77(13) only addresses the scenario of a joint dismissal or indictment; not that of split closing orders. However, this is no justification to argue that therefore split closing orders are prohibited. On the contrary, the Supreme Court Chamber in its appeal judgement in Case 001 explicitly acknowledged the scenario of the [Co-Investigating Judges] reasonably disagreeing over personal jurisdiction, for example, and that in the context of the disagreement procedure the investigation shall proceed.

16. We are of the view that the investigation stage ends at the very latest with the decision of the [Pre-Trial Chamber] on any appeal against the closing order. If there were to be no supermajority in the [Pre-Trial Chamber] for upholding one of the closing orders, both would appear to stand under the application of Internal Rule 77(13) [...].¹⁶³

86. In their Decision on Request for Clarification, the Co-Investigating Judges stated with respect to the disagreement procedure:

23. As the filing of two final submissions evidences a disagreement between the Co-Prosecutors, the question of whether the Co-Prosecutors are obliged to use the full complement of disagreement settlement measures, in other words, whether the mechanisms in Internal Rule 71 are mandatory or discretionary, does [...] fall within [the Co-Investigating Judges’] remit, as it relates to the admissibility of the final submissions. [...].

¹⁶⁰ See Order to Place Disagreements Decisions onto Case File 003 (D262), para. 7 referring to Case 004/2, Decision on AO An’s Request for Clarification, 5 September 2017, D262.1 (“Decision on Request for Clarification (D262.1)”); Decision on Disclosure concerning Disagreements (D262.2).

¹⁶¹ Indictment (D267), para. 19 referring to Order to Place Disagreements Decisions onto Case File 003 (D262) referring to, *inter alia*, Decision on Request for Clarification (D262.1).

¹⁶² Indictment (D267), para. 19 referring to Decision on Disclosure concerning Disagreements (D262.2), paras 13-16; Dismissal Order (D266), para. 7 referring to Decision on Disclosure concerning Disagreements (D262.2), para. 15.

¹⁶³ Decision on Disclosure concerning Disagreements (D262.2), paras 14-16 (footnotes omitted).



[...]

27. [...] We [...] consider that it is clear [...] that under the ECCC Law and the Internal Rules the recording of disagreements between the Co-Prosecutors is discretionary. Therefore we do not consider that the Co-Prosecutors have an obligation to use the full complement of settlement measures [...].¹⁶⁴

87. Regarding the possibility to file multiple final submissions, the Co-Investigating Judges stated in the same Decision:

32. While we agree [...] that one reading of Internal Rule 66(5) envisages one final submission, the language does not require a joint final submission, nor does it exclude the filing of separate submissions [...]. While the Co-Prosecutors are required to work together to prepare indictments, that they may disagree is recognised in the [Agreement] which requires them to “cooperate with a view to arriving at a common approach to the prosecution” and, of course, in the fact that a disagreement resolution mechanism is provided for, which, in the [Agreement], explicitly envisages a disagreement on “whether to proceed with a prosecution”.

33. A further consideration is that [...] [the Co-Investigating Judges] are not bound to accept the contents of any final submissions [...]. [...]

34. Regarding the submission that filing two final submissions effectively usurps the [Pre-Trial Chamber]’s “exclusive authority” to settle disputes [...], we do not consider that seising the [Pre-Trial Chamber] is mandatory, and accordingly, there is no exclusive authority to be usurped.¹⁶⁵

88. At the outset, the Pre-Trial Chamber observes that the Co-Prosecutors’ filing of two separate final submissions, which the Chamber regards as the first procedural anomaly in the closing phase of the investigation in this case, also occurred in Case 004/1 and did not prevent the Co-Investigating Judges’ issuance of one single Closing Order in that other case. In this respect, the Chamber stresses, as a preliminary matter, that fundamental differences exist, in function and authority, between parties’ submissions and judicial decisions reached by judges, such as closing orders.¹⁶⁶ Independent of the question of whether the filing of separate final submissions by the Co-Prosecutors is permitted in the ECCC legal system, the Chamber finds that the Co-Investigating Judges committed a gross error of law in this case by finding that the ECCC legal framework

¹⁶⁴ Decision on Request for Clarification (D262.1), paras 23, 27.

¹⁶⁵ Decision on Request for Clarification (D262.1), paras 32-34 (emphasis and footnotes omitted).

¹⁶⁶ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122.



permits the issuance of separate and opposing Closing Orders.

C. DISCUSSION

89. As noted above, the Pre-Trial Chamber considers that the Co-Investigating Judges' filing of separate and opposing Closing Orders in this case exposes an unresolved disagreement between them over whether or not MEAS Muth falls within the ECCC's personal jurisdiction. The Chamber has already determined in another case that the ECCC legal framework does not permit the issuance of conflicting closing orders.¹⁶⁷ The Pre-Trial Chamber will refer to its jurisprudence in considering the case at hand, firstly correcting the legal interpretation reached by the Co-Investigating Judges, and secondly clarifying the nature of the errors they committed in this case.

90. First, the Pre-Trial Chamber recalls that as is the case with any other legal systems, the law governing the ECCC does not necessarily resolve all the legal uncertainties that may arise regarding procedural and/or substantive matters.¹⁶⁸ However, this law not only prescribes procedures applicable in case of *lacunae* in the legal framework,¹⁶⁹ but also openly contemplates that disagreements may arise in the ECCC hybrid context and enacts specific procedures to handle and settle such disagreements in order to, *inter alia*, avoid procedural stalemates. Under the ECCC Agreement, the primary function that is entrusted to the Pre-Trial Chamber is precisely to provide for an effective mechanism to conclusively resolve disagreements between the Co-Prosecutors and between the Co-Investigating Judges. As stressed above, the Co-Investigating Judges have wilfully decided to evade this mechanism and, instead, issued separate and opposing Closing Orders with the full knowledge of the problems that their action would be causing for the ensuing proceedings within the ECCC legal system.

91. The Pre-Trial Chamber must make findings on whether this course of action complied with the ECCC legal framework in this case. For reasons detailed hereafter, the Chamber finds that the Co-Investigating Judges' issuance of conflicting Closing Orders violated the very foundations of the ECCC legal system. The Chamber will

¹⁶⁷ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 88-124.

¹⁶⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 101.

¹⁶⁹ See ECCC Agreement, Art. 12; Internal Rule 2. See also ECCC Law, Art. 23^{new} (specifically regarding the practice of the Co-Investigating Judges).



(a) reaffirm the fundamental principles governing the disagreements between the Co-Investigating Judges and (b) recall the different procedures available to settle disagreements between them, before (c) providing its observations on the impermissible simultaneous issuance of two conflicting closing orders in the instant case.

1. Fundamental Principles Governing Disagreements between the Co-Investigating Judges

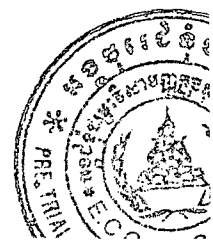
92. First, the Pre-Trial Chamber recalls that the joint conduct of investigations by the National and the International Co-Investigating Judges is a primary fundamental legal principle at the ECCC, as Article 5(1) of the ECCC Agreement provides that “[t]here shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.”

93. The ECCC Law strengthens this fundamental principle as Article 14(1) of this Law mandates that “[t]he judges shall attempt to achieve unanimity in their decisions.” Article 23^{new} of the ECCC Law specifies how the principle must be implemented by requiring that “[a]ll investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force.” The Pre-Trial Chamber has held that this provision, which mirrors Article 1 of the Cambodian Code of Criminal Procedure, providing that the Code “aims at defining the rules to be strictly followed and applied in order to clearly determine the existence of a criminal offense”, dictates that the Co-Investigating Judges must conduct the investigations jointly and in compliance with the law applicable at the ECCC.¹⁷⁰

94. The Pre-Trial Chamber has further clarified that “[t]he Co-Investigating Judges are under no obligation to seise the Pre-Trial Chamber when they do not agree on an issue before them” insofar as they agree on a course of action that is “coherent” with the “default position” embedded in the ECCC framework, “being that the ‘investigation shall proceed’”.¹⁷¹ Relatedly, the Chamber observed that Article 23^{new} of the ECCC Law specifies Article 5(4) of the ECCC Agreement, by stipulating that “[i]n the event of disagreement between the Co-Investigating Judges, [...] [t]he investigation shall

¹⁷⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 104.

¹⁷¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 106 referring to Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 274.



proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled".¹⁷² Internal Rule 72(4)(d), which governs the settlement of disagreements between the Co-Investigating Judges by the Pre-Trial Chamber, reinforces this fundamental position by providing that:

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

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

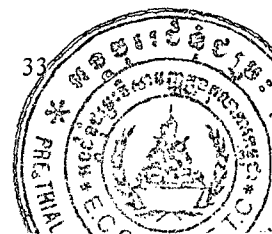
95. In this case, the Chamber must state whether these legal principles permitted the Co-Investigating Judges to issue conflicting Closing Orders under Internal Rule 67, instead of referring the matters over which they disagreed to the Pre-Trial Chamber pursuant to Internal Rule 72.

2. Settlement of Disagreements between the Co-Investigating Judges

96. As a general matter, the Pre-Trial Chamber considers that the issue of whether the Co-Investigating Judges are obliged to refer their disagreement to this Chamber under Internal Rule 72 is governed by the overriding principle that ECCC proceedings must comply with the legality, fairness and effectiveness requirements of the ECCC legal framework. In this case, the requirement of effective criminal justice is worthy of particular attention by this Chamber.

97. One way in which the Royal Government of Cambodia and the United Nations secured effective justice in the ECCC context was by making sure that procedures were available not only to handle disagreements arising in the course of investigations and prosecutions, but also to effectively resolve such disagreements in order to avoid procedural stalemates that would, *inter alia*, hamper the effectiveness of the ECCC's proceedings. At the pre-trial stage, these procedures are underlined and ultimately governed by the aforesaid "default position" prescribed, *inter alia*, by Article 5(4) of the ECCC Agreement, which unambiguously states that when "the co-investigating judges

¹⁷² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 107.



are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests [...] that the difference shall be settled” by the Pre-Trial Chamber.

98. In light of this, the Pre-Trial Chamber has determined that the issue of whether the Co-Investigating Judges have the prerogative to issue conflicting closing orders, instead of referring their disagreement to this Chamber, hinges on whether their avoidance of the disagreement settlement procedure provided for under Internal Rule 72 circumvents or not the practical effect of the default position intrinsic to the ECCC legal system.¹⁷³ In this respect, the Chamber has stressed that a principle as fundamental and determinative as the default position cannot be overridden or deprived of its fullest weight and effect by interpretative constructions taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless.¹⁷⁴ Concluding otherwise would lead to a manifestly unreasonable legal result, violating both international law and Cambodian law.

99. On this basis, the Pre-Trial Chamber specified in a prior decision the diverse array of procedures available to the Co-Investigating Judges for handling their disagreements in full compliance with the ECCC legal framework.¹⁷⁵ In this regard, the Chamber emphasised that the nature and the severity of the disagreement between them must inform their choice of the most appropriate procedure to be followed in any given case.¹⁷⁶ The Chamber recalls that depending on the particular circumstances of each case, the procedures available to the Co-Investigating Judges may range from the tacit toleration of an act or decision taken by the other Judge,¹⁷⁷ to the registration of a disagreement,¹⁷⁸ or referral of a disagreement to the Pre-Trial Chamber over a contested

¹⁷³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 112. *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 110-111.

¹⁷⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 112.

¹⁷⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 113-121.

¹⁷⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 113.

¹⁷⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 115 (“The Chamber finds [...] that under Article 23^{new}(3) of the ECCC Law, stating that ‘[t]he investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions’, a Co-Investigating Judge may validly allow the action of his colleague to be carried out by not associating with such action while not registering any disagreement, thus allowing the investigation to proceed” (footnote omitted)).

¹⁷⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 116 (“Where the disagreement concerns a serious issue, such as a matter that is at the core of the investigation, a Co-Investigating Judge may raise an objection against his colleague’s action or decision by formally registering a disagreement. The Chamber finds that the formalisation of disagreements pursuant to



act or decision pursuant to Internal Rule 72.¹⁷⁹

100. The Pre-Trial Chamber reaffirms that in any such situations, the Co-Investigating Judges' actions must always be within their individual capacity and performed according to the cooperation principle upheld by Article 5(4) of ECCC Agreement, reflecting the equal status of the National and the International Co-Investigating Judges in the ECCC hybrid system.¹⁸⁰ The Chamber further reiterates that the Co-Investigating Judges are obliged, under the ECCC legal framework, to continue to seek a common position during the disagreement process.¹⁸¹ The ECCC legal system was designed and is structured to manage the joint conduct of judicial investigations by the Co-Investigating Judges who may thus reach an agreement at any stage of the investigation of cases of which they are seised. The crystallisation of any disagreements between them about such cases is permissible,¹⁸² but only insofar as it complies with existing procedures in force and remains coherent with the default position intrinsic to the ECCC legal system, which

Article 23^{new}(3) of the ECCC Law and Internal Rule 72(1), or the reaching of consensus over matters at issue, is recognised and permitted in the ECCC legal system. In such cases, 'the Co-Investigating Judges, either one or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges' pursuant to Internal Rule 72(1). The Chamber considers that the disagreement is then contained between the Co-Investigating Judges and remains confidential. The Chamber further notes that Article 5(4) of the ECCC Agreement, Article 23^{new} of the ECCC Law and Internal Rule 72(3) clearly indicate that in such case, one Co-Investigating Judge may act without the consent of the other Judge where neither of them brings such formalised disagreement before the Pre-Trial Chamber within the prescribed time limit. This Co-Investigating Judge may then proceed with the contested decision once the required time limit has elapsed" (footnotes omitted)).

¹⁷⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 117 ("The Chamber notes that when the disagreement is so critical that one of the Co-Investigating Judges wishes to halt the implementation of his colleague's decision, this Judge's only available legal recourse is to bring the disagreement before the Pre-Trial Chamber, which is explicitly and specifically empowered to settle the differences between the Co-Investigating Judges. To trigger this effective disagreement resolution mechanism, the Co-Investigating Judge(s) must submit, in writing, a statement of the facts and reasons for the disagreement. The ECCC's applicable laws endow the Pre-Trial Chamber with the necessary power to conclusively resolve the matters in dispute between the two equal Co-Investigating Judges and determine whether or not the disputed decision should be carried out. In cases where the Pre-Trial Chamber cannot achieve the supermajority vote to conclusively settle the disagreement, the ECCC legal framework provides that the matter is then resolved by the default position, stipulating that the investigation must proceed" (footnotes omitted)).

¹⁸⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 114 *referring to* ECCC Agreement, Art. 5(1) read in conjunction with ECCC Law, Art. 27^{new}.

¹⁸¹ *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 118 (The Chamber remarked that the use of the present tense in Internal Rule 72(3) leaves no doubt that the Co-Investigating Judges are obliged to continue to seek a common legal reasoning or mutually agreed course of action during the disagreement settlement period and that the two Co-Investigating Judges have a reciprocal obligation in this sense under the ECCC legal framework).

¹⁸² *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 119 (This Chamber acknowledged that the applicable law before the ECCC contemplates that despite their genuine efforts to reach a compromise or find a consensus, the two equal National and International Co-Investigating Judges may still be unable to agree on a common position).



provides an effective way out of any possible procedural impasses.

101. Ultimately, the Pre-Trial Chamber reiterates that when the National and the International Co-Investigating Judges are unable to agree on a common position, and where the matter in dispute between them, or their prolonged disagreement over an issue, jeopardises the effectiveness of the judicial investigation, the ECCC legal framework does not permit that such disagreement be entrenched or sheltered from an effective resolution.¹⁸³ The Chamber thus affirms its previous holding that where the disagreement settlement procedure provided for by Internal Rule 72 emerges as the only remaining course of action available to the Co-Investigating Judges to prevent the occurrence of a procedural stalemate and to safeguard the legality, fairness and effectiveness of a judicial investigation conducted at the ECCC, the Co-Investigating Judges must trigger this procedural mechanism by referring their disagreement to the Pre-Trial Chamber.¹⁸⁴

3. Observations regarding the Issuance of Conflicting Closing Orders

102. In light of the foregoing principles, the Pre-Trial Chamber has found that where a disagreement relates to matters that must be determined by a closing order under Internal Rule 67, the ECCC legal framework allows only two courses of action pursuant to Article 23^{new} of the ECCC Law and Internal Rule 72(3). The Co-Investigating Judges are obliged either to reach a tacit, or express consensus on those matters or to refer their disagreement on such matters to the Pre-Trial Chamber.¹⁸⁵

103. Further, the Pre-Trial Chamber reaffirms that the ECCC's legal texts leave no significant ambiguity in this respect: Internal Rule 67(1) clearly stipulates that “[t]he Co-Investigating Judges *shall conclude* the investigation by issuing *a* Closing Order, *either* indicting a Charged Person [...], *or* dismissing the case.” The Glossary of the Internal Rules adds that a “Closing Order refers to *the* final order made by the Co-Investigating Judges or the Pre-Trial Chamber at the end of the judicial investigation, *whether* Indictment *or* Dismissal Order.”¹⁸⁶

¹⁸³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 119.

¹⁸⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 119.

¹⁸⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 120.

¹⁸⁶ Internal Rules, Glossary, p. 83 (emphasis added). *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122.



104. It follows from these provisions that a closing order of the Co-Investigating Judges is a single decision. As such, Internal Rule 1(2) – stating that in the Rules, the singular includes the plural, and a reference to the Co-Investigating Judges “includes both of them acting jointly and each of them acting individually” – does not offer a sufficient legal basis to override or undermine core principles of the ECCC Agreement, such as the default position, and the rule on strict construction of penal laws further prevents any interpretations in this sense.

105. For these reasons, the Pre-Trial Chamber rejects the Co-Investigating Judges’ reasoning on the purported legal permissibility of issuing two separate and opposing closing orders. In addition to the manifest errors of law on which their reasoning is based, the Chamber recalls that the Co-Investigating Judges have a judicial duty to decide on matters in dispute of which they are seised.¹⁸⁷ When their disagreement prevents them from arriving at a common final determination of such matters, they must still discharge this joint judicial duty by following the procedures available in the ECCC legal system to make sure that a conclusive determination of the matters within their jurisdiction is attained.¹⁸⁸

106. In sum, the Pre-Trial Chamber stresses that by issuing contradicting Closing Orders instead of referring their related disagreement to the Pre-Trial Chamber or abiding by the default position, the Co-Investigating Judges committed errors that undermine the foundations of the hybrid system and proper functioning of the ECCC. The Chamber further observes that despite the fundamental nature of the matter at stake, that is, whether or not MEAS Muth falls within the ECCC’s personal jurisdiction, the Co-Investigating Judges issued the Closing Orders with remarkably minimal reasoning, recalling simply two of their prior Decisions.¹⁸⁹

107. Additionally, while it must be presumed that the Co-Investigating Judges may

¹⁸⁷ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122.

¹⁸⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122.

¹⁸⁹ See *supra* paras 85-87; Indictment (D267), para. 19 referring to Order to Place Disagreements Decisions onto Case File 003 (D262) referring to Decision on Request for Clarification (D262.1) and Decision on Disclosure concerning Disagreements (D262.2), paras 13-16; Dismissal Order (D266), para. 7 referring to Decision on Disclosure concerning Disagreements (D262.2), para. 15. The Chamber observes that these Decisions (D262.1; D262.2), which were initially issued to address the parties’ requests in Case 004/2, were placed onto the Case File 003 by a single order (D262) without taking any measures, such as seeking tailored Parties’ submissions, to address the singularity of this case, notwithstanding the far-reaching impacts of such action.



have committed these legal errors in good faith, it is obvious from their above-cited decisions that they knew that by refusing to refer their disagreement to the Pre-Trial Chamber, any matters over which they disagreed, including the key issue of whether or not MEAS Muth falls within the ECCC's jurisdiction, would have to be addressed only as part of appellate proceedings before this Chamber, instead of through the procedural mechanism specifically provided for under the ECCC legal framework to conclusively settle disagreements between them. The Co-Investigating Judges were aware of the difficulties their actions would be causing not only on appeal, but beyond the pre-trial appellate stage of the Case 003 proceedings.¹⁹⁰ The Pre-Trial Chamber also finds it disturbing that the conflicting Closing Orders were issued on the same day in only one language¹⁹¹ with a joint declaration by the two Co-Investigating Judges that they agreed on the issuance of separate and conflicting Closing Orders.

108. Overall, the Pre-Trial Chamber considers that the Co-Investigating Judges' errors have jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations. More than a violation of the fundamental principles of the ECCC legal framework, the Chamber is of the view that the Co-Investigating Judges' *mauvaises pratiques* may amount to a denial of justice, especially since the Chamber is unable to exclude that they may have intended to defeat the default position and frustrate the authority of the Pre-Trial Chamber. The Chamber further notes that more than an isolated example, their actions in this case confirm a pattern that the Co-Investigating Judges have apparently adopted in dealing with all the final cases on the ECCC's docket.¹⁹²

109. The Chamber once more notes with regret that never, to its knowledge, has there been criminal cases in the history of other national and international legal systems that concluded with the simultaneous issuance of two contrary decisions emanating from one single judicial office. After ten years of investigation into crimes among the most atrocious and brutal committed during the twentieth century, the Pre-Trial Chamber can only condemn once again the legal predicament that the Co-Investigating Judges'

¹⁹⁰ See Decision on Disclosure concerning Disagreements (D262.2), paras 15-16.

¹⁹¹ See *supra* para. 23 (On 28 November 2018, Dismissal Order (D266) was filed in Khmer only and Indictment (D267) was filed in English only).

¹⁹² See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 88-124. See also Case 004, Order Dismissing the Case against YIM Tith, 28 June 2019, D381; Case 004, Closing Order, 28 June 2019, D382.



unlawful actions precipitated upon yet another ECCC proceeding.

VI. MERITS

110. While the decision of the Pre-Trial Chamber in respect of the admissibility of the Appeals and the illegal character of the Co-Investigating Judges' agreement to issue separate Closing Orders is expressed in the preceding paragraphs, the Chamber, upon deliberation, has not attained the required majority of four affirmative votes to reach a decision based on common reasoning on the merits. Pursuant to Internal Rule 77(14), the Opinions of the various members of the Pre-Trial Chamber are attached to these Considerations.



VII. DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

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

In accordance with Internal Rule 77(13), the present Decision is not subject to appeal.

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

Phnom Penh, 7 April 2021



President

Pre-Trial Chamber

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion.



VIII. OPINION OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

111. In the unanimous decision above with MEAS Muth being the Charged Person, the Pre-Trial Chamber ruled on Point 5 that “Declare the issuance of the two Closing Orders by the Co-Investigating Judges is illegal, violating the legal framework of the ECCC.”

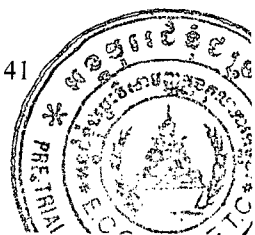
112. Based on this ruling, the National Judges of the Pre-Trial Chamber wish to opine regarding the legal value of the two Closing Orders as follows:

- The two Closing Orders were filed separately on 28 November 2018 in English and Khmer only, with the translation to follow. However, the Co-Investigating Judges notified the Parties in advance on 18 September 2017 that they considered the separate and opposing Closing Orders in light of their disagreement allowed by the existing law before the ECCC and consequences may arise for the appeal proceedings in accordance with Internal Rule 77(13).
- Internal Rule 72 is for Settlement of Disagreements between the Co-Investigating Judges. However, the confidential disagreements between them were recorded on the following dates:
 - 7 February 2013
 - 22 February 2013
 - 17 July 2014
 - 16 January 2017
 - 17 September 2018

113. Both Co-Investigating Judges agreed to keep their disagreement in their respective offices and also agreed not to refer it before the Pre-Trial Chamber, which means that they agreed not to implement what is provided for in Internal Rule 72. Therefore, the Pre-Trial Chamber cannot apply its competence as provided for in Internal Rule 72.

114. Internal Rule 77(13) provides that:

[a] decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the default decision of the Chamber shall be as follows:



a. As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.

b. As regards appeals against indictment issued by the Co-Investigating Judges, if the required majority is not attained, the Pre-Trial Chamber shall appeal to the Trial Chamber on the basis of the Closing Order of the Co-Investigating Judges.

115. In light of aforesaid Internal Rule 77(13), the two Closing Orders are of the same value and stand valid.

116. The two Co-Investigating Judges enjoy equal status, and in accordance with the exception of the presumption of innocence, the law in force does not allow the Pre-Trial Chamber to rule that the act of any Co-Investigating Judge has preponderance.

117. Therefore, the two Closing Orders maintain the same value.

118. In light of the foregoing considerations, the National Judges of the Pre-Trial Chamber are of the view that Case File 003 against the Charged Person MEAS Muth should be held at the ECCC archives.

FOR THESE REASONS, THE NATIONAL JUDGES OF THE PRE-TRIAL CHAMBER HEREBY:

- **FORWARD** Case File 003 against the Charged Person MEAS Muth to be held at the ECCC archives.

Phnom Penh, 7 April 2021



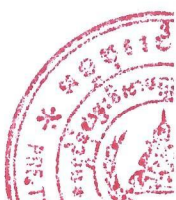
President PRAK Kimsan



Judge NEY Thol



Judge HUOT Vuthy



IX. OPINION OF JUDGES OLIVIER BEAUVALLET AND KANG JIN BAIK

A. PRELIMINARY ISSUES

119. The International Judges will now examine preliminary issues relevant to the review of the admissible Appeals in the instant case. At the outset, the International Judges vigorously reject the notion that the Supreme Court Chamber's Decision on Immediate Appeal in Case 004/2 can be imported into Case 003 to control the result in this case. Case 003 contains an incomplete hence invalid Dismissal Order ignoring seven years of evidence and criminal allegations of which the National Co-Investigating Judge was duly seised. This unfinished Order is invalid and void on this account alone.¹⁹³ The International Judges consequently find that the Dismissal Order is null, that the Indictment stands and that the prosecution shall proceed. The International Judges will address (i) the authority of the Pre-Trial Chamber;¹⁹⁴ (ii) the excessive delays in the judicial investigation of Case 003;¹⁹⁵ (iii) the evidentiary considerations;¹⁹⁶ and (iv) the ECCC's position in the Cambodian judicial system and the effect of its decision finding lack of personal jurisdiction.¹⁹⁷

1. Authority of the Pre-Trial Chamber

120. The International Judges deem it necessary to recall and clarify the main functions the Pre-Trial Chamber may perform at the closing order stage of ECCC's proceedings. In this section, the International Judges will address (i) the source of its general authority, (ii) the nature of its jurisdiction at the closing order stage of proceedings, (iii) the different interventions it may conduct at such stage, and (iv) the latest instance regarding which the Pre-Trial Chamber's authority must be reminded.

a. Source of the Pre-Trial Chamber's Authority

121. In prior rulings,¹⁹⁸ the Pre-Trial Chamber has affirmed the responsibilities and powers it is vested with within the ECCC legal system. It clearly emerges, notably from

¹⁹³ See *infra* paras 249-250.

¹⁹⁴ See *infra* paras 120-134.

¹⁹⁵ See *infra* paras 135-149.

¹⁹⁶ See *infra* paras 150-169.

¹⁹⁷ See *infra* paras 170-176.

¹⁹⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 32-34, 46.



Internal Rule 73(a), that the Chamber’s jurisdiction encompasses an appellate function. The Chamber has further clarified that its appellate function empowers it to determine the law that governs the pre-trial stage of proceedings in an authoritative and final manner.¹⁹⁹ The Chamber has also found that in the specific case of appeals against closing orders, it has the power to issue a new or revised closing order, including an indictment pursuant to Internal Rule 79(1).²⁰⁰

122. In this regard, the Pre-Trial Chamber has consistently held that when the need arises to fill *lacunae* in the Internal Rules, the ECCC legal framework allows the Chamber to decide in accordance with Cambodian law and international law.²⁰¹ In practice, due to the sparsity of the Cambodian courts’ practice, the Chamber also seeks guidance from other inquisitorial systems of criminal procedure, especially the French Code of Criminal Procedure, which inspired the Cambodian criminal procedure. As for the international standards, the Chamber gives special attention to the sources that reflect the particularities of the inquisitorial system of criminal procedure, which the ECCC legal framework and Cambodian law espouse at the pre-trial stage of proceedings.

b. Nature of the Pre-Trial Chamber’s Jurisdiction at the Closing Order Stage

123. In contrast to the rules that govern the appeals against the decisions of the Trial Chamber, conferring on the Supreme Court Chamber the jurisdiction to review specific categories of legal and factual “errors”,²⁰² the Internal Rules bestow the Pre-Trial Chamber with a general jurisdiction over “orders” and “decisions” of the Co-Investigating Judges.²⁰³

124. The International Judges note that the scope and the nature of the Pre-Trial Chamber’s review powers are subject to its obligation under Internal Rule 76(7), which states that “[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation.” The International Judges consider that as “[n]o issues concerning [...] procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber”,²⁰⁴ this provision, in light of Internal Rule 21(1), provides the

¹⁹⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), footnote 163.

²⁰⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 30 and footnote 53; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22 and footnote 58.

²⁰¹ See ECCC Agreement, Art. 12(1) and Internal Rule 2.

²⁰² See Internal Rule 104(1).

²⁰³ See Internal Rules 73 and 74.

²⁰⁴ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 52.



presumption that all actions shall be undertaken to preserve the rights of the accused and other parties before a closing order becomes final. Hence, when the Pre-Trial Chamber is called upon on an appeal against the Co-Investigating Judges' closing order, the Chamber is vested with the authority to review whether the issuance of the closing order and the preparatory investigation comply with all the provisions and the procedures in force within the ECCC legal framework, especially Internal Rules 21 and 76 as well as the terms of Article 261 of the Cambodian Code of Criminal Procedure.²⁰⁵

125. The International Judges observe that while there is no specific provision that provides the Pre-Trial Chamber with necessary tools to fulfil such important obligation and the ECCC Agreement appears to contemplate the Pre-Trial Chamber solely as a disagreement settlement mechanism,²⁰⁶ the Internal Rules explicitly endow the Chamber with additional powers and, *inter alia*, the appellate jurisdiction over the closing orders.²⁰⁷ Consequently, the International Judges consider that the Internal Rules not only allow, but direct it to exercise the broad powers of the Cambodian Investigating Chamber, through the application of Article 12 of the ECCC Agreement, Internal Rule 2 as well as Articles 1(2) and 55 of the Cambodian Code of Criminal Procedure, in order to safeguard the rights of the accused and other parties during the investigation and guarantee remedy to violations of parties' rights when deemed necessary.

126. Furthermore, the International Judges recall that when an admissible appeal against the Co-Investigating Judges' closing order is filed and brought before the Pre-Trial Chamber, not just the disposition of a specific order or decision, but the entire case file is referred to it²⁰⁸ and the Chamber thus gains authority over the whole case file.²⁰⁹ From that stage, the Co-Investigating Judges are no longer seised of the case in

²⁰⁵ See Case 003 (PTC01), Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant SENG Chan Theary, 28 February 2012, D11/1/4/2, Opinion of Judges DOWNING and LAHUIS, para. 6 (The Pre-Trial Chamber already determined, *inter alia*, that it accordingly has jurisdiction to examine the due diligence displayed by the Co-Investigating Judges' conduct where this constitutes "a relevant factor [for] considering victims' rights in the proceedings").

²⁰⁶ See ECCC Agreement, Art. 7.

²⁰⁷ See Internal Rule 73.

²⁰⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 48, footnote 88 referring to Christian GUÉRY, "*Effet dévolutif de l'appel et manifestation de la vérité : du prétendu pouvoir de révision de la chambre de l'instruction*", *Droit pénal n° 5 (étude 8)*, LexisNexis, May 2014, para. 3.

²⁰⁹ French Court of Criminal Cassation, 1 December 1999, n° 99-81.853 ("*Qu'en effet [l'article 202 du code de procédure pénale] permet à la chambre d'accusation et sans que sa saisine puisse être limitée par l'effet dévolutif de l'appel, de statuer d'office, à l'égard de la personne mise en examen renvoyée devant elle, sur tous les chefs de crimes, délits principaux ou connexes, résultant de la procédure et notamment*").



dispute and thereby divested of any authority over all aspects of the investigation of the case.²¹⁰ The jurisdiction of the Pre-Trial Chamber, including its broad powers, is accordingly activated as soon as it is seised of an appeal against a closing order. The Pre-Trial Chamber has further found that such understanding of the appeal process against the Co-Investigating Judges' closing orders is consistent with the features of the inquisitorial model of criminal procedure prescribed by the ECCC legal texts.²¹¹

c. Different Interventions the Pre-Trial Chamber May Perform

127. The Pre-Trial Chamber has recognised that it may perform at least three distinct interventions at the closing order stage of proceedings – namely, primarily (i) the review of admissible appeals filed by parties to the proceedings, and incidentally (ii) the review of the Co-Investigating Judges' findings reached in the closing order and of the investigative acts performed in the case, and (iii) the exercise of an ancillary investigative power to complement, where necessary, the investigation through supplementary actions. The International Judges will recall how each of these powers has been fleshed out in its jurisprudence.

i. *Review of Appeals Filed by Parties*

128. The Pre-Trial Chamber has an explicit jurisdiction to entertain admissible appeals filed against closing orders pursuant to Internal Rules 67(5), 73(a) and 74. The Chamber has determined that the scope of its review for such appeals is limited to the issues raised by the appeals²¹² as well as by the internationally established standards for the appellate review of errors of law, fact, and discretion alleged by parties to

sur ceux qui, comme en l'espèce, en avaient été distraits par une ordonnance de renvoi devant le tribunal correctionnel"); Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 48.

²¹⁰ See Internal Rules 75(2)(3). See also French Court of Criminal Cassation, 9 January 2002, n° 01-87.123 (“[L]’ordonnance du juge d’instruction qui, sur les réquisitions du procureur de la République, décide que l’information est complète et y met fin, soit en disant qu’il n’y a lieu à suivre, soit en renvoyant la personne mise en examen devant la juridiction compétente, dessaisit le juge d’instruction”); French Court of Criminal Cassation, 23 December 1969, n° 69-91612, (“Cette ordonnance qui, sur les réquisitions du procureur de la République, décidait que l’information était complète et y mettait fin, dessaisissait le juge d’instruction de l’ensemble de la procédure”). See also Case 003 (PTC34), Decision on MEAS Muth’s Application for the Annulment of Torture-Derived Written Records of Interview, 24 July 2018, D257/1/8 (“Decision on Torture-Tainted Evidence (D257/1/8)”), para. 11 (“[t]he Pre-Trial Chamber interprets Internal Rules 66(1), 67(1) and 76(2) in light of Internal Rule 21(1) and considers that the ‘judicial investigation’ is officially concluded by the issuance of the Closing Order, and not at the time the Co-Investigating Judges notify the parties of their intent to conclude it”).

²¹¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 38.

²¹² See, e.g., Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 104 referring to Case 001 Decision on Closing Order Appeal (D99/3/42), para. 29.



international criminal proceedings against judicial rulings of lower-instance bodies.²¹³ The Chamber has also found that in accordance with internationally recognised standards of appellate review, it retains the inherent jurisdiction to address issues of “general significance” for the ECCC’s jurisprudence and/or legacy.²¹⁴

ii. Review of the Co-Investigating Judges’ Actions

129. The Pre-Trial Chamber has emphasised that its jurisdiction differs from that of most other appellate bodies in the international criminal justice system, for, when it is seised of appeals against the Co-Investigating Judges’ closing orders, it may also conduct, in parallel, a *proprio motu* review of the Co-Investigating Judges’ findings²¹⁵ and all the investigative acts performed in the case by the Co-Investigating Judges and the Co-Prosecutors.²¹⁶ The Chamber has noted that similar powers are entrusted to equivalent hybrid bodies, such as the *Chambre africaine extraordinaire d’Accusation* within the Dakar Court of Appeals²¹⁷ and the Central African Republic’s Special Accusation Chamber.²¹⁸ Within the ECCC legal framework, the Pre-Trial Chamber may,

²¹³ See, e.g., Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 and D427/3/15), para. 86.

²¹⁴ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 73.

²¹⁵ In this respect, it must be noted that unlike most other international criminal appellate bodies, which review trial chambers’ decisions, including judgements on guilt or innocence, and whose breadth of review usually bars them from entering *de novo* factual findings on appeal and amending trial judgements accordingly, the ECCC Pre-Trial Chamber has the authority, under the ECCC jurisprudence and Internal Rules, to amend the Co-Investigating Judges’ indictments (*see* Internal Rule 79(1)); *see also*, e.g., Case 002 (PTC104), Decision on KHIEU Samphân’s Appeal against the Closing Order, 13 January 2011, D427/4/14, p. 4). Such power enables the Pre-Trial Chamber to substitute the Co-Investigating Judges’ findings on both law and fact with its own findings where the manifestation of the judicial truth of the events under investigation do so requires. Since this power is exercised at the pre-trial stage, it does not infringe on the defence’s rights under the ICCPR, nor encroaches upon the role of the ECCC Trial Chamber within the ECCC legal system.

²¹⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 42 and footnote 75 referring to Henri ANGEVIN, Jean-Paul VALAT, “*Chambre de l’instruction. – Composition. – Compétence. – Contrôle de l’activité des officiers et agents de police judiciaire*”, *Jurisclasseur Procédure pénale*, LexisNexis, 8 November 2018, para. 13. *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para 47 and footnote 84 referring to Jacques GUYÉNOT, “*Le pouvoir de révision et le droit d’évocation de la chambre d’accusation*”, *Revue de sciences criminelles et de Droit pénal comparé*, Tome XIX (1964), para. 3.

²¹⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 43 and footnote 76 referring to Statute of African Extraordinary Chambers within the Courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (“EAC Statute”), Art. 11(2). *See also* Code of Criminal Procedure (“CCP”) [Senegal], Art. 185.

²¹⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 43 and footnote 77 referring to *Loi n°15.003 portant création, organisation et fonctionnement de la cour pénale spéciale*, 5 June 2015, JORCA/ES n°05, Art. 12(1); *Loi n° 18.010 du 02 juillet 2018, portant règlement de procédure et de preuve devant la cour pénale spéciale de la République centrafricaine*, JORCA/ES N°5, 1 August 2018 (“Law No. 18-010 establishing the Rules of Procedure and Evidence of the Special Criminal Court of the Central African Republic”), Art. 107A (“*La Chambre d’accusation spéciale statue en Chambre du conseil sur les appels des ordonnances rendues par les Cabinets d’instruction*”).



upon its seisin of an appeal against a closing order, perform such intervention pursuant to Article 12 of the ECCC Agreement and Internal Rule 2, Internal Rules 67(5), 73(a), 74, 76(7) and 79(1), and Articles 55 and 261 of the Cambodian Code of Criminal Procedure. These two latter provisions define the jurisdiction of the Investigation Chamber within the Cambodian Court of Appeal, which plays an essential function at the pre-trial stage of proceedings in Cambodian law. In this regard, the International Judges recall that Article 261 of the Cambodian Code of Criminal Procedure provides that:

[e]very time it is seized, the Investigation Chamber shall examine the regularity and assure itself of the proper conduct of the proceedings. If the Investigation Chamber finds grounds for annulling all or part of the proceedings, it may, on its own motion, annul such proceedings. The Investigation Chamber shall act in compliance with Article 280 (Effect of Annulment) of this Code.²¹⁹

Relatedly, the Pre-Trial Chamber's jurisprudence has upheld the view that:

[t]he Investigation Chamber can be defined as an Appeal Court's Chamber [...] whose mission is not only to know about appeals against first instance jurisdiction's decisions, *i.e.* the investigating judges [...], but also to [...] monitor the regularity of investigations and to assume a supervisory role with the investigating judges, whose mistakes the Chamber shall remedy. In that sense, it may be considered as the high court for investigation.²²⁰

iii. Power to Undertake Supplementary Actions

130. The Pre-Trial Chamber has affirmed that upon its seisin of an appeal against the Co-Investigating Judges' closing order, the Chamber may also, pursuant to Article 12 of the ECCC Agreement and Internal Rule 2, Internal Rules 76(2), (3) and 7, and 79(1), and Article 55 of the Cambodian Code of Criminal Procedure,²²¹ undertake any actions that derive from the authority of the Cambodian Investigation Chamber, including investigative acts in seeking and ascertaining the truth.²²² Accordingly, the Pre-Trial Chamber has found that the Chamber's aforesaid review powers can be complemented

²¹⁹ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 40 and footnote 73.

²²⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 42 and footnote 75.

²²¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 39.

²²² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 47 and footnote 86 referring to Frédéric DESPORTES, Laurence LAZERGES, *Traité de procédure pénale* (Economica, Corpus, 3rd Edition, 2013), para. 2144.



by any supplementary acts that are required to complete the investigation,²²³ and/or by any acts that are necessary to correct procedural irregularities in the proceeding and/or implement the Chamber's own decisions – including, where appropriate, altering the closing order originally issued by the Co-Investigating Judges. The International Judges recall that similar investigative courts in other domestic inquisitorial legal systems are vested with comparable powers at the closing phase of the pre-trial stage of proceedings.²²⁴

d. Reminder of the Pre-Trial Chamber's Authority: the Office of the Co-Investigating Judges' Order to Seal and Archive Case 004/2

131. The International Judges note that after the Trial Chamber's Statement regarding Case 004/2²²⁵ and immediately following the Supreme Court Chamber's Decision terminating Case 004/2,²²⁶ the Co-Investigating Judges issued the "Order Sealing and Archiving Case File 004/2" ("Order to Seal and Archive"),²²⁷ in response to the "Request to Seal and Archive Case File 004/02" from the Co-Lawyers for AO An ("AO An Co-Lawyers' Request").²²⁸

132. At the outset, the International Judges recall that the Office of the Co-Investigating Judges can only be seised of a submission filed by the Office of the Co-Prosecutors.²²⁹ Further, the Office of the Co-Investigating Judges is *functus officio* immediately after the issuance of a closing order,²³⁰ except for the administrative functions explicitly set forth in the ECCC legal framework.²³¹ The International Judges

²²³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 48, footnote 89 referring to Henri ANGEVIN, Jean-Paul VALAT, "Chambre de l'instruction. – Pouvoirs de la chambre de l'instruction : révision, évocation, annulation. – supplément d'information. – décisions sur le fond", *Jurisclasseur Procédure pénale*, LexisNexis, 15 February 2019, para. 139.

²²⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 43.

²²⁵ ECCC Press Release, "Statement of the Judges of the Trial Chamber of the ECCC regarding Case 004/2 Involving AO An", 3 April 2020, <https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> (accessed 7 April 2021).

²²⁶ Case 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2 ("Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2)").

²²⁷ Case 004/2, Order Sealing and Archiving Case File 004/2, 14 August 2020, D363/3 ("Case 004/2 Order Sealing and Archiving Case File 004/2 (D363/3)").

²²⁸ Case 004/2, Request to Seal and Archive Case File 004/02, 17 March 2020, D363.

²²⁹ See Internal Rule 53(1).

²³⁰ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 33.

²³¹ For example, the Greffier of the Office of the Co-Investigating Judges must forward the case file to the Pre-Trial Chamber in cases of appeals against the closing order, see Internal Rule 69(1). Additionally, while the International Judges acknowledge the singular manner in which Case 004/2 was terminated, they nevertheless consider that the Co-Investigating Judges were misguided in basing their Order to Seal and Archive on Internal Rule 69(2)(b), even *mutatis mutandis*, considering the fact that multiple appeals



reiterate that the Pre-Trial Chamber, as the Cambodian Investigation Chamber of the ECCC and pursuant to Article 12(1) of the ECCC Agreement and Article 261 of the Cambodian Code of Criminal Procedure, is the final jurisdiction of the investigation,²³² including the jurisdiction over any request related to the pre-trial stage after the Office of the Co-Investigating Judges is unseised.²³³

133. The International Judge recall that by virtue of Article 12(2) of the Practice Direction on Classification and Management of Case-Related Information, “[t]he last judicial office seised of a case shall undertake a review of the security classification of records in the case file.” The International Judges find that the last judicial office seised of Case 004/2 being either the Pre-Trial Chamber or the Supreme Court Chamber, the Office of the Co-Investigating Judges was no longer seised of Case 004/2 following the issuance of their closing orders in that case, and therefore did not have the authority to issue decisions or orders regarding Case File 004/2, including the Order to Seal and Archive.

134. Accordingly, the International Judges find that the Office of the Co-Investigating Judges issued the Order to Seal and Archive Case 004/2 despite no longer having jurisdiction over the case.

2. Excessive Delay in the Issuance of the Closing Orders

135. The International Judges recall that Internal Rule 21(4) requires the proceedings be brought to a conclusion “within a reasonable time”. The International Judges of the Pre-Trial Chamber, the reviewing court at the investigation stage,²³⁴ consider that while the Internal Rules do not set out a specific deadline for issuing a closing order, the Co-Investigating Judges are nevertheless obliged to issue closing orders within a reasonable time, since this principle, with its counterpart in Article 35^{new} of the ECCC

had been filed against the Closing Orders in Case 004/2, *see* Case 004/2 Order Sealing and Archiving Case File 004/2 (D363/3), para. 9. The International Judges, therefore, find that this Rule could not have constituted the appropriate legal basis for this action, *mutatis mutandis*.

²³² Case 004/2, Decision on the Custody of the Office of the Co-Investigating Judges’ Disagreement Records and Other Documents Currently in the Custody of the Records and Archives Unit, 18 December 2019, D360/32, p. 2 *referring to* Case 001 Decision on Closing Order Appeal (D99/3/42), para. 41. *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 40; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22; Case 001, Decision on Appeal against Provisional Detention Order of KAINING Guek Eav *alias* “Duch”, 3 December 2009, C5/45, para. 7.

²³³ *See, e.g.*, Case 004/2 (PTC59), Decision on AO An’s Urgent Request for Redaction and Interim Measures, 5 September 2018, D360/3, paras 5, 13. *See also supra* paras 127-130.

²³⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 61.



Law, is a fundamental principle enshrined in Article 14(3)(c) of the ICCPR.²³⁵

136. The International Judges reaffirm the Pre-Trial Chamber's findings on the law concerning the delays in the issuance of closing orders in Cases 004/1 and 004/2,²³⁶ and accordingly examine the undue delay in the Co-Investigating Judges' conclusion of the judicial investigation in Case 003, the excessive delay in their issuance of the Closing Orders as well as the further delays in the proceedings of Case 003 that were precipitated by the separate issuance of two conflicting Closing Orders in only one of the working languages of the ECCC.

a. Delays in the Conclusion of the Investigation

137. The International Judges note that in this case, three notices of conclusion of judicial investigation under Internal Rule 66(1) were issued respectively on 29 April 2011 by the National and the International Co-Investigating Judges,²³⁷ 10 January 2017²³⁸ and 24 May 2017²³⁹ by the International Co-Investigating Judge alone with an arbitrary interpretation of Internal Rule 66(1) with respect to the 15-day period for the parties to request further investigative action after a notification of conclusion of investigation. The International Judges further observe that the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors on 25 July 2017,²⁴⁰ two months after the Second Rule 66(1) Notification that disposed of the last investigation request on 24 May 2017,²⁴¹ and not "immediately" in accordance with Internal Rule 66(4).

138. The International Judges recall that a judicial investigation is not a discretionary exercise.²⁴² Rather, the Co-Investigating Judges are required to operate in accordance with the applicable law and exercise their entrusted powers with caution.²⁴³ Article 23^{new} of the ECCC Law unambiguously dictates that the Co-Investigating Judges "shall

²³⁵ ICCPR, Art. 14(3)(c).

²³⁶ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 28-31; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 60-72.

²³⁷ See 2011 Rule 66(1) Notification (D13).

²³⁸ See First Rule 66(1) Notification (D225).

²³⁹ See Second Rule 66(1) Notification (D252).

²⁴⁰ Forwarding Order (D256).

²⁴¹ Second Rule 66(1) Notification (D252).

²⁴² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 68.

²⁴³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 49; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20.



follow existing procedures in force.”²⁴⁴ Therefore, the Co-Investigating Judges are obliged to conduct their judicial investigation within the ECCC legal framework in which the Pre-Trial Chamber situates as a reviewing court and duly contributes with its jurisprudence.

139. The International Judges further recall that the procedure of the Office of the Co-Investigating Judges shall be in accordance with Cambodian law pursuant to Article 12(1) of the ECCC Agreement,²⁴⁵ and reaffirm that the applicable law before the ECCC and the Cambodian Code of Criminal Procedure shall be strictly interpreted as instructed by Article 1 of that Code, which states that “[t]he purpose of the Code of Criminal Procedure is to set out the *rules to be observed and to apply rigorously* in order to clearly determine the existence of a criminal offense.”²⁴⁶

140. In this case, the International Judges firstly observe that the International Co-Investigating Judge was arbitrary in his compliance with Internal Rule 66(1) as he deprived the Parties of the 15-day period under the above-mentioned Rule by informing them in his Second Rule 66(1) Notification that no further opportunity to request investigative action would be afforded following the Notification,²⁴⁷ whereas in his First Rule 66(1) Notification, he extended the 15-day period to 30 days.²⁴⁸

141. In this regard, the International Judges reaffirm the right of the parties to adequate time to prepare by recalling that under Internal Rule 66(1), the period of 15 days during which the parties may request additional investigative action must apply after a notification of conclusion of the investigation “no matter whether the notification is the ‘first’, or a ‘second’ one issued after completion of supplementary investigations.”²⁴⁹ Furthermore, this provision clearly states that “*the parties shall have 15 (fifteen) days to request further investigative actions. They may waive such period.*”²⁵⁰ Accordingly, the International Judges consider that contrary to the International Co-Investigating Judge’s

²⁴⁴ In this respect, the Co-Investigating Judges are also expected to follow the interpretation the Pre-Trial Chamber gives of the law governing the investigation (*see, e.g.*, Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), footnote 163).

²⁴⁵ *See, e.g.*, Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 38.

²⁴⁶ Cambodian Code of Criminal Procedure, Art. 1 (emphasis added).

²⁴⁷ Second Rule 66(1) Notification (D252), paras 17, 19.

²⁴⁸ First Rule 66(1) Notification (D225), paras 4, 7.

²⁴⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 63; Case 004 Decision on Request for Adequate Preparation Time (D361/4/1/10), paras 23-27.

²⁵⁰ Internal Rule 66(1) (emphasis added).



furtive declaration in a footnote of his Closing Order,²⁵¹ the Co-Investigating Judges are without authority to determine or provide their consideration as to whether such period is necessary and that, consequently and more significantly, such period is not for the Co-Investigating Judges to “grant”.

142. Therefore, considering the Co-Investigating Judges’ fundamental obligation to ensure a balance between the expediency of the proceedings and the rights of the parties pursuant to Internal Rule 21, the International Judges find that the International Co-Investigating Judge did not comport with the ECCC legal framework²⁵² when depriving the Parties of the 15-day period that is explicitly prescribed under Internal Rule 66(1) to request further investigative action following the Second Rule 66(1) Notification.

143. Turning to the Co-Investigating Judges’ forwarding of the Case File, the International Judges recall that Internal Rule 66(4) reflects Article 246 of the Cambodian Code of Criminal Procedure, which instructs that the investigating judge shall forward the case file to the prosecution “[t]wo days” after the notification that the judicial investigation is terminated. The International Judges reaffirm that creation of a case file and the diligence in the communication of the procedure, *i.e.* the investigating judge’s timely preparation of the case file with this procedure duly in mind, is a legal requirement specific to the inquisitorial system and, while common to the hybrid jurisdictions of this type, one of the most extraordinary and singular characteristics of the ECCC, compared to other international tribunals.²⁵³

144. Accordingly, the International Judges find that the Co-Investigating Judges’ forwarding of the Case File to the Co-Prosecutors two months after the issuance of the Second Rule 66(1) Notification in this case constitutes an excessive delay.

²⁵¹ See Indictment (D267), footnote 22 (“I did not consider it necessary to grant the parties in case 003 a further 15 days to request investigation action in light of the PTC’s comments as I considered it unlikely that any party had suffered prejudice as a result of my not granting the further 15 days, and certainly not prejudice to the extent that would constitute an exceptional case warranting a reconsideration of my decision”).

²⁵² See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 65; Case 004 Decision on Request for Adequate Preparation Time (D361/4/1/10), para. 27. See also Case 004/2, Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 30 June 2020, D362/6 (“Case 004/2 Considerations on Civil Party Applicants Admissibility Appeal (D362/6)”), Opinion of Judges BAIK and BEAUVALLET, para. 110.

²⁵³ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 69.



b. Undue Delay in the Issuance of the Closing Orders

145. The International Co-Investigating Judge issued the Indictment on 28 November 2018, thereby terminating the investigation more than 18 months after having issued his Second Rule 66(1) Notification, which concluded the judicial investigation on 24 May 2017.²⁵⁴ The National Co-Investigating Judge issued the Dismissal Order on the same date of 28 November 2018 while considering that the judicial investigation was concluded on 29 April 2011. The International Judges will examine the legality of such interpretation in another section.²⁵⁵

146. The International Judges recall the Pre-Trial Chamber's previous finding in Cases 004/1 and 004/2 that periods of 18 and 16 months, respectively, for issuing the closing orders after the conclusion of the investigations were excessive, in comparison especially with the closing orders issued in Cases 001 and 002 within periods of three and eight months, respectively.²⁵⁶

147. Having given due consideration to the complexity of Case 003 and the volume of its record, compared with Cases 001, 002, 004/1 and 004/2, the International Judges find that the Co-Investigating Judges failed to issue the Closing Orders within a reasonable time in this case. Furthermore, the International Judges consider that the difficulties listed in the annexes to the Indictment²⁵⁷ fail to provide any justification for such delay since, *inter alia*, the issues concerning staff and translations²⁵⁸ were foreseeable from their previous experience in other Cases before the ECCC and thus the delays could have been mitigated.

c. Other Avoidable Delays

148. The International Judges find that the Co-Investigating Judges' separate issuance of two conflicting Closing Orders, each over 200 pages, in only one of the working languages of the ECCC²⁵⁹ is not only in violation of Article 7 of the Practice Directions

²⁵⁴ Second Rule 66(1) Notification (D252).

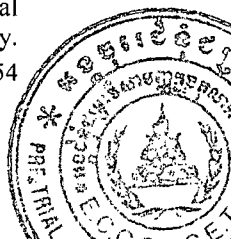
²⁵⁵ See *infra* paras 226-250.

²⁵⁶ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 30; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 71.

²⁵⁷ See Case 003, Completion Plan Chronology, Annex I to Indictment (D267), 28 November 2018, D267.1 ("Annex I to Indictment (D267.1)"); Case 003, Motions and Requests Filed with the [Co-Investigating Judges], Annex II to the Indictment (D267), 28 November 2018, D267.2.

²⁵⁸ See, e.g., Annex I to Indictment (D267.1), ERN (EN) 01596616, paras 25-26.

²⁵⁹ See *supra* para. 23. On 28 November 2018, the National Co-Investigating Judge issued the Dismissal Order in Khmer only, and the International Co-Investigating Judge issued the Indictment in English only.



on Filing of Documents before the ECCC,²⁶⁰ but more significantly, has instigated further undue delays in the whole proceedings of Case 003, which, in the International Judges' view, could have been avoided by strict adherence to the ECCC's legal framework.²⁶¹

d. Conclusion

149. In light of the foregoing, the International Judges find that the Co-Investigating Judges' conduct of the judicial investigation were at the origin of excessive and avoidable delays that depart from the ECCC legal framework.

3. Evidentiary Considerations

150. The Co-Investigating Judges have continued in Case 003 with their practice of devoting a chapter of their respective Closing Orders to "Evidentiary Considerations",²⁶² exposing their similar approach to evidence assessment.²⁶³ The Pre-Trial Chamber has previously rebuked such practice in Cases 004/1²⁶⁴ and 004/2²⁶⁵ as unnecessary and legally incorrect since this approach is not only contrary to the applicable legal framework and the established jurisprudence of the Court, but also in violation of the Co-Investigating Judges' duty to take into consideration all the evidence in the issuance of a closing order pursuant to Internal Rule 67. In this section, the International Judges examine whether the Co-Investigating Judges correctly stated the law governing (i) the evaluation of evidence, (ii) the standard of evidence and (iii) the estimation of the number of victims at the closing order stage of the ECCC's proceedings.

a. Evidentiary Evaluation

i. *Principle of Freedom of Evidence*

151. The International Judges recall that as a hybrid jurisdiction, the ECCC is guided

²⁶⁰ *Practice Directions on Filing of Documents before the ECCC*, ECCC/01/2007/Rev.8, as amended 7 March 2012, Art. 7.1. The International Judges note that for appeals against closing orders to be fully briefed, pursuant to Article 7.1, which states that "[a]ll documents shall be filed in Khmer as well as in English or French", all submissions on appeal, responses to those submission, and replies to those responses must be filed in both Khmer and either English or French.

²⁶¹ The International Judges recount these delays in detail in the Procedural History section of the present Considerations (*see supra* paras 1-36).

²⁶² *See* Indictment (D267), paras 118-148; Dismissal Order (D266), paras 354-359.

²⁶³ *See infra* paras 226-250 (for the considerations of the International Judges of the Pre-Trial Chamber on the evidentiary basis relied upon by the National Co-Investigating Judge to issue his Dismissal Order).

²⁶⁴ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 42.

²⁶⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 73.



by its Internal Rules, Cambodian law and international standards.²⁶⁶ The principle of freedom of evidence and, its corollary, the principle of the judge's personal conviction are enshrined in Article 321 of the Cambodian Code of Criminal Procedure and Internal Rule 87(1), which dictates that “[u]nless provided otherwise in these [Internal Rules], all evidence is admissible.”

152. Accordingly, the International Judges reaffirm that the gathering of evidence at the ECCC during the investigation stage is governed by the principle of freedom of evidence,²⁶⁷ which is peculiar to the civil law system.²⁶⁸ Consequently, subject to any annulment proceedings or express provisions to the contrary, all evidence is admissible and generally enjoys the same probative value at the pre-trial stage of the ECCC's proceedings.²⁶⁹

153. The International Judges further recall that Article 23^{new} of the ECCC Law, which instructs that “[t]he Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution”,²⁷⁰ excludes any subjective categorisation of evidence based on its provenance and indicates that all evidence, unless prescribed specifically by the law, enjoy the same legal presumption of probative value, if legally collected.²⁷¹ Other hybrid jurisdictions have also adopted a civil law model of criminal procedure with a similar evidentiary approach.²⁷²

²⁶⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 76. *See also* ECCC Agreement, Art. 12; Internal Rule 2.

²⁶⁷ *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 44; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 76. *See also* Case 004 (PTC51), Decision on [REDACTED]'s Application to Annul the Requests for and Use of Civil Parties' Supplementary Information and Associated Investigative Products in Case 004, 20 August 2018, D370/1/1/6 (“Case 004 Decision concerning the Use of Civil Parties' Information (D370/1/1/6)”), para. 17.

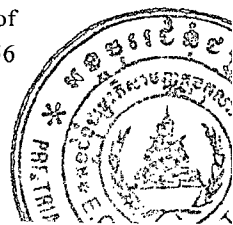
²⁶⁸ *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 44; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 76. *See also* L.G.D.J (ed.), *Droit du Cambodge* (Bibliothèque de l'Association Henri Capitant, 1st Edition, 2016), pp. 44-45; Jean PRADEL, *Procédure pénale* (Cujas, 13th Edition, 2006-2007), p. 364; Bernard BOULOC, *Procédure pénale* (Dalloz, 24th Edition, 2014), p. 121. *See also* Cambodian Code of Criminal Procedure, Art. 321; CCP [France] Art. 427; CCP [Senegal], Art. 414; CCP [Ivory Coast], Art. 418; CCP [Guinea], Art. 420; CCP [Mali], Art. 412.

²⁶⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 76 referring to Case 004 Decision concerning the Use of Civil Parties' Information (D370/1/1/6), para. 17.

²⁷⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 77.

²⁷¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 77.

²⁷² *See, e.g.*, Extraordinary African Chambers (“EAC”), *Prosecutor v. Habré et. al.*, Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d'Assises, Chambre d'instruction, 13 February 2015, D2819 (“*Habré* Closing Order (EAC)”), p. 6 (The Pre-Trial Chamber affirmed that freedom of evidence, as provided by Article 414 of the Senegalese Code of



154. In this case, the International Judges observe that despite the Pre-Trial Chamber's clarification of the relevant applicable law in Case 004/1 prior to the issuance of the Closing Orders in Case 003, both Co-Investigating Judges disregarded the principle of freedom of evidence in their evidentiary considerations and re-imposed the arbitrary and legally incorrect hierarchical classification of evidence, notably without any supporting legal provision in the applicable law before the ECCC.²⁷³ The Co-Investigating Judges formulated that the evidence collected or generated by their Office, such as the written records of witness interview ("WRI"), and the transcripts of trial proceedings obtained from other ECCC's cases, which were "prepared under judicial supervision and subject to specific legal and procedural safeguards", should be placed at the top of the hierarchy and entitled to a presumption of high reliability and probative value.²⁷⁴ In contrast, the Co-Investigating Judges categorised the evidence collected by other entities without judicial supervision, such as interviews conducted by the Co-Prosecutors during their preliminary investigations, certain Documentation Centre for Cambodia ("DC-Cam") reports or documents, civil party applications and victim complaints, as evidence that do not enjoy such presumption, and thereby granted them with lesser or no probative value at all and relied upon them only when corroborated by other sources.²⁷⁵ As a result, most evidence relied on by the Co-Investigating Judges in the Closing Orders consists of WRIs generated by their Office.²⁷⁶

155. The International Judges recall that "the entire Case File is under the judicial supervision of the Co-Investigating Judges, not only the evidence produced by their Office",²⁷⁷ and reaffirm that it is an error of law to make general assertions and predeterminations at the pre-trial stage as to the value of certain categories of evidence, thus creating a hierarchy of evidence based on the formal provenance, rather than the

Criminal Procedure, is applicable at the pre-trial stage); Law No. 18-010 establishing the Rules of Procedure and Evidence of the Special Criminal Court of the Central African Republic, Art. 161 ("The Court applies the general rules of evidence contained in the Rules and, in particular, the principle of freedom of evidence" (unofficial translation)).

²⁷³ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 42; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 73-74.

²⁷⁴ Indictment (D267), paras 118, 122; Dismissal Order (D266), para. 354.

²⁷⁵ Indictment (D267), paras 119-121; Dismissal Order (D266), paras 355-356.

²⁷⁶ Indictment (D267), para. 118; Dismissal Order (D266), para. 354.

²⁷⁷ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 50 and footnote 103 referring to Internal Rule 55(5); Cambodian Code of Criminal Procedure, Art. 127. See also Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 80.



substance, of the evidence.²⁷⁸ The International Judges remark that in light of Internal Rule 67, “the only relevant criterion for the evaluation of evidence” at the pre-trial stage, is “the impact that the substance of the evidence may have on the personal conviction of the Co-Investigating Judges regarding whether there is sufficient evidence for the charges.”²⁷⁹ Moreover, at the closing order stage of the ECCC’s proceedings, the sole duty of the Co-Investigating Judges, pursuant to Internal Rule 67, is to issue a closing order of indictment or dismissal, based on their assessment of the content of the evidence in the case file.²⁸⁰ In light of their obligation to take into consideration all the evidence in the case file,²⁸¹ the Co-Investigating Judges may not arbitrarily disregard or depreciate entire categories of evidence²⁸² before each individual piece of the evidence has been fully debated by the parties at the adversarial trial stage of proceedings.²⁸³

156. Accordingly, the International Judges find that in this case, both Co-Investigating Judges committed an error of law by readopting the hierarchical and formalistic categorisation of evidence based on its provenance, rather than its substance, which not only departs from their own prior practice²⁸⁴ and the Pre-Trial Chamber’s jurisprudence,²⁸⁵ but more importantly, is incorrect within the ECCC legal framework and unsubstantiated in the inquisitorial investigating legal system.

157. In addition, the International Judges recall that while the probative value of particular items of evidence in isolation may appear, *prima facie*, minimal, the very fact that they have some relevance means that they must be available for consideration.²⁸⁶

²⁷⁸ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 52; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 80.

²⁷⁹ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 52; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 80.

²⁸⁰ See Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 42; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 73.

²⁸¹ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 73.

²⁸² The International Judges note that the National Co-Investigating Judge’s disregard of entire portions of evidence validly placed in the Case File stems, in part, from his erroneous interpretation of the legal effects to be given to the re-opening of the judicial investigation ordered by the Reserve International Co-Investigating Judge on 2 December 2011. This issue will be addressed in the International Judges’ examination of Grounds B and C of the International Co-Prosecutor’s Appeal, *see infra* paras 226-250.

²⁸³ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 73.

²⁸⁴ See Case 001, Closing Order Indicting KAING Guek Eav *alias* Duch, 8 August 2008, D99 (“Case 001 Closing Order (D99)”); Case 002, Closing Order, 15 September 2010, D427 (“Case 002 Closing Order (D427)”); Case 002, Dismissal Order, 14 September 2010, D420.

²⁸⁵ See, e.g., Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 41-63; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 73-87.

²⁸⁶ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 53 and footnote 105 referring to Special Court for Sierra Leone (“SCSL”), *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Fofana – Appeal against Decision Refusing Bail, Appeals Chamber, 11 March 2005, para. 23; SCSL, *Prosecutor*



Indeed, a comprehensive review of all evidence in a case file may enable identification and analysis of, *inter alia*, patterns or contexts of crimes that are typical of mass criminality, which may, in turn, affect the initial probative value assessment of certain evidence by, for instance, corroboration. In this regard, the International Judges observe that the interviews conducted by the Co-Prosecutors, the civil party applications and the DC-Cam documents remain on the Case File 003 despite the Co-Investigating Judges' findings on their purportedly limited probative value, and consider that they may be fully taken into consideration at the trial stage.²⁸⁷

ii. Treatment of the Evidence Provided by the Victims

158. The International Judges consider that serious flaws of the Co-Investigating Judges' legally incorrect hierarchisation of evidence become manifest in the International Co-Investigating Judge's treatment of the evidence provided by the victims in this case. As briefly noted above, the International Co-Investigating Judge proclaimed in his Indictment that:

Civil party applications enjoy no presumption of reliability and have been afforded little, if any, probative value if the circumstances in which they were recorded are not known. Civil party applications and victim complaints offering only general conclusions and therefore representing a "common narrative" as opposed to personal experiences have been treated as insufficient to establish relevant facts. Out-of-court statements by civil parties, other than those taken by the [Office of the Co-Investigating Judges], have been afforded low probative value, while in-court civil party testimony has been assessed with caution.²⁸⁸

159. As a preliminary matter, the International Judges recall that victims and civil party applicants may have first-hand information about the facts relevant to the investigation before the ECCC.²⁸⁹ The credibility of their evidence, therefore, should be evaluated on a case-by-case basis,²⁹⁰ and not automatically be regarded as intrinsically unreliable.²⁹¹ The fact that they have a personal interest in the outcome of the case should

v. Sesay et al., SCSL-04-15-T, Ruling on GBAO Application to Exclude Evidence of Prosecution Witness Mr. KOKER, Trial Chamber, 23 May 2005, para. 9. *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 82.

²⁸⁷ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 48; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 82.

²⁸⁸ Indictment (D267), para. 121 (footnotes and emphasis omitted).

²⁸⁹ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 55; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 81.

²⁹⁰ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 55; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 81.

²⁹¹ *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 81.



not lead to the assumption that their evidence is less credible.²⁹² The International Judges reaffirm that the Co-Investigating Judges' such hierarchisation limits the effectiveness of the victims' right of access to the courts²⁹³ and is contrary to Article 137 of the Cambodian Code of Criminal Procedure, which explicitly states that there is no formal requirement for the civil party to intervene at the investigation stage.²⁹⁴

160. The International Judges accordingly consider that the International Co-Investigating Judge's formalistic approach of denying *prima facie* the presumption of reliability for civil party applications and vesting them with less weight than other evidence collected by their Office is not only legally incorrect within the ECCC legal framework, but also practically unsound and inappropriate under Internal Rule 21(4) as the Co-Investigating Judges would be bound to interview each civil party applicant individually in order to ensure probative value and safeguard the victims' access to the ECCC,²⁹⁵ creating delays in the proceedings.

161. Therefore, the International Judges find that the International Co-Investigating Judge adopted a flawed legal reasoning by re-imposing the formalistic hierarchisation of evidence with respect to the evidence proffered by the victims in this case.

b. Standard of Evidence

162. The International Judges observe that in the Indictment, the International Co-Investigating Judge declared, without elaboration, that "the standard of proof for a decision on an indictment is one of probability",²⁹⁶ and relied on the jurisprudence of the Trial Chamber and the Supreme Court Chamber to establish principles for the evaluation of the evidence.²⁹⁷ The International Judges further remark the notable absence in the National Co-Investigating Judge's Dismissal Order of judicial discourse on the standard

²⁹² Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 55; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 81.

²⁹³ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 56; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 81.

²⁹⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 81. *See also* Case 004/2 Considerations on Civil Party Applicants Admissibility Appeal (D362/6), paras 31-38 (providing only the legal requirement for the admissibility of a civil party application).

²⁹⁵ *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 55; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 81.

²⁹⁶ Indictment (D267), para. 30 *referring to* Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3 ("Case 004/1 Closing Order Reasons (D308/3)"), para. 2 *referring to, inter alia*, Case 002 Closing Order (D427), paras 1323-1326.

²⁹⁷ Indictment (D267), paras 118-129.



of proof for a decision of dismissal.

163. The International Judges recall that the nature of the decision and the stage of the proceedings affect the standard of evidence.²⁹⁸ While Internal Rule 67 dictates that the test for the Co-Investigating Judges' issuance of closing orders is the existence of "sufficient evidence [...] of the charges",²⁹⁹ the Trial Chamber and the Supreme Court Chamber, for entering and affirming conviction, are bound by the standard of "beyond a reasonable doubt",³⁰⁰ which is distinct from and higher than that of "sufficient evidence" applied at the pre-trial stage of the proceedings.³⁰¹

164. Concerning the determination of "sufficient charges", the International Judges observe the different terminologies used in Cases 001, 002, 003, 004/1 and 004/2,³⁰² and note that in this case, the International Co-Investigating Judge readopted the "probability standard" from the Closing Order in Case 002:³⁰³

While it is obviously not required at this stage to ascertain the guilt of the Charged Person (given that only the Trial Chamber has such jurisdiction), it is clear that "*probability*" of guilt is necessary (i.e. more than a mere possibility). Accordingly, the assessment of the charges at this stage must not be confused with the "*beyond a reasonable doubt*" standard at the trial stage, yet the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.³⁰⁴

165. While there is no provision in the applicable law before the ECCC that specifically provides the standard of proof for the determination of "sufficient charges" under Internal Rule 67 and the notion of "sufficient charges" that the Co-Investigating Judges must consider to indict or dismiss a case is difficult to objectify, the International Judges recall that "the legal standards required for a decision progress incrementally throughout the judicial proceedings "from a 'mere possibility' to a 'probability' or

²⁹⁸ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 84. See also Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 61.

²⁹⁹ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 61; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 84.

³⁰⁰ See Internal Rules 87(1), 104*bis*.

³⁰¹ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 61-62; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 84.

³⁰² See Case 001 Closing Order (D99), para. 130 ("sufficient evidence"); Case 002 Closing Order (D427), para. 1323 ("probability of guilt"); Indictment (D267), para. 30 ("probability"); Case 004/1 Closing Order Reasons (D308/3), para. 2 ("probability standard"); Case 004/2, Closing Order (Indictment), 16 August 2018, D360 ("Case 004/2 Indictment (D360)") (no standard specified).

³⁰³ Indictment (D267), para. 30 referring to Case 004/1 Closing Order Reasons (D308/3), para. 2 referring to Case 002 Closing Order (D427), paras 1323-1326.

³⁰⁴ Case 002 Closing Order (D427), para. 1323 (footnotes omitted) (emphasis added).



‘plausibility’ of guilt during the investigation, to evidence of such guilt beyond reasonable doubt at the trial stage.”³⁰⁵ In this regard, the International Judges note the interpretation of the Co-Investigating Judges of the Extraordinary African Chambers in similar circumstances that, although it is necessary at the pre-trial stage to have more than mere *indicia* or suspicion to send a person to trial, the evidence gathered does not yet need to assert guilt with certainty.³⁰⁶ This interpretation comports with the Pre-Trial Chamber’s consistent jurisprudence that the standard of “sufficient charges” for the issuance of a closing order corresponds *a minima* to the requirement of “clear and consistent evidence”, indicating that a person may be criminally responsible for the commission of a crime, for charging a suspect pursuant to Internal Rule 55(4).³⁰⁷ Accordingly, the International Judges reiterate that this standard is applicable to the instant case.

c. Number of Victims

166. The International Judges note that the International Co-Investigating Judge, in the Indictment, sought to establish an accurate and precise number of victims at each crime site and event under investigation while providing detailed formulation of his methodology³⁰⁸ by which he “conservatively” adopted the “minimum number of victims” with admission that “the actual victim numbers are very likely to be much higher than” his estimation.³⁰⁹

167. While the International Judges observe that the Co-Investigating Judges have a duty to ascertain the truth, they also acknowledge that the passage of time and the objective difficulty to quantify casualties constitute obstacles to the determination of precise numbers of victims. The International Judges reiterate that bearing in mind the evidentiary standard applicable at the ECCC’s pre-trial stage of the proceedings, while the number of victims is one of the elements taken into account to assess the gravity of the crimes in determining the ECCC’s personal jurisdiction,³¹⁰ it is unnecessary for the

³⁰⁵ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 62; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 85.

³⁰⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 85 referring to *Habré* Closing Order (EAC), p. 5.

³⁰⁷ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 62; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 85.

³⁰⁸ Indictment (D267), paras 132-145.

³⁰⁹ Indictment (D267), para. 133.

³¹⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 86.



Co-Investigating Judges to determine a precise number of victims and to detail a method to this effect.³¹¹ Further, the International Judges recall that it may be impractical and artificial to insist on a high degree of specificity in cases of mass crimes. The uncertainty regarding the exact number of victims does not preclude the conclusion that the crimes within the ECCC's jurisdiction were committed at a concrete place and at a concrete point in time.³¹²

168. Accordingly, the International Judges reaffirm that for the purpose of ascertaining the ECCC's personal jurisdiction at the pre-trial stage, a "reasonable estimate" of the victim numbers or the reference to "many killings" suffices and is more appropriate.³¹³

d. Conclusion

169. In light of the foregoing, the International Judges find that the Co-Investigating Judges' hierarchical approach to evidence in this case departs from the jurisprudence of the Pre-Trial Chamber concerning the applicable law governing the pre-trial stage of ECCC's proceedings and does not comport with the ECCC legal framework.

4. The ECCC's Position in the Cambodian Judicial System and the Effects of Its Decision Finding Lack of Personal Jurisdiction

170. The International Judges reaffirm that while the ECCC exists within the Cambodian legal system in which it exercises exclusive jurisdiction at the trial stage and no referral to another court is possible,³¹⁴ the applicable law before the ECCC does not preclude national jurisdiction and the ordinary Cambodian courts inherently have full jurisdiction over matters of criminal justice.³¹⁵ Accordingly, the International Judges find that the Cambodian judicial authorities are not legally barred from pursuing justice

³¹¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 86; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 214.

³¹² Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 214; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 86.

³¹³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 86 referring to ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber II, 31 July 2003 ("*Stakić* Trial Judgment (ICTY)"), para. 201.

³¹⁴ Case 001 Appeal Judgment (F28), para. 71.

³¹⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 59; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 79.



for the Khmer Rouge-era cases that had not been referred to or have been found not to be within the ECCC's exclusive jurisdiction.³¹⁶

171. In this regard, the International Judges firstly note that a dismissal order on the basis of lack of personal jurisdiction does not rule on whether there is sufficient evidence against the charged person(s), within the meaning of Internal Rule 67(3)(c). Consequently, while such order terminates the proceedings against the charged person(s) before the ECCC, it is not a judicial determination on the criminal charges and thus differs from an acquittal of the charged person(s) or a dismissal of the case based on the findings on the charges.³¹⁷ This specific characteristic of the dismissal order on the basis of lack of personal jurisdiction can be gleaned from the jurisprudence of the ECCC. In the Cases 004/1,³¹⁸ 004/2³¹⁹ and 003,³²⁰ where some Judges found that the charged persons did not fall within the Court's personal jurisdiction, the International Judges observe the notable absence of holdings establishing that the alleged crimes had not been

³¹⁶ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 79 and Disposition p. 27. *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 58-59; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 340 (A jurisdictional decision "must not prevent the serious allegations [against the charged person] from being addressed before a national court, since Cambodia has inherent jurisdiction over all Khmer Rouge-era cases of which the ECCC is not or cannot be seised" (footnote omitted)).

³¹⁷ Established case-law of the French Court of Criminal Cassation. *See, e.g.*, French Court of Criminal Cassation, 6 February 1885, ("An order of the Investigating Judge only has the character of a dismissal order and can only produce the effect of it provided the nefarious act does not constitute a crime, an offence or an infraction, or there is no charge against the accused" (unofficial translation)). *See also* French Court of Criminal Cassation, 23 June 1992, n° 92-81.460 ("[A]rticle 177 of the Code of Criminal Procedure only authorises the Investigating Judge to render a dismissal order provided the nefarious act does not constitute a crime, an offence or an infraction, or there is no charge against the accused; that the principle of *res judicata* is only valid for such an order; and that on the other hand, the decision of the Investigating Judge cannot present the characteristics of a dismissal order, nor produce its effects, when the Investigating Judge, under the pretext of a dismissal on the one hand, and the referral to the correctional court on the other, in reality, proceeded with a re-characterisation" (unofficial translation)).

³¹⁸ Case 004/1, Case 004/1 Closing Order Reasons (D308/3), paras 306-311; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 82-92.

³¹⁹ Case 004/2, Order Dismissing the Case against AO An, 16 August 2018, D359 ("Case 004/2 Dismissal Order (D359)"), paras 497 ("Evidence shows that AO An might also have been involved in giving orders to arrest and execute a small number of people"), 498 ("Concerning the treatment of Cham people, evidence shows that AO An participated in leading the dissemination of the policy targeting the Cham people, continued implementing orders by instructing the district level to collect data on Cham people and to follow up work progress through the reporting regime, and received reports back from lower ranks"), 500 ("[w]ith regard to forced marriage, AO An participated in and coordinated forced marriages within Sector 41"); Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges PRAK, NEY and HUOT, para. 280 ("AO An's participation in the commission of crimes was non-autonomous, inactive, non-creative, and indirect").

³²⁰ *See, e.g.*, Dismissal Order (D266), paras 313-314 (MEAS Muth reported the shooting of a Vietnamese boat in Koh Kyâng, the capture of a Siamese boat with 21 people on board at Koh Wai and two Vietnamese boats with 76 people on board at Koh Tang to SON Sen. MEAS Muth also reported the capture and arrest of 120 Vietnamese and the seizure of boats and weapons and the exchange of Thai fishermen to the upper echelons (footnotes omitted)).



committed, or that the facts under investigation were, at least in part, not attributable to the charged persons.

172. The International Judges recall that the ordinary national courts of Cambodia have inherent and full jurisdiction over all Khmer Rouge-era cases of which the ECCC is not or cannot be seised, and thus consider that the crimes that the perpetrators with Cambodian nationality committed on Cambodian soil to the detriment of Cambodian victims fall within the jurisdiction of the national courts.³²¹ Consequently, the International Judges find that when a Khmer Rouge-era case is no longer under the seisin and the jurisdiction of the ECCC, it is the responsibility of the national courts to continue the pursuit of criminal justice by exercising their full jurisdiction and adjudicating on the facts and the law of these cases. In other words, a decision finding lack of the ECCC's jurisdiction does not terminate the criminal proceedings within the Cambodian legal system. Rather, it allows the proceedings to be redirected and brought before the competent Cambodian judicial authorities,³²² with full jurisdiction over those crimes so heinous that are not subject to statutory limitations.³²³ Additionally, the International Judges observe that other avenues are conceivable; among others, passive personal jurisdiction may enable other competent foreign courts to adjudicate over all or part of the facts and seek legal assistance from the ECCC.³²⁴

³²¹ See, e.g., Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 340. See also *Letters dated 15 March 1999 from the Secretary-General Kofi ANNAN to the President of the General Assembly and the President of the Security Council concerning the Report of the Group of Experts for the Crimes Committed in Cambodia under the Khmer Rouge*, 16 March 1999, UN Doc. A/53/850, S/1999/231 (“At a meeting I held on 2 March with the Minister for Foreign Affairs and International Cooperation of Cambodia, Hor Namhong, he conveyed to me his Government’s view that on the basis of Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 33 of the Cambodian Constitution, the Cambodian courts were fully competent to conduct any such trial. He recalled that the criminals are Cambodians, the victims were Cambodians and the crimes were committed in Cambodia”).

³²² See, e.g., Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 340. See also CCP (France), Art. 469(1) (“If the fact referred to the correctional court as an offense is of such a nature as to result in a criminal sentence, *the court shall refer the matter back to the Public Prosecutor’s Office for it to seise the appropriate court*” (unofficial translation and emphasis added)). See also Danièle CARON, “Fasc. 20 : TRIBUNAL CORRECTIONNEL. – Jugement. – Détention provisoire. Compétence. – Ajournement, dispense et exemption de peine. Relaxe”, *Jurisclasseur Procédure Pénale*, 16 May 2019, para. 43.

³²³ See, e.g., Cambodian Code of Criminal Procedure, Art. 9.

³²⁴ The jurisdiction of the EAC was governed by criteria identical to those applicable to the ECCC, see EAC Statute, Art. 3 (giving the EAC the jurisdiction to “prosecute and punish the perpetrator(s) of crimes and serious violations of international law, international custom and international conventions ratified by Chad, committed on Chadian territory” during the Habré regime). In July 2013, the EAC Prosecutor requested the indictment of Habré and five other officials in his administration, see EAC, *Ministère Public v. Habré*, Judgement, 30 May 2016, para. 61. The Chadian authorities refused to extradite two of them



173. The International Judges note that no provision in the ECCC's applicable law prevents the Office of the Co-Prosecutors or one of the Co-Prosecutors, either the National or the International Co-Prosecutor, from seising the ordinary national courts of Cambodia.³²⁵ Therefore, the International Judges find that the Cambodian national authorities' prosecution and adjudication of the Khmer Rouge-era crimes that were found to be outside the ECCC's jurisdiction may be initiated not only by a national prosecutor of Cambodia, but also by the Office of the Co-Prosecutors of the ECCC.

174. Assuming the legality and the legitimacy of a decision determining lack of the Court's personal jurisdiction, the International Judges recall the integrated nature and position of the ECCC within the Cambodian legal system, and thus find that the Prosecution, both of the ECCC and of Cambodia, bears the responsibility to proceed with the prosecution beyond the ECCC in order to bring justice over these heinous crimes.³²⁶

175. However, in practice, the International Judges observe that neither before nor after the creation of the ECCC, aside from the *in absentia* trial of POL Pot and IENG Sary held in 1979 at the People's Revolutionary Tribunal, which was established in Cambodia in 1979 under the jurisdiction of the People's Republic of Kampuchea and staffed by both Cambodian and international lawyers,³²⁷ no criminal proceedings have been brought and conducted solely by the Cambodian judicial authorities against the perpetrators of the Khmer Rouge-era crimes committed in the name of Democratic Kampuchea.³²⁸ Moreover, the International Judges note that despite the factual findings

(the other three were apparently subject to an arrest warrant). These two individuals, initially prosecuted before a hybrid court, were finally tried before the competent national court, *see* Court of Appeal of N'Djamena (Chad), *Ministère Public et. al. v. Saleh Younous Ali, Warou Fadil Ali et. al.*, Judgement, 25 March 2015, Directory 1/15. *See also* French Court of Criminal Cassation, 21 January 2009, n° 07-88.330 (recognising the jurisdiction of French courts over acts committed in Phnom Penh in April 1975).

³²⁵ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 76 and footnote 147. *See* ECCC Agreement, Art. 6(5) (regarding the nomination of the International Co-Prosecutor).

³²⁶ Cambodian Code of Criminal Procedure, Art. 290(6) applied *mutatis mutandis* to the objections relating to the personal jurisdiction of the court ("If the court which receives the complaint finds that it does not have territorial jurisdiction, the court shall declare by judgment that it has no territorial jurisdiction and shall order referring the dossier to a prosecutor so that the prosecutor delivers the dossier to the court that has territorial jurisdiction. Eventually, the court shall decide to continue detaining or placing under judicial control the accused person").

³²⁷ *See Judgement of the Revolutionary People's Tribunal Held in Phnom Penh from 15 to 19 August 1979*, UN Doc. A/34/491, 20 September 1979.

³²⁸ Suzannah LINTON, "Putting Cambodia's Extraordinary Chambers into context", *Singapore Year Book of International Law* (2007), pp. 195-259, *see* specifically p. 215 ("Although the 1994 Law Outlawing the Khmer Rouge/CPK suggests that there was a plan to prosecute low ranking cadre, there is nothing to indicate that the authorities ever had a concrete accountability strategy, let alone one involving



of the National and the International Co-Investigating Judges against IM Chaem in Case 004/1,³²⁹ the national prosecution of Cambodia has not initiated any criminal proceedings against her, to date.

176. Given the magnitude and the gravity of the charged crimes, the International Judges consider that in the current circumstances, the national judicial authorities shall assume their responsibilities by prosecuting and exercising their full jurisdiction over the cases that the ECCC has been found incompetent on the basis of lack of personal jurisdiction.

B. MERITS

177. The International Judges will now review the merits of the two admissible appeals.

1. The National Co-Prosecutor's Appeal

a. Submissions

178. The National Co-Prosecutor appeals against the International Co-Investigating Judge's Indictment,³³⁰ which found MEAS Muth within the ECCC's personal jurisdiction as one of those "most responsible" for Democratic Kampuchea ("DK")-era crimes, and requests the Pre-Trial Chamber to dismiss the case against MEAS Muth as the ECCC has no jurisdiction over him.³³¹

179. In the Appeal against the Indictment, the National Co-Prosecutor firstly presents the relevant facts and law of the Case,³³² and provides her "viewpoint" that (i) MEAS Muth is "free of liability"³³³ and that (ii) he does not fall within the ECCC

courts of law or an informal accountability process according to which unrepentant Khmer Rouge would be punished *en masse*"). See also Tom FAWTHROP and Helen JARVIS, *Getting away with Genocide*, (Pluto Press, 2004); LY Sok-Kheang, "Reconciliation Process in Cambodia: 1979-2007 Before the Khmer Rouge Tribunal", Documentation Center of Cambodia, Documentation Serie n°24 (2017); John HALL, "In the Shadow of the Khmer Rouge tribunal: The Domestic Trials of Nuon Paet, Chhouk Rin and Sam Bith, and the Search of Judicial Legitimacy in Cambodia", *Columbia Journal of Asian Law* (2006), pp. 235-297; Toshihiro ABE (ed.), *The Khmer Rouge Trials in Context*, (Silkworm, 2019). See also Case 004/2 Dismissal Order (D359), para. 448.

³²⁹ See Case 004/1 Closing Order Reasons (D308/3), paras 306-311; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 82-92.

³³⁰ National Co-Prosecutor's Appeal (D267/3), para. 6.

³³¹ National Co-Prosecutor's Appeal (D267/3), para. 75.

³³² National Co-Prosecutor's Appeal (D267/3), paras 14-55.

³³³ National Co-Prosecutor's Appeal (D267/3), paras 56-60, 74.



personal jurisdiction (“non-applicability of personal jurisdiction”).³³⁴ The National Co-Prosecutor, in response to the Pre-Trial Chamber Judges’ question at the Hearing, further clarified that the specific error alleged through her Appeal is the International Co-Investigating Judge’s finding that MEAS Muth falls within the ECCC’s personal jurisdiction, which constitutes an error of law.³³⁵

180. More specifically, the National Co-Prosecutor firstly argues that MEAS Muth is free from liability as he merely followed the Standing and Central Committees’ policies and decisions.³³⁶ In this regard, the National Co-Prosecutor submits that the most influential institution of the DK leadership was the Central Committee of the Communist Party of Kampuchea (“CPK”), which took “major decisions”,³³⁷ while the Standing Committee had authority over decision-making and played a “key role” in the day-to-day leadership on behalf of the Central Committee.³³⁸ She adds that the purge policy, reflected in the Central Committee’s 30 March 1976 decision, provided that purges at the zone level were to be decided by the Zone Standing Committee.³³⁹ This policy required cadres to follow or otherwise, they were to be purged.³⁴⁰ Such suppression allegedly began with the arrests of a number of zone leaders to be executed at S-21 Security Centre,³⁴¹ became widespread across the country, notably after 30 June 1976, and coincided with the wide use of the word “enemies” whose meaning was broadened.³⁴² She contends that when someone was accused of being an enemy, he or she was killed.³⁴³

181. The National Co-Prosecutor secondly submits that MEAS Muth does not fall within the ECCC’s personal jurisdiction as stated in Article 1 of the ECCC Law because he was neither a senior leader nor one of those most responsible in accordance with the determination of the Royal Government of Cambodia and the spirit of the ECCC Law, which require the Court to bring to investigation and trial only senior leaders and those

³³⁴ National Co-Prosecutor’s Appeal (D267/3), paras 61-74.

³³⁵ 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D267/23.2), at ERN (EN) 01639983-01639984, pp. 12:08-13:04.

³³⁶ National Co-Prosecutor’s Appeal (D267/3), paras 56-60.

³³⁷ National Co-Prosecutor’s Appeal (D267/3), para. 57.

³³⁸ National Co-Prosecutor’s Appeal (D267/3), para. 57.

³³⁹ National Co-Prosecutor’s Appeal (D267/3), para. 56.

³⁴⁰ National Co-Prosecutor’s Appeal (D267/3), para. 59.

³⁴¹ National Co-Prosecutor’s Appeal (D267/3), para. 59.

³⁴² National Co-Prosecutor’s Appeal (D267/3), para. 60.

³⁴³ National Co-Prosecutor’s Appeal (D267/3), para. 60.



most responsible during the DK period.³⁴⁴ More specifically, the National Co-Prosecutor argues that the ECCC, like the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”), is not a permanent court,³⁴⁵ and that “a restriction on the scope of the personal jurisdiction” is a “method acceptable” for terminating the ECCC mandate.³⁴⁶ She adds that as a “founder of the [ECCC Agreement]”, the Royal Government of Cambodia – which is purportedly “playing a role as the UN Security Council did with the ICTY, ICTR and SCSL”³⁴⁷ – may have an influence on, *inter alia*, the termination of the ECCC mandate.³⁴⁸ She avers that the “influence on the scope of personal jurisdiction and judicial affairs” that “founders of international tribunals” may have is “without prejudice to [the] impartiality and independence of [such] tribunals”.³⁴⁹ On this basis, she articulates Cambodian Government’s understanding of the terms “senior leaders”³⁵⁰ and “those who were most responsible”³⁵¹ – which delineate the ECCC’s personal jurisdiction – and urges the Pre-Trial Chamber “to act in line with the [Cambodian Government’s] determination” of the ECCC’s personal jurisdiction.³⁵²

182. In this regard, the National Co-Prosecutor further argues that with the United Nations’ recognition that a balance must be struck “between ‘justice’ and ‘national reconciliation’”, by signing the ECCC Agreement in which the Preamble refers to the “legitimate concern” of the Cambodian Government and Cambodian people “in the pursuit of justice and national reconciliation, stability, peace, and security”,³⁵³ the ECCC Agreement and ECCC Law aim at only two categories of perpetrators – “senior leaders” and “those who were most responsible” – to be brought to trial for Khmer Rouges crimes.³⁵⁴

³⁴⁴ National Co-Prosecutor’s Appeal (D267/3), paras 61-74.

³⁴⁵ National Co-Prosecutor’s Appeal (D267/3), para. 61.

³⁴⁶ National Co-Prosecutor’s Appeal (D267/3), paras 63, 67.

³⁴⁷ National Co-Prosecutor’s Appeal (D267/3), para. 67. *See also* National Co-Prosecutor’s Appeal (D267/3), para. 64.

³⁴⁸ National Co-Prosecutor’s Appeal (D267/3), paras 63, 67.

³⁴⁹ National Co-Prosecutor’s Appeal (D267/3), para. 67.

³⁵⁰ Understood as covering only the small number of individuals who were members of the Central and Standing committees, *see* National Co-Prosecutor’s Appeal (D267/3), para. 68.

³⁵¹ Understood as referring only to KAING Guek Eav *alias* Duch, the S-21 Chairman, *see* National Co-Prosecutor’s Appeal (D267/3), paras 68-70.

³⁵² National Co-Prosecutor’s Appeal (D267/3), para. 67. *See also* National Co-Prosecutor’s Appeal (D267/3), paras 68-73.

³⁵³ National Co-Prosecutor’s Appeal (D267/3), para. 71.

³⁵⁴ National Co-Prosecutor’s Appeal (D267/3), para. 72.



183. Lastly, the National Co-Prosecutor submits that “[e]xpanding the scope of [the ECCC’s] personal jurisdiction over MEAS Muth beyond the scope of [...] Cases 001 and 002 will lengthen the time and spend money unnecessarily”.³⁵⁵ She contends that “as regards the number of victims who lost their lives in the DK regime and the suffering of surviving victims, justice has been brought to them through the trial of Cases 001 and 002”³⁵⁶ since these two cases are “a complete representation” of the scope of crimes committed in the context of the DK regime and ECCC’s mandate.³⁵⁷

184. In the Response, the International Co-Prosecutor submits that the National Co-Prosecutor’s Appeal presents arguments that do not meet the standard of appellate review³⁵⁸ and/or that are unpersuasive,³⁵⁹ and requests the Pre-Trial Chamber to dismiss the Appeal; uphold the International Co-Investigating Judge’s finding that MEAS Muth falls within the ECCC’s personal jurisdiction as one of those “most responsible” for DK-era crimes; and send the case against him to trial based on the Indictment.³⁶⁰

185. The International Co-Prosecutor firstly submits that the National Co-Prosecutor’s Appeal does not meet the standard of appellate review because it does not raise any discernible grounds of appeal that articulate legal and/or factual errors in the Indictment, explaining why such errors invalidate the Indictment and/or occasion a miscarriage of justice, and/or how the International Co-Investigating Judge abused his discretion in issuing the Indictment.³⁶¹ She stresses that the Appeal does not contain arguments with respect to why the International Co-Investigating Judge erred in coming to his factual and legal conclusions.³⁶² She adds that the factual assertions made by the National Co-Prosecutor regarding MEAS Muth’s role and authority only seek to suggest another interpretation of the evidence.³⁶³

186. The International Co-Prosecutor further submits that the National

³⁵⁵ National Co-Prosecutor’s Appeal (D267/3), para. 73.

³⁵⁶ National Co-Prosecutor’s Appeal (D267/3), para. 73.

³⁵⁷ 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D267/23.2), at ERN (EN) 01640007, p. 36:09-36:13.

³⁵⁸ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), paras 4, 5-14.

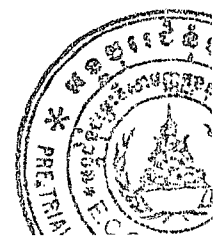
³⁵⁹ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), paras 4, 15-41.

³⁶⁰ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), para. 42.

³⁶¹ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), paras 4-6.

³⁶² International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), paras 7, 13.

³⁶³ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), para. 7.



Co-Prosecutor's legal contentions regarding the scope of the ECCC's personal jurisdiction are unpersuasive.³⁶⁴ On this basis, she contends that the National Co-Prosecutor fails to discharge her burden on appeal and that the Pre-Trial Chamber may consequently summarily dismiss the Appeal.³⁶⁵

187. Concerning the National Co-Prosecutor's "incorrect arguments" on the scope of the ECCC's personal jurisdiction, while the International Co-Prosecutor admits that the ECCC Agreement and ECCC Law limit the ECCC's personal jurisdiction to "senior leaders" and "those who were most responsible" for DK-era crimes,³⁶⁶ and that the issue of the number of persons to be tried by the ECCC was highly debated before the passing of the ECCC Law by the Cambodian National Assembly,³⁶⁷ she contends that the National Co-Prosecutor's understanding of "those who were most responsible" is not supported by textual interpretation;³⁶⁸ is contradicted by statements of Cambodian Government's officials;³⁶⁹ and departs from the United Nations' understanding of this category of perpetrators.³⁷⁰ She further argues that the ECCC negotiating history shows that both the Cambodian Government and the United Nations intended that the term "most responsible" remain an open category to be judicially determined.³⁷¹ She notes that such an understanding has been confirmed by the Supreme Court Chamber in Case 001 and supported by the National Co-Investigating Judge in Cases 003, 004/1 and 004/2.³⁷²

188. Regarding the National Co-Prosecutor's "inapt analogy" of the role of the Cambodian Government and that of the Security Council with the ICTY, ICTR and SCSL,³⁷³ the International Co-Prosecutor notes that the ECCC Agreement was approved by both the United Nations and the Royal Government of Cambodia following negotiations in which these parties were equal participants,³⁷⁴ and that Article 2(3) of

³⁶⁴ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 15-41.

³⁶⁵ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 6-7, 13 and footnotes 13-14, 17-19, 44.

³⁶⁶ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 16.

³⁶⁷ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 19.

³⁶⁸ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 16-17.

³⁶⁹ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 16, 18-19, 22-23.

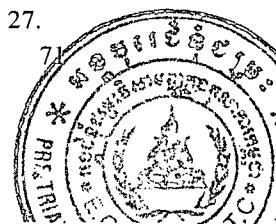
³⁷⁰ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 16, 20-23.

³⁷¹ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 23.

³⁷² International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 23.

³⁷³ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 24-26.

³⁷⁴ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 27.



the ECCC Agreement makes it clear that any amendment to the ECCC Law must be preceded by consultations between the two parties and approved by them both.³⁷⁵ Accordingly, she contends that neither the Cambodian Government nor the United Nations can unilaterally amend the ECCC Agreement. To date, the International Co-Prosecutor observes, neither has sought to either withdraw from the ECCC Agreement or amend the provisions of the ECCC Law regarding the ECCC's jurisdiction.³⁷⁶ She adds that the completion plans of the ICTY and the ICTR in no way altered the obligation to investigate and try the crimes within these tribunals' jurisdictions.³⁷⁷ Further, she points out that the Security Council respected the judicial independence of the *ad hoc* tribunals by never expressing any views on the disposition of the ICTY and the ICTR cases.³⁷⁸ In this respect, she notes that the requirement for an independent judiciary is enshrined in Article 3(3) of the ECCC Agreement and Article 10*new* of the ECCC Law, which stipulate that ECCC judges must be independent in the performance of their functions and must not accept instructions from governments or other outside sources,³⁷⁹ and is reflected in the Cambodian Constitution,³⁸⁰ several international instruments,³⁸¹ and rule of law principles governing the separation between the executive, legislative, and judiciary.³⁸²

189. Lastly, with respect to the National Co-Prosecutor's "unpersuasive claim" concerning national reconciliation and justice brought by Cases 001 and 002,³⁸³ the International Co-Prosecutor argues that accountability and reconciliation are in fact complementary and key in ensuring stability³⁸⁴ and that the National Co-Prosecutor's Appeal does not provide evidence that sending MEAS Muth to trial would hinder national reconciliation.³⁸⁵ She argues that on the contrary, making him stand trial would help achieve a measure of justice and promote reconciliation.³⁸⁶ In this regard, the International Co-Prosecutor stresses that there have been no negative public reactions to

³⁷⁵ International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D267/9), para. 27.

³⁷⁶ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 27-28.

³⁷⁷ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 29.

³⁷⁸ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 29.

³⁷⁹ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 30.

³⁸⁰ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 31.

³⁸¹ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 31.

³⁸² International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 32.

³⁸³ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), paras 33-41.

³⁸⁴ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 34.

³⁸⁵ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 33.

³⁸⁶ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D267/9), para. 33.



the announcement that MEAS Muth was being indicted³⁸⁷ and that there are currently no armed groups exercising power over Cambodian territory.³⁸⁸ She further points out that Case 003 addresses issues and crimes sites that have not been the subject of Cases 001, 002/01 and 002/02.³⁸⁹ She concludes, by relying on studies³⁹⁰ and the number of persons who applied to become civil parties in Case 003,³⁹¹ that there are “strong indications” that victims and the public have a strong interest in hearing the truth about the crimes covered by this case and seeing it proceed to trial.³⁹²

b. Discussion

190. The International Judges recall that while the Co-Prosecutors may appeal against all orders issued by the Co-Investigating Judges,³⁹³ Internal Rule 75(4) dictates that “[t]he submissions on appeal shall contain the reasons of fact and law upon which the appeal is based”. In this regard, the International Judges reaffirm that the Pre-Trial Chamber may summarily dismiss submissions that do not satisfy the established standard for consideration on the merits on appeal.³⁹⁴ Relatedly, the International Judges emphasise that like other international and hybrid criminal appellate chambers, the Pre-Trial Chamber has inherent discretion to select which submissions require a detailed reasoned opinion in writing and which submissions it will summarily dismiss without providing such detailed reasoning.³⁹⁵ The International Judges deem it relevant to recall

³⁸⁷ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), para. 35.

³⁸⁸ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), para. 35.

³⁸⁹ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), para. 40.

³⁹⁰ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), paras 36-39.

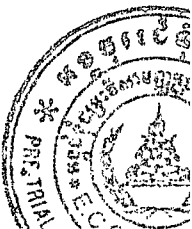
³⁹¹ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D267/9), para. 40.

³⁹² The Co-Lawyers for MEAS Muth did not file a Response. The National Co-Prosecutor did not file a Reply.

³⁹³ See *supra* paras 51, 53 referring to Internal Rules 67(5), 73(a) and 74(2).

³⁹⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 649 and footnote 1345 referring to Case 002 (PTC47), Decision on Appeals against Co-Investigating Judges’ Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5 (“Case 002 Decision on Civil Party Applications (D250/3/2/1/5)”), para. 22 referring to ICTY, *Prosecutor v. Blaškić*, ICTY-IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004 (“*Blaškić* Appeal Judgment (ICTY)”), para. 13; International Criminal Tribunal for Rwanda (“ICTR”), *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003 (“*Rutaganda* Appeal Judgment (ICTR)”), para. 18.

³⁹⁵ See, e.g., International Residual Mechanism for Criminal Tribunals (“IRMCT”), *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, Appeals Chamber, 20 March 2019, para. 20; IRMCT, *Prosecutor v. Šešelj*, MICT-16-99-A, Judgement, Appeals Chamber, 11 April 2018, para. 18; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, Appeals Chamber, 29 November 2017 (“*Prlić* Appeal Judgment (ICTY)”), para. 24; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, Appeals Chamber, 14 December 2015, paras 35, 1799; *Rutaganda* Appeal Judgment (ICTR), para. 19; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Appeals Chamber, 26 September 2013 (“*Taylor* Appeal Judgment (SCSL)”), para. 31; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04.15-A, Judgment, Appeals Chamber, 26 October 2009 (“*Sesay* Appeal Judgment (SCSL)”), para. 36; Special Tribunal for Lebanon (“STL”),



the internationally recognised criteria guiding this determination.

191. As a general principle, an appeal cannot be allowed to turn into a guessing enterprise for the Pre-Trial Chamber,³⁹⁶ which will thus not consider arguments merely claiming that a given Co-Investigating Judges' order or finding is erroneous, without substantiating why such order or finding is in error.³⁹⁷ In other words, a party contending that the Co-Investigating Judges erred in law or in fact must articulate the alleged error and advance arguments in support of that contention.³⁹⁸ The required substantiation depends on the type of alleged errors. With regard to an alleged legal error, the party must substantiate how the Co-Investigating Judges' interpretation of the law was incorrect.³⁹⁹ Regarding an alleged factual error, the party must at least identify the challenged factual finding.⁴⁰⁰ Irrespective of the type of the alleged error, the party must identify how the error materially affects the conclusions of the Co-Investigating Judges⁴⁰¹ and provide references to relevant paragraphs in the impugned order.⁴⁰² Where a party simply seeks to substitute its own evaluation of the evidence for that of the Co-Investigating Judges, such submission may be summarily dismissed by the Pre-Trial Chamber.⁴⁰³ Similarly, arguments that do not have the potential to cause the impugned order to be reversed or revised, may be dismissed without analysis of their substance.⁴⁰⁴

Prosecutor v. Al Jadeed et al., STL-14-05/A/AP, Judgment on Appeal, Appeals Panel, 8 March 2016 (“*Al Jadeed Appeal Judgment (STL)*”), para. 18. *See also* International Criminal Court (“ICC”), *Prosecutor v. Lubanga*, ICC-01/04-01/06-3122, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”, Appeals Chamber, 1 December 2014 (“*Lubanga Appeal Judgment (ICC)*”), para. 30.

³⁹⁶ ICTY, *Prosecutor v. Kupreškic et al.*, IT-95-16-A, Appeal Judgement, Appeals Chamber, 23 October 2001 (“*Kupreškic Appeal Judgment (ICTY)*”), para. 27.

³⁹⁷ Case 002/1, Appeal Judgement, 23 November 2016, F36 (“Case 002/1 Appeal Judgment (F36)”), para. 102.

³⁹⁸ *Kupreškic Appeal Judgment (ICTY)*, para. 27; *Al Jadeed Appeal Judgment (STL)*, para. 19; *Lubanga Appeal Judgment (ICC)*, para. 30.

³⁹⁹ *See, e.g., Lubanga Appeal Judgment (ICC)*, para. 31.

⁴⁰⁰ *See, e.g., Prlić Appeal Judgment (ICTY)*, para. 25; ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, Appeals Chamber, 30 June 2016, para. 25; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, Appeals Chamber, 9 December 2015, para. 22; *Taylor Appeal Judgment (SCSL)*, para. 31; *Sesay Appeal Judgment (SCSL)*, para. 38; *Al Jadeed Appeal Judgment (STL)*, para. 18.

⁴⁰¹ *See, e.g., Taylor Appeal Judgment (SCSL)*, para. 31; *Sesay Appeal Judgment (SCSL)*, para. 41; *Lubanga Appeal Judgment (ICC)*, para. 30.

⁴⁰² Case 002 Decision on Civil Party Applications (D250/3/2/1/5), para. 22 referring to *Blaškić Appeal Judgment (ICTY)*, para. 13; *Rutaganda Appeal Judgment (ICTR)*, para. 18.

⁴⁰³ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, Appeals Chamber, 17 March 2009, para. 27; ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003, para. 22; ICTY, *Prosecutor v. Simić*, IT-95-9-A, Judgement, Appeals Chamber, 28 November 2006, para. 14; ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Judgement, Appeals Chamber, 16 October 2007, para. 12; *Taylor Appeal Judgment (SCSL)*, para. 31; *Sesay Appeal Judgment (SCSL)*, para. 40.

⁴⁰⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 649 referring to



192. Accordingly, the International Judges find that the National Co-Prosecutor's Appeal does not meet the threshold for appellate review by the Pre-Trial Chamber and therefore summarily dismiss this Appeal entirely. The Appeal is misconceived as it does not provide any guidance on how the Pre-Trial Chamber's intervention is warranted in this case to reverse and/or revise the International Co-Investigating Judge's Indictment. The International Judges observe that her Appeal limits itself only to general factual assertions on the overarching historical background and context of the DK regime;⁴⁰⁵ and to restatements of her views on the meaning of the terms "senior leaders" and "most responsible",⁴⁰⁶ without substantiating or even attempting to substantiate why the International Co-Investigating Judge's Indictment or finding that MEAS Muth falls within the ECCC's personal jurisdiction is erroneous. The International Judges find that there is no basis in this Appeal upon which they could revise the International Co-Investigating Judge's Indictment.

193. Nonetheless, the International Judges recall that the Pre-Trial Chamber has the power to, *inter alia*, address issues of general significance for the ECCC's jurisprudence and legacy⁴⁰⁷ that fall outside of its scope of appellate review.⁴⁰⁸ Such power is discretionary.⁴⁰⁹ In this regard, the International Judges deem it relevant to partly address two ancillary issues raised by the National Co-Prosecutor in her Appeal, namely: (i) the position and the power of the Royal Government of Cambodia *vis-à-vis* the delineation of the scope of the ECCC's personal jurisdiction,⁴¹⁰ and (ii) the contention that the ECCC Agreement, signed between the United Nations and the Cambodian Government, requires "striking a balance" between "justice and national reconciliation" for the

Case 002 Decision on Civil Party Applications (D250/3/2/1/5), para. 22 referring to *Blaškić* Appeal Judgment (ICTY), para. 13; *Rutaganda* Appeal Judgment (ICTR), para. 18. See also Case 001 Appeal Judgment (F28), para. 20.

⁴⁰⁵ National Co-Prosecutor's Appeal (D267/3), paras 51-54, 56-60.

⁴⁰⁶ National Co-Prosecutor's Appeal (D267/3), paras 66-68, 72.

⁴⁰⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 32; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 73 referring to ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001 ("*Akayesu* Appeal Judgment (ICTR)"), paras 19, 23-24; ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999 ("*Tadić* Appeal Judgment (ICTY)"), paras 247, 281, 316; ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 221.

⁴⁰⁸ See, e.g., *Tadić* Appeal Judgment (ICTY), para. 247; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 218; *Akayesu* Appeal Judgment (ICTR), paras 17-18; ICTR, *Prosecutor v. Kanyarukiga*, ICTR-02-78-A, Judgment, Appeals Chamber, 8 May 2012, para. 264.

⁴⁰⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 33. See, e.g., *supra* para. 128.

⁴¹⁰ National Co-Prosecutor's Appeal (D267/3), paras 63, 66-68.



victims in Case 003.⁴¹¹

194. Firstly, the International Judges recall that the scope of the ECCC's personal jurisdiction is set forth in the ECCC Agreement, signed between the United Nations and the Royal Government of Cambodia. The ECCC Agreement is an international treaty, which, in accordance with the principle of *pacta sunt servanda* codified under Article 26 of the Vienna Convention on the Law of the Treaties, binds the parties and must be performed in good faith. Consequently, the Agreement "may be amended *by agreement between the parties*".⁴¹² Therefore, the International Judges consider that any unilateral modification to the ECCC Agreement by one of the parties would violate the well-established *pacta sunt servanda* principle.

195. The International Judges accordingly reject the National Co-Prosecutor's assertions regarding the role and the power of the Royal Government of Cambodia that like the United Nations Security Council for the ICTY or the ICTR, the Cambodian Government may have unilateral "influence on the scope of the [ECCC's] personal jurisdiction and judicial affairs."⁴¹³ The International Judges consider that there is no legal basis upon which the Cambodian Government could, as one of the two parties to the ECCC Agreement, unilaterally redefine the meaning of the ECCC's personal jurisdiction or assert its "influence" on the independent judicial functioning of this Court.⁴¹⁴ The National Co-Prosecutor's reference to the ECCC's negotiating history⁴¹⁵ reflects solely her viewpoint and thus fails to provide a persuasive, least an authoritative basis for interpreting the ECCC Agreement and the ECCC Law, especially for the purpose of delineating the scope of the ECCC's personal jurisdiction.⁴¹⁶

196. Secondly, the International Judges observe that the Preamble of the ECCC Agreement states that "the [United Nations] General Assembly recognised the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security". Having considered the plain

⁴¹¹ National Co-Prosecutor's Appeal (D267/3), paras 71-73.

⁴¹² Vienna Convention, Art. 39 (emphasis added).

⁴¹³ National Co-Prosecutor's Appeal (D267/3), para. 67.

⁴¹⁴ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 652.

⁴¹⁵ National Co-Prosecutor's Appeal (D267/3), para. 68.

⁴¹⁶ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 652.



meaning of the text, the International Judges find that this sentence places all the enumerated goals on an equal footing, rather than advocating for two arbitrarily singled-out objectives to be counterbalanced. Therefore, the International Judges are not convinced with the National Co-Prosecutor's contention that the ECCC Agreement, through this sentence of the Preamble, requires that "a balance must be struck" between justice and reconciliation. Justice and reconciliation are, in the International Judges' view, not contradicting goals. Rather, justice is considered as a necessary condition for reconciliation.⁴¹⁷ *Arguendo* the National Co-Prosecutor's such assertion is with some grounding, the International Judges are not persuaded that striking a balance between justice and national reconciliation⁴¹⁸ would accommodate her conclusion that "a collective surge of justice" has been brought to the victims in Case 003 through the trial of Cases 001 and 002⁴¹⁹ since these cases are "a complete representation" of the crimes committed during the DK regime.⁴²⁰

197. The International Judges recall that MEAS Muth is charged with, *inter alia*, genocide, which is one of the most heinous international crimes, placing MEAS Muth "solidly within the bracket of the [ECCC's] personal jurisdiction."⁴²¹ Irrespective of the total number of victims killed and families affected, the International Co-Investigating Judge also determined, for instance, that a minimum of 15,000 people in the Kampong Som Autonomous Sector were subjected to forced labour under appalling conditions for which MEAS Muth should account at trial.⁴²² The International Judges duly note that hundreds of persons have applied to become civil parties in Case 003 and that a

⁴¹⁷ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 654; *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, UN Doc. S/2004/616, para. 7 ("For the United Nations, 'justice' is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large"). In the instant case, the International Co-Investigating Judge has admitted the participation in the proceedings of 22 Civil Party applicants (*see* Case 003, List of Civil Party Applications Admissible, Annex A to the Order on the Admissibility of Civil Party Applications, 28 November 2018, D269.1 ("Annex A to Order on Civil Party Applications Admissibility (D269.1)")) while 604 applicants are still claiming to join this case through their Appeal against the International Co-Investigating Judge's decision in which he declared their applications inadmissible (*see* Case 003, Civil Party Applicants Found Inadmissible, Annex A to Appeal against Order on the Admissibility of Civil Party Applicants, 7 March 2019, D269/3.2.1).

⁴¹⁸ National Co-Prosecutor's Appeal (D267/3), para. 71.

⁴¹⁹ National Co-Prosecutor's Appeal (D267/3), para. 73.

⁴²⁰ 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D267/23.2), at ERN (EN) 01640007, p. 36:09-36:13.

⁴²¹ Indictment (D267), para. 463.

⁴²² Indictment (D267), para. 468.



significant number of these applicants are currently appealing before the Pre-Trial Chamber against the International Co-Investigating Judge's order finding that their application is inadmissible.⁴²³ The International Judges will examine the very issue of whether MEAS Muth falls within the ECCC's personal jurisdiction in a separate section of the present Opinion.⁴²⁴

2. The International Co-Prosecutor's Appeal

a. Submissions

198. The International Co-Prosecutor appeals against the National Co-Investigating Judge's Dismissal Order and requests the Pre-Trial Chamber to: (i) reverse the Dismissal Order's finding that MEAS Muth does not fall within the ECCC's personal jurisdiction; (ii) find that MEAS Muth was one of those "most responsible" for DK-era crimes; and (iii) order that the case against him proceed to trial based on the International Co-Investigating Judge's Indictment.⁴²⁵

i. Ground A: Legal Error of Failure to Make Factual and Legal Findings on Crimes Committed and MEAS Muth's Criminal Liability for Those Crimes

199. The International Co-Prosecutor submits that the National Co-Investigating Judge committed an error by failing to make factual and legal findings on the crimes committed and MEAS Muth's criminal liability for those crimes because the Dismissal Order lacks: (i) substantive factual findings as to whether crimes within the jurisdiction of the ECCC were actually committed and whether MEAS Muth is responsible for any such crimes; and (ii) legal conclusions following from its own factual findings.⁴²⁶

200. In their Response, the Co-Lawyers for MEAS Muth argue that Ground A of the International Co-Prosecutor's Appeal should be dismissed since (i) the International Co-Prosecutor failed to demonstrate any error of law in the National Co-Investigating Judge's decision not to legally characterise crimes and modes of liability that would invalidate his personal jurisdiction determination and (ii) the National Co-Investigating Judge's such decision was not so unfair or unreasonable as to constitute an abuse of

⁴²³ Case 003, Order on the Admissibility of Civil Party Applications, 28 November 2018, D269, para. 2; Annex A to Order on Civil Party Applications Admissibility (D269.1).

⁴²⁴ See *infra* paras 285-340.

⁴²⁵ International Co-Prosecutor's Appeal (D266/2), paras 3, 202-203.

⁴²⁶ International Co-Prosecutor's Appeal (D266/2), paras 20-34.



discretion.⁴²⁷ The Co-Lawyers further assert that the Dismissal Order was sufficiently reasoned and that the National Co-Investigating Judge made the requisite findings on all the facts of which the Co-Investigating Judges were seised.⁴²⁸

201. In the Reply, the International Co-Prosecutor contends that the Co-Lawyers, in the Response, (i) fail to substantiate their claim that the National Co-Investigating Judge was not required to legally characterise its factual findings; (ii) misstate the impact that this error had on his personal jurisdiction findings; and (iii) misrepresent his failure to reach the required factual findings.⁴²⁹

ii. Ground B: Legal Error of Failure to Consider any Evidence Placed on Case File 003 After 29 April 2011

202. The International Co-Prosecutor submits that the National Co-Investigating Judge erred in law by failing to consider any evidence placed on Case File 003 after the issuance of the 2011 Rule 66(1) Notification by the Co-Investigating Judges because: (i) a notice of conclusion does not prevent the Case from being “reopened”;⁴³⁰ (ii) the Co-Investigating Judges have an obligation to undertake a complete investigation,⁴³¹ (iii) Case 003 investigation was manifestly incomplete on 29 April 2011;⁴³² and (iv) the failure to assess all the evidence on the Case File determinatively impacted his personal jurisdiction analysis.⁴³³

203. In their Response, the Co-Lawyers argue that the National Co-Investigating Judge did not err in law by not considering the evidence gathered after 29 April 2011 since (i) the investigation was complete as of 29 April 2011;⁴³⁴ and (ii) the Notification dated 29 April 2011 neither lapsed nor was voided upon the “reopening” of the investigation by the International Reserve Co-Investigating Judge KASPER-ANSERMET.⁴³⁵ The Co-Lawyers further assert that the Pre-Trial Chamber should summarily dismiss any claim that the investigation undertaken by the

⁴²⁷ MEAS Muth’s Response (D266/5), para. 54.

⁴²⁸ MEAS Muth’s Response (D266/5), para. 54.

⁴²⁹ International Co-Prosecutor’s Reply (D267/11), para. 12.

⁴³⁰ International Co-Prosecutor’s Appeal (D266/2), paras 36-42.

⁴³¹ International Co-Prosecutor’s Appeal (D266/2), paras 43-48.

⁴³² International Co-Prosecutor’s Appeal (D266/2), paras 49-57.

⁴³³ International Co-Prosecutor’s Appeal (D266/2), paras 58-62 *referring to* Dismissal Order (D266), para. 2; 2011 Rule 66(1) Notification (D13).

⁴³⁴ MEAS Muth’s Response (D266/5), paras 22-32.

⁴³⁵ MEAS Muth’s Response (D266/5), paras 33-39.



Co-Investigating Judges prior to 29 April 2011 was not impartial as the International Co-Prosecutor fails to illustrate any evidence of bias.⁴³⁶

204. In the Reply, the International Co-Prosecutor contends that the Co-Lawyers (i) misconstrue the Co-Investigating Judge's investigative duties; and (ii) fail to substantiate the arguments that the 2011 Rule 66(1) Notification was final and validly closed the investigation.⁴³⁷

iii. Ground C: Legal Error of Failure to Consider and Issue a Decision on All the Facts within the Scope of Case 003

205. The International Co-Prosecutor submits that the National Co-Investigating Judge legally erred in his determination of personal jurisdiction – which requires a full assessment of both the gravity of the crimes and the level of MEAS Muth's responsibility – because, in breach of his duty to issue a decision on all the facts of which he has been seised,⁴³⁸ (i) he fails to consider many of the crime sites falling within the scope of the Introductory and Supplementary Submissions⁴³⁹ which (ii) would have significantly enhanced the gravity of the crimes for which MEAS Muth is responsible.⁴⁴⁰

206. In their Response, the Co-Lawyers argue that the National Co-Investigating Judge did not err in law in considering and issuing a decision on all the facts within the scope of Case 003⁴⁴¹ as the International Co-Prosecutor misreads the Dismissal Order in claiming that the National Co-Investigating Judge failed to consider crime sites and criminal events in making factual findings.⁴⁴² The Co-Lawyers assert that the International Co-Prosecutor fails to demonstrate any error of law in the National Co-Investigating Judge's consideration "on all, but only, the facts that were part of the investigation", or that his decision not to make explicit findings on each crime sites forming part of the facts was so unfair or unreasonable as to constitute an abuse of

⁴³⁶ MEAS Muth's Response (D266/5), para. 6(a).

⁴³⁷ International Co-Prosecutor's Reply (D267/11), para. 19.

⁴³⁸ International Co-Prosecutor's Appeal (D266/2), para. 63 referring to Case 001 Decision on Closing Order Appeal (D99/3/42), paras 33, 37-38; Case 002, Order concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1, para. 10; French Court of Criminal Cassation, 24 March 1977, n° 76-91.442.

⁴³⁹ International Co-Prosecutor's Appeal (D266/2), paras 64-69.

⁴⁴⁰ International Co-Prosecutor's Appeal (D266/2), paras 70-82.

⁴⁴¹ MEAS Muth's Response (D266/5), paras 40-44.

⁴⁴² MEAS Muth's Response (D266/5), para. 42.



discretion.⁴⁴³

207. In the Reply, the International Co-Prosecutor avers that the Co-Lawyers misstate the law and wrongly defend the National Co-Investigating Judge's failure to fulfil the Co-Investigating Judges' obligation to issue complete factual and legal findings.⁴⁴⁴ She further claims that the National Co-Investigating Judge's "*de minimis*" consideration of the evidence related to the missing crime sites is not sufficient to meet the standard of a reasoned opinion.⁴⁴⁵

iv. Ground D: Legal and Factual Errors in the Dismissal Order's Treatment of Coercion, Duress and Superior Orders when Determining Level of Responsibility for Crimes Committed

208. The International Co-Prosecutor submits that the National Co-Investigating Judge made several legal and factual errors in his treatment of coercion, duress, and superior orders when determining the level of responsibility of the crimes committed by MEAS Muth as: (i) he accorded excessive weight to superior orders and duress in the analysis of personal jurisdiction;⁴⁴⁶ (ii) MEAS Muth committed crimes willingly and enthusiastically with no need of coercion or duress;⁴⁴⁷ (iii) SON Sen delegated to MEAS Muth his power to arrest and smash foreigners captured at sea;⁴⁴⁸ (iv) MEAS Muth established and participated in mechanisms for identifying perceived enemies, ordered their arrests and transfer to S-21;⁴⁴⁹ and (v) the treatment of superior orders, coercion and duress arbitrarily differs in Case 001 and Case 003.⁴⁵⁰

209. In their Response, the Co-Lawyers assert that the National Co-Investigating Judge did not err in law or in fact in his treatment of coercion, duress, and superior orders because (i) he correctly considered MEAS Muth's level of responsibility based on his position and roles within the DK hierarchy as he analysed MEAS Muth's position within the overall chain of responsible actors, his subordinate relationship with his superior SON Sen, his degree of authority as well as his actual role and participation in the alleged crimes; and (ii) coercion, duress and superior orders are factors that can be considered

⁴⁴³ MEAS Muth's Response (D266/5), paras 42, 44.

⁴⁴⁴ International Co-Prosecutor's Reply (D267/11), paras 31-33.

⁴⁴⁵ International Co-Prosecutor's Reply (D267/11), paras 34-36.

⁴⁴⁶ International Co-Prosecutor's Appeal (D266/2), paras 83-91.

⁴⁴⁷ International Co-Prosecutor's Appeal (D266/2), paras 92-97.

⁴⁴⁸ International Co-Prosecutor's Appeal (D266/2), paras 98-102.

⁴⁴⁹ International Co-Prosecutor's Appeal (D266/2), paras 103-107.

⁴⁵⁰ International Co-Prosecutor's Appeal (D266/2), paras 108-111.



for the purpose of sentencing and personal jurisdiction.⁴⁵¹

210. In the Reply, the International Co-Prosecutor argues that the Co-Lawyers' response incorrectly justifies the National Co-Investigating Judge's error in law and fact in treating superior orders, coercion, and duress as factors that could reduce MEAS Muth's level of responsibility.⁴⁵² She contends that the Co-Lawyers (i) misapprehend the law and fail to establish any circumstances in which these factors could possibly reduce the level of his responsibility; and (ii) misrepresent the evidence of MEAS Muth's willing involvement in the commission of crimes as well as the level of authority and protection he enjoyed during the DK regime.⁴⁵³

v. Ground E: Legal and Factual Errors in the Dismissal Order's Treatment of Direct Participation in and Proximity to Crimes When Determining the Level of Responsibility for Crimes Committed

211. The International Co-Prosecutor submits that the National Co-Investigating Judge factually and legally erred in his treatment of direct participation in and proximity to the crimes when determining the level of responsibility for the crimes committed, because (i) while analysing the personal jurisdiction, he accorded excessive weight to direct participation in and proximity to the crimes committed;⁴⁵⁴ and (ii) MEAS Muth actually played a direct and active role in the commission of crimes.⁴⁵⁵

212. In their Response, the Co-Lawyers assert that the National Co-Investigating Judge did not err in law and fact in his treatment of MEAS Muth's direct participation in and proximity to crimes when determining his level of responsibility⁴⁵⁶ as: (i) the International Co-Prosecutor misleadingly cites inapposite jurisprudence on the law on modes of liability at trial;⁴⁵⁷ (ii) the National Co-Investigating Judge did not premise his Dismissal Order on the basis of MEAS Muth's physical participation, but rather focused on the "scope of direct acts and the effective authority of those acts;"⁴⁵⁸ (iii) in evaluating MEAS Muth's level of responsibility, the National Co-Investigating Judge did not

⁴⁵¹ MEAS Muth's Response (D266/5), paras 55-64.

⁴⁵² International Co-Prosecutor's Reply to MEAS Muth's Response (D267/11), para. 37.

⁴⁵³ International Co-Prosecutor's Reply to MEAS Muth's Response (D267/11), para. 37.

⁴⁵⁴ International Co-Prosecutor's Appeal (D266/2), paras 112-120.

⁴⁵⁵ International Co-Prosecutor's Appeal (D266/2), paras 121-134.

⁴⁵⁶ MEAS Muth's Response (D266/5), paras 65-71.

⁴⁵⁷ MEAS Muth's Response (D266/5), para. 65 referring to International Co-Prosecutor's Appeal (D266/2), para. 115, footnotes 462-469.

⁴⁵⁸ MEAS Muth's Response (D266/5), para. 66 referring to Dismissal Order (D266), para. 368 and Case 001 Appeal Judgment (F28), para. 57.



ignore, but explicitly considered “the hierarchical rank or position” of MEAS Muth;⁴⁵⁹ (iv) the National Co-Investigating Judge did not contradict his findings of MEAS Muth with those of the Charged Persons in Case 002, who were found to be senior leaders and/or most responsible;⁴⁶⁰ and (v) the International Co-Prosecutor misleads and cherry picks in her references to the ICTY Referral Bench decisions when considering the role and the degree of participation in each crime and neither of the Co-Investigating Judges found that MEAS Muth played a direct or active role in the commission of crimes.⁴⁶¹

213. In the Reply, the International Co-Prosecutor argues that contrary to the Co-Lawyers’ incorrect assertions in their Response, the National Co-Investigating Judge erred in law and fact by (i) giving undue weight to MEAS Muth’s participation in “direct acts”; and (ii) ignoring evidence of his committed and active participation in implementing the CPK’s enemies, enslavement and forced marriage policies in his areas of authority, for the purpose of the personal jurisdiction determination.⁴⁶²

vi. Ground F: Erroneous Factual Findings with a Determinative Impact on the Issue of Personal Jurisdiction

214. The International Co-Prosecutor submits that the National Co-Investigating Judge erroneously made factual findings that have a determinative impact on the issue of personal jurisdiction since, contrary to his findings, MEAS Muth was actually (i) Secretary of Division 164 and Secretary of Kampong Som Autonomous Sector from 17 April 1975 until 6 January 1979;⁴⁶³ (ii) a member of the General Staff Committee from mid-1975 and Deputy Secretary of the General Staff from late 1978;⁴⁶⁴ and (iii) a member of the CPK Central Committee from January 1976.⁴⁶⁵ She contends that these errors resulted from a failure to review all the pre-29 April 2011 evidence and consider other relevant evidence available after that date,⁴⁶⁶ which notably led the National Co-Investigating Judge to mistakenly assert that MEAS Muth’s rank was “below around

⁴⁵⁹ MEAS Muth’s Response (D266/5), para. 67.

⁴⁶⁰ MEAS Muth’s Response (D266/5), para. 68 referring to Case 002 Closing Order (D427), paras 1327-1328.

⁴⁶¹ MEAS Muth’s Response (D266/5), paras 69-70.

⁴⁶² International Co-Prosecutor’s Reply (D267/11), para. 44.

⁴⁶³ International Co-Prosecutor’s Appeal (D266/2), paras 137-141.

⁴⁶⁴ International Co-Prosecutor’s Appeal (D266/2), paras 142-147.

⁴⁶⁵ International Co-Prosecutor’s Appeal (D266/2), paras 148-154.

⁴⁶⁶ International Co-Prosecutor’s Appeal (D266/2), para. 135.



50 cadres”.⁴⁶⁷

215. In their Response, the Co-Lawyers argue that none of the factual errors claimed by the International Co-Prosecutor had a definitive impact on the personal jurisdiction assessment,⁴⁶⁸ and that the National Co-Investigating Judge’s findings do not contain determinative errors concerning MEAS Muth’s position, level of hierarchy or authority with respect to his positions as (i) Division 164 Commander or Kampong Som Autonomous Sector Secretary,⁴⁶⁹ (ii) a member of the General Staff⁴⁷⁰ and (iii) as a member of the Central Committee.⁴⁷¹

216. In the Reply, the International Co-Prosecutor avers that the Co-Lawyers fail to substantiate their claim that the National Co-Investigating Judge did not make erroneous factual findings pertaining to MEAS Muth’s positions and roles during the DK regime, particularly with respect to his positions as (i) Secretary of Division 164 and Kampong Som Autonomous Sector and a member of (ii) the General Staff as well as (iii) the Central Committee.⁴⁷²

vii. Ground G: Factual Errors in the Dismissal Order’s Treatment of Victims

217. The International Co-Prosecutor submits that the National Co-Investigating Judge’s treatment of victims in his Dismissal Order constitutes factual errors because the National Co-Investigating Judge: (i) discounts victims of crimes not occurring at S-21;⁴⁷³ (ii) fails to consider the victims at several criminal events and crime sites within the scope of the case;⁴⁷⁴ (iii) fails to take into account all evidence in the Case File when making findings or surveying evidence regarding victims at other crime sites;⁴⁷⁵ and (iv) provides the S-21 figures that underestimate the number of deaths at S-21 for which MEAS Muth is at least partly responsible.⁴⁷⁶

218. In their Response, the Co-Lawyers argue that the National Co-Investigating

⁴⁶⁷ International Co-Prosecutor’s Appeal (D266/2), para. 154.

⁴⁶⁸ MEAS Muth’s Response (D266/5), paras 72-88.

⁴⁶⁹ MEAS Muth’s Response (D266/5), paras 73-78.

⁴⁷⁰ MEAS Muth’s Response (D266/5), paras 79-81.

⁴⁷¹ MEAS Muth’s Response (D266/5), paras 82-88.

⁴⁷² International Co-Prosecutor’s Reply (D267/11), paras 50-61.

⁴⁷³ International Co-Prosecutor’s Appeal (D266/2), para. 157.

⁴⁷⁴ International Co-Prosecutor’s Appeal (D266/2), para. 158.

⁴⁷⁵ International Co-Prosecutor’s Appeal (D266/2), paras 159-168.

⁴⁷⁶ International Co-Prosecutor’s Appeal (D266/2), paras 169-170.



Judge's factual findings regarding the gravity of the crimes were not erroneous and grossly underestimated as: (i) the International Co-Prosecutor misleads by claiming that the National Co-Investigating Judge failed to consider all the evidence on the Case File, make requisite findings and legally characterise them in reaching his conclusion that there is a great difference between the number of victims who suffered as a result of MEAS Muth's direct actions and those as a result of Duch's direct actions;⁴⁷⁷ (ii) the victim numbers raised by the International Co-Prosecutor were not accepted by either Co-Investigating Judges and the International Co-Prosecutor fails to demonstrate any error of the Co-Investigating Judges in rejecting such numbers;⁴⁷⁸ and (iii) the National Co-Investigating Judge was correct in his gravity assessment considering the direct acts and conduct of MEAS Muth.⁴⁷⁹

219. In the Reply, the International Co-Prosecutor notes the Co-Lawyers' concession that the National Co-Investigating Judge erred in underestimating the victim tolls for which MEAS Muth is responsible⁴⁸⁰ and emphasises that contrary to the Co-Lawyers' claim, the International Co-Prosecutor is not bound by every finding in the Indictment.⁴⁸¹ She further contends that the Co-Lawyers' "cherry-picked quotes" of the International Co-Investigating Judge's victim estimations wildly distort the International Co-Investigating Judge's findings that thousands were victims to MEAS Muth's crimes, the number of which was explicitly underestimated by the International Co-Investigating Judge as he acknowledged himself.⁴⁸²

viii. Ground H: Legal Error of Holding that Duch is the Only Most Responsible Person

220. The International Co-Prosecutor submits that the National Co-Investigating Judge's assertions that Duch is the only person within the category of those "most responsible" for the crimes of the DK regime and that the prosecution of senior leaders shall not extend to lower-level cadres are erroneous⁴⁸³ as such contentions are inconsistent with (i) the plain language of the ECCC Agreement and the ECCC Law,⁴⁸⁴

⁴⁷⁷ MEAS Muth's Response (D266/5), para. 90.

⁴⁷⁸ MEAS Muth's Response (D266/5), paras 6(c), 91.

⁴⁷⁹ MEAS Muth's Response (D266/5), para. 92.

⁴⁸⁰ International Co-Prosecutor's Reply (D267/11), para. 62.

⁴⁸¹ International Co-Prosecutor's Reply (D267/11), para. 62.

⁴⁸² International Co-Prosecutor's Reply (D267/11), para. 63.

⁴⁸³ International Co-Prosecutor's Appeal (D266/2), paras 171-172.

⁴⁸⁴ International Co-Prosecutor's Appeal (D266/2), paras 175-188.



(ii) both the Royal Government of Cambodia's and the United Nations' expressed understanding of personal jurisdiction;⁴⁸⁵ and (iii) the National Co-Investigating Judge's own statement that personal jurisdiction was not intended to be limited to a specific number of named individuals.⁴⁸⁶

221. In their Response, the Co-Lawyers argue that the International Co-Prosecutor's Ground H should be summarily dismissed as she misrepresents the Dismissal Order and challenges the National Co-Investigating Judge's findings that the category of most responsible "could *only ever* apply to Duch"⁴⁸⁷ upon which the National Co-Investigating Judge did not rely in his determination of personal jurisdiction.⁴⁸⁸ The Co-Lawyers note the International Co-Prosecutor's concession that the National Co-Investigating Judge "correctly [highlighted] [...] the question of who would be among 'those most responsible' was not predetermined."⁴⁸⁹ They further aver that contrary to the International Co-Prosecutor's assertion that the National Co-Investigating Judge contradicted the Co-Investigating Judges' conclusion in Case 004/1 regarding the ECCC's jurisdiction, the National Co-Investigating Judge held that the term "most responsible" refers to "a category of persons."⁴⁹⁰

222. In the Reply, the International Co-Prosecutor contends that the Co-Lawyers' arguments are contradictory and do not counter the fact that the National Co-Investigating Judge's erroneous analysis amounts to a legal error.⁴⁹¹ She argues that contrary to the plain language of the Dismissal Order, the Co-Lawyers merely claims, without any supporting citation or argument, that the National Co-Investigating Judge's restriction of the "most responsible" category to Duch had no impact on his subsequent personal jurisdiction determination.⁴⁹²

ix. Submissions regarding Conflicting Closing Orders

223. The International Co-Prosecutor, in her submissions regarding the conflicting Closing Orders, argues that the policy evidenced by Article 7(4) of the ECCC

⁴⁸⁵ International Co-Prosecutor's Appeal (D266/2), paras 173-174.

⁴⁸⁶ International Co-Prosecutor's Appeal (D266/2), paras 189-190.

⁴⁸⁷ MEAS Muth's Response (D266/5), paras 6(d), 93.

⁴⁸⁸ MEAS Muth's Response (D266/5), paras 6(d), 93, 95, 96.

⁴⁸⁹ MEAS Muth's Response (D266/5), para. 93.

⁴⁹⁰ MEAS Muth's Response (D266/5), para. 94 (emphasis omitted).

⁴⁹¹ International Co-Prosecutor's Reply (D267/11), para. 65.

⁴⁹² International Co-Prosecutor's Reply (D267/11), para. 66.



Agreement, the ECCC Law and the provisions of the Internal Rules, in particular Internal Rule 77(13)(b), as well as the Supreme Court Chamber jurisprudence mandate that Case 003 proceeds to trial on the basis of the Indictment, not only when the Pre-Trial Chamber grants her Appeal reversing the National Co-Investigating Judge's finding on personal jurisdiction in his Dismissal Order, but also in the situation where the two conflicting Closing Orders remain in effect because the Pre-Trial Chamber either fails to reach the required supermajority vote for a decision or reaches a decision that denies all Appeals against both the Indictment and the Dismissal Order.⁴⁹³ In support, she contends that Internal Rule 77(13)(b) is *lex specialis* relating to indictments and thereby prevails over the general terms of Internal Rule 77(13)(a).⁴⁹⁴ Additionally, she highlights that the Supreme Court Chamber, in the Case 001 Appeal Judgement, held that "the investigation shall proceed", if the Pre-Trial Chamber is unable to achieve a supermajority on the consequences of a scenario where the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an indictment or a dismissal order for the reason that a charged person is or is not most responsible.⁴⁹⁵

224. In their Response, the Co-Lawyers submit that the International Co-Prosecutor's submissions regarding the conflicting Closing Orders are unsound and unconstitutional because she calls upon the Pre-Trial Chamber to ignore the principle *in dubio pro reo*⁴⁹⁶ and embrace a "policy" that is not evidenced by (i) Internal Rule 77(13) as the Co-Investigating Judges jointly considered that the Rule "only addresses the scenario of joint dismissal or indictment; not that of split closing orders" and that the resolution of the appeals against opposing closing orders lies with the Pre-Trial Chamber;⁴⁹⁷ nor (ii) the Supreme Court Chamber jurisprudence since the *obiter dictum* in the Case 001 Appeal Judgement concerns the Pre-Trial Chamber's dispute resolution procedure *before* the Co-Investigating Judges' conclusion of investigation;⁴⁹⁸ or (iii) the ECCC Agreement as the International Co-Prosecutor fails to substantiate her related claim and misleadingly analogises the dispute resolution procedure under Article 7(4) of the Agreement with the resolution of appeals against opposing closing orders.⁴⁹⁹ They

⁴⁹³ International Co-Prosecutor's Appeal (D266/2), paras 191-198.

⁴⁹⁴ International Co-Prosecutor's Appeal (D266/2), paras 192-194.

⁴⁹⁵ International Co-Prosecutor's Appeal (D266/2), paras 195-196, footnote 750 *referring to* Case 001 Appeal Judgment (F28), para. 65.

⁴⁹⁶ MEAS Muth's Response (D266/5), paras 15, 17, 20.

⁴⁹⁷ MEAS Muth's Response (D266/5), paras 15, 16.

⁴⁹⁸ MEAS Muth's Response (D266/5), paras 15, 18.

⁴⁹⁹ MEAS Muth's Response (D266/5), paras 15, 19.



contend that given the equal force of the opposing Closing Orders issued by the two equal and independent Co-Investigating Judges, the Dismissal Order cannot be set aside absent the Pre-Trial Chamber's finding by supermajority that the National Co-Investigating Judge committed errors or abuses fundamentally determinative of his exercise of discretion and that even if with such a finding, the Pre-Trial Chamber would still need to uphold the Indictment by supermajority.⁵⁰⁰

225. In her Reply, the International Co-Prosecutor reiterates that the ECCC Agreement, the ECCC Law and the Internal Rules clearly mandate that unless the Indictment is overturned by the Pre-Trial Chamber's finding by supermajority, Case 003 must be sent for trial,⁵⁰¹ and claims that the Co-Lawyers (i) misapply the *in dubio pro reo* principle since no doubt remains in this case and the principle applies to questions of fact and substantive law determining an accused's guilt *at trial*;⁵⁰² and (ii) adopt an overly narrow interpretation of the governing law and jurisprudence as the substantive outcomes are the same whether the Pre-Trial Chamber has been seised of the disagreement by the Parties' Appeals or through the formal dispute resolution procedure.⁵⁰³

b. Discussion

i. *Grounds B and C*

226. The International Judges note that the International Co-Prosecutor, in Grounds B and C of her Appeal, submits that the National Co-Investigating Judge committed legal errors by failing to consider any evidence in the Case File 003 after 29 April 2011,⁵⁰⁴ and by failing to consider and issue a decision on all facts within the scope of Case 003.⁵⁰⁵ Since both Grounds allege fundamental errors that could affect the validity of the Dismissal Order, the International Judges consider it indispensable to initiate the appellate review with these two appeal grounds.

(a) Ground B

227. The International Judges will examine, after providing (i) contextual elements

⁵⁰⁰ MEAS Muth's Response (D266/5), para. 20.

⁵⁰¹ International Co-Prosecutor's Reply (D267/11), para. 67.

⁵⁰² International Co-Prosecutor's Reply (D267/11), paras 67, 70, 71 (emphasis added).

⁵⁰³ International Co-Prosecutor's Reply (D267/11), paras 67, 69.

⁵⁰⁴ International Co-Prosecutor's Appeal (D266/2), paras 35-62.

⁵⁰⁵ International Co-Prosecutor's Appeal (D266/2), paras 63-82.



related to the evidentiary basis of the National Co-Investigating Judge's Dismissal Order,⁵⁰⁶ the International Co-Prosecutor's claims that (ii) the 2011 Rule 66(1) Notification could not have prevented the valid resumption of the judicial investigation;⁵⁰⁷ (iii) the judicial investigation was manifestly incomplete by 29 April 2011;⁵⁰⁸ and that (iv) the failure to assess all the evidence on the Case File determinatively impacted the National Co-Investigating Judge's personal jurisdiction analysis.⁵⁰⁹

(i) *Background*

228. The National Co-Investigating Judge, in his Dismissal Order, affirms that the judicial investigation in Case 003 concluded on 29 April 2011 with the issuance of the 2011 Rule 66(1) Notification.⁵¹⁰ Concerning the evidentiary basis of the Dismissal Order, the National Co-Investigating Judge further proclaims that he "exercises his discretion to consider only those evidence included [in the Case File] before the date of the conclusion of the judicial investigation",⁵¹¹ *i.e.*, 29 April 2011.⁵¹²

229. In this regard, the International Judges remark the *prima facie* contradiction within the Dismissal Order as the National Co-Investigating Judge concurrently states that "[h]owever it is possible that documents which are parts [*sic*] of the investigation before the conclusion of the investigation were subsequently filed into this case file."⁵¹³ The National Co-Investigating Judge further provides that he relied upon, *inter alia*, the "documents in Case 003 obtained from the investigation and transferred from Cases 001, 002 and 004."⁵¹⁴ He adds that the issuance of the Closing Orders in Case 003 seven years after the conclusion of the investigation is "not groundless" because the Co-Investigating Judges remain "in possession of the case file until the issuance of the closing orders."⁵¹⁵

⁵⁰⁶ *See infra* paras 228-229.

⁵⁰⁷ International Co-Prosecutor's Appeal (D266/2), paras 36-42.

⁵⁰⁸ International Co-Prosecutor's Appeal (D266/2), paras 49-57.

⁵⁰⁹ International Co-Prosecutor's Appeal (D266/2), paras 58-62.

⁵¹⁰ Dismissal Order (D266), paras 2, 41, 359.

⁵¹¹ Dismissal Order (D266), para. 359. *See also* Dismissal Order (D266), paras 2, 41.

⁵¹² Dismissal Order (D266), paras 2, 359. *See also* Dismissal Order (D266), para. 41.

⁵¹³ Dismissal Order (D266), para. 2.

⁵¹⁴ Dismissal Order (D266), para. 2.

⁵¹⁵ Dismissal Order (D266), para. 8.



(ii) The 2011 Rule 66(1) Notification and Its Impact on the Conclusion of the Investigation

230. The International Co-Prosecutor claims, in support of her assertion that the 2011 Rule 66(1) Notification could not prevent the resumption of the judicial investigation in Case 003, that the judicial investigation was not concluded with the said Notification⁵¹⁶ and that the judicial investigation was validly resumed by the International Reserve Co-Investigating Judge KASPER-ANSERMET.⁵¹⁷

231. Regarding the assertion that the judicial investigation was not concluded with the 2011 Rule 66(1) Notification as it could not have concluded the investigation, the International Judges reaffirm that under a combined reading of Internal Rules 66(1), 67(1) and 76(2), and in light of Internal Rule 21(1), “‘the judicial investigation’ is officially concluded by the issuance of the Closing Order, and not at the time the Co-Investigating Judges notify the parties of their intent to conclude it.”⁵¹⁸ This interpretation is in line with the Cambodian Code of Criminal Procedure⁵¹⁹ and the rights of the parties under Internal Rule 66 concerning any procedural defects in the investigation⁵²⁰ or requests for additional investigative acts prior to the termination of investigation.⁵²¹

232. In the instant case, the International Judges recall that the judicial investigation was effectively concluded on 28 November 2018 by the Co-Investigating Judges’ simultaneous issuance of the Closing Orders. Therefore, the International Judges find that the 2011 Rule 66(1) Notification could not be considered a valid legal or procedural impediment to the resumption of Case 003 investigation since such a notification could not conclude a judicial investigation; only a closing order can. The International Judges thus find that the National Co-Investigating Judge’s interpretation regarding the

⁵¹⁶ International Co-Prosecutor’s Appeal (D266/2), paras 36-38.

⁵¹⁷ International Co-Prosecutor’s Appeal (D266/2), para. 39.

⁵¹⁸ Case 004 Decision concerning the Use of Civil Parties’ Information (D370/1/1/6), para. 8; Decision on Torture-Tainted Evidence (D257/1/8), para. 11.

⁵¹⁹ Cambodian Code of Criminal Procedure, Art. 247 (“An investigating judge terminates the judicial investigation by a closing order”).

⁵²⁰ Internal Rules 66(2) and (3) (“2. Where the Co-Investigating Judges decide to reject such requests [for further investigative actions], they shall issue a reasoned order. Such order shall also reject any remaining requests, filed earlier in the investigation, which had not yet been ruled upon by the Co-Investigating Judges. 3. All the parties may, within 30 (thirty) days from notice of such order, file appeals to the Pre-Trial Chamber. The parties may, in the presence of their lawyer, or where the lawyer has been summoned in due form, waive their right to appeal”).

⁵²¹ Internal Rule 66(1) (“The parties shall have 15 (fifteen) days to request further investigative action”).



conclusion of the investigation at the time of issuing the 2011 Rule 66(1) Notification amounts to an error of law.

233. The International Judges now turn to address the issue of whether the investigation was validly resumed following the issuance of 2011 Rule 66(1) Notification. The International Judges note the National Co-Investigating Judge's assertion that the resumption of the investigation was invalid because the Reserve International Co-Investigating Judge KASPER-ANSERMET was not formally appointed by the Supreme Council of Magistracy.⁵²²

234. In this regard, the International Judges observe that Article 5(5) of the ECCC Agreement and Article 26(4) of the ECCC Law set forth the required formalities for a Reserve International Co-Investigating Judge's appointment. Further, Article 5(6) of the ECCC Agreement and Article 26(2) of the ECCC Law state that the Reserve Co-Investigating Judges shall replace the appointed Co-Investigating Judges in their absence. More specifically, Article 27^{new} (3) of the ECCC law provides that "[i]n the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge."

235. The International Judges accordingly find that unlike the Reserve International Judges of the Trial Chamber or the Supreme Court Chamber who must be expressly designated by the President of the relevant Chamber "on a case-by-case basis [...] to replace a foreign judge if that judge is unable to continue sitting",⁵²³ there is no additional procedural requirement, other than an initial appointment, for a Reserve International Co-Investigating Judge to undertake the duties incumbent upon that function.

236. The International Judges note that Judge KASPER-ANSERMET was validly appointed as the Reserve International Co-Investigating Judge on 30 November 2010 by His Majesty the King NORODOM Sihamoni,⁵²⁴ upon the approval of the Supreme

⁵²² See Dismissal Order (D266), para. 29. See also Dismissal Order (D266), para. 44 (The National Co-Investigating Judge makes a distinction between "the International Reserve Co-Investigating Judge and the International *Full-Rights* Co-Investigating Judge" (emphasis added)).

⁵²³ See ECCC Law, Art. 11^{new}(4). See also ECCC Agreement, Art. 3(8).

⁵²⁴ See Royal Decree by His Majesty King NORODOM Sihamoni (No. NS/RKT/1110/909), 30 November 2010 ("Judge KASPER-ANSERMET Nomination Decree"), Art. 2. See also ECCC Press Release, "Dr. Siegfried BLUNK appointed as new International Co-Investigating Judge", 1 December 2010, https://www.eccc.gov.kh/sites/default/files/media/ECCC_1_Dec_2010_%28Eng%29.pdf (accessed 7 April 2021); ECCC Press Release, "Statement by the International Reserve Co-Investigating Judge", 6



Council of Magistracy,⁵²⁵ and was sworn in before the ECCC Plenary on 21 February 2011.⁵²⁶ Subsequently, Judge KASPER-ANSERMET took office on 1 November 2011 upon the International Co-Investigating Judge BLUNK's resignation on 31 October 2011, who thus became absent from that date onwards. Therefore, the International Judges find that contrary to the National Co-Investigating Judge's contention, the legal requirements specified above for a valid appointment of Judge KASPER-ANSERMET as the Reserve International Co-Investigating Judge have been fully complied with and, thus, Judge KASPER-ANSERMET had the ability to validly resume the investigation in Case 003.

237. At this juncture, the International Judges remark that the National Co-Investigating Judge's claim regarding Judge KASPER-ANSERMET's standing to conduct investigative acts was the subject of a disagreement that arose when the latter issued the Order on Resuming the Judicial Investigation on 2 December 2011.⁵²⁷ The International Judges observe that this disagreement was brought before and adjudicated in a distinctive manner by the Pre-Trial Chamber. While the National Judges of the Chamber issued an interoffice memorandum⁵²⁸ declaring summarily that "[Judge] Laurent Kasper-Ansermet [did] not have enough qualifications to undertake his duty according to legal procedure in force",⁵²⁹ the International Judges CHUNG and

December 2011, <https://www.eccc.gov.kh/en/articles/statement-international-reserve-co-investigating-judge> (accessed 7 April 2021).

⁵²⁵ The International Judges observe that the Supreme Council of Magistracy approved the nomination of Judge KASPER-ANSERMET, *see* Judge KASPER-ANSERMET Nomination Decree, Preamble. Further, the Supreme Council of Magistracy is responsible for making recommendations to His Majesty the King for all judicial and prosecutorial appointments, *see* Law on Supreme Council of Magistracy (No. 09 NS.94), 22 December 1994, Art. 11 ("The Supreme Council of Magistracy shall decide and raise its suggestion to His Majesty the King regarding the appointment, transfer, disruption from (actual) function, suspension of job, put outside of the cadre or removal of title, of all judges and prosecutors" (unofficial translation)). *See also* 1993 Constitution, Art. 115 ("[...] The Supreme Council of the Magistracy shall make proposals to the King on the appointment of judges and prosecutors to all courts"). In addition, the International Judges emphasise that His Majesty the King, who signed the royal decree appointing Judge KASPER-ANSERMET, chairs the Supreme Council of Magistracy, *see* 1993 Constitution, Art. 115 ("The Supreme Council of the Magistracy shall be chaired by the King. The King may appoint a representative to chair the Supreme Council of the Magistracy").

⁵²⁶ *See* Public Opening Speech of President KONG Srim at the ECCC Plenary, Phnom Penh, 21 February 2011, <https://www.eccc.gov.kh/en/articles/9th-eccc-plenary-session-commences> (accessed 7 April 2021).

⁵²⁷ Order on Resuming the Judicial Investigation (D28). The Reserve International Co-Investigating Judge submitted a record of disagreement regarding the admissibility of his order on 15 December 2011, which was communicated to the Pre-Trial Chamber pursuant to Internal Rule 72 on the next day.

⁵²⁸ Case 003, Interoffice Memorandum from Judge PRAK, President of the Pre-Trial Chamber, to the Office of Administration on Returning the Documents Communicated to Pre-Trial Chamber by the Office of Administration, 3 February 2012, D29/1/1.3 ("Interoffice Memorandum on Returning the Documents (D29/1/1.3)").

⁵²⁹ *See* Interoffice Memorandum on Returning the Documents (D29/1/1.3).



DOWNING⁵³⁰ issued a separate opinion, articulating the legal reasoning in finding that (i) Judge KASPER-ANSERMET had standing before the Pre-Trial Chamber as the Reserve International Co-Investigating Judge acting temporarily in the absence of a permanent International Co-Investigating Judge;⁵³¹ (ii) the acts undertaken by the Reserve International Co-Investigating Judge KASPER-ANSERMET were legally valid until the position of International Co-Investigating Judge had been permanently filled;⁵³² and (iii) given the absence of supermajority in the Pre-Trial Chamber to decide on the disagreement before it and pursuant to Internal Rule 72(4)(d) referring to Article 23^{new} of the ECCC Agreement, the default decision required that the order to resume the investigation in Case 003 proposed by Judge KASPER-ANSERMET be executed.⁵³³

238. In light of the above, the International Judges find that the National Co-Investigating Judge erred in law by concluding that the Reserve International Co-Investigating Judge KASPER-ANSERMET could not validly resume the investigation in Case 003, and by misplacing his reliance on such error in deciding to disregard post-April 2011 evidence in the Case File.

⁵³⁰ Case 003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges DOWNING and CHUNG on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, 10 February 2012, <https://www.eccc.gov.kh/en/document/court/opinion-pre-trial-chamber-judges-downing-and-chung-disagreement-between-co> (accessed 7 April 2021) (“Opinion of Judges CHUNG and DOWNING on Disagreement”).

⁵³¹ Opinion of Judges CHUNG and DOWNING on Disagreement, para. 37. See Opinion of Judges CHUNG and DOWNING on Disagreement, paras 34-37 (explaining that Article 26 of the ECCC Law spells out two legal conditions related to the taking of office of a reserve international co-investigating judge: that the reserve international co-investigating judge replaces the appointed investigating judge in his/her absence and that this judge had already been appointed as a reserve international co-investigating judge). See also Opinion of Judges CHUNG and DOWNING on Disagreement, paras 35-36 (noting that Judge KASPER-ANSERMET met these two conditions since he had been appointed as a reserve international co-investigating judge and replaced International Co-Investigating Judge BLUNK in absence following his resignation).

⁵³² Opinion of Judges CHUNG and DOWNING on Disagreement, para. 45. Regarding the merits of the disagreement on the admissibility of the Order Resuming the Judicial Investigation in Case 003, Judges CHUNG and DOWNING reiterated that no other formality was required for the entry into function of a reserve international co-investigating judge, see Opinion of Judges CHUNG and DOWNING on Disagreement, para. 44. They additionally stated that the Co-Investigating Judges may reconsider prior decisions as per the case law of the Pre-Trial Chamber and international jurisprudence, see Opinion of Judges CHUNG and DOWNING on Disagreement, para. 46, referring to Order on Resuming the Judicial Investigation (D28), para. 4 and citing Case 002 (PTC03), Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25 (referring to case law from the ICTY, e.g., ICTY, *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukasin Andrić and Dobre Aleksovski, Trial Chamber, 17 May 2005, para. 6; ICTY *Prosecutor v. Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, Bench of the Appeals Chamber, 14 December 2001, para. 13; ICTY *Prosecutor v. Mucić et al*, IT-96-21-Abis, Judgment on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 49).

⁵³³ Opinion of Judges CHUNG and DOWNING on Disagreement, para. 50.



(iii) Complete Investigation in Case 003 by 29 April 2011

239. With respect to the International Co-Prosecutor's assertion that the investigation was manifestly incomplete by 29 April 2011 given that most of the evidence relevant to Case 003 was added to the Case File after that date,⁵³⁴ the International Judges note the National Co-Investigating Judge's claim that he and the International Co-Investigating Judge BLUNK had completed the judicial investigation by 29 April 2011 and, consequently, issued the 2011 Rule 66(1) Notification to conclude the investigation.⁵³⁵ The National Co-Investigating Judge adds that "he maintains his position [that the investigation was concluded] and exercises his discretion to consider only those evidence included [in the Case File] before the date of the conclusion of the judicial investigation gathered by [himself and Judge BLUNK]."⁵³⁶

240. As a preliminary matter, the International Judges note that decisions to undertake – or, as in the present case, not to undertake – any investigative act fall within the remit of the Co-Investigating Judges' appreciation.⁵³⁷ However, their appreciation is not unlimited as it must be exercised according to well-settled legal principles⁵³⁸ and may be subject to the Pre-Trial Chamber's appellate judicial review.⁵³⁹

241. The International Judges recall that pursuant to Internal Rule 55(5), "in the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth."⁵⁴⁰ The International Judges clarify that a duty is cast on the Co-Investigating Judges to take the necessary investigative acts to ascertain the truth *throughout* the conduct of the judicial investigation. Internal Rule 55(5) also obliges the Co-Investigating Judges to "conduct their investigation impartially, whether the evidence is inculpatory or exculpatory."⁵⁴¹

⁵³⁴ International Co-Prosecutor's Appeal (D266/2), paras 49-57.

⁵³⁵ Dismissal Order (D266), para. 359.

⁵³⁶ Dismissal Order (D266), para. 359.

⁵³⁷ See Internal Rule 55(10). See also Case 002 Decision on Request to Place Additional Evidentiary Material on the Case File (D313/2/2), para. 15.

⁵³⁸ Case 002 (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras 25-27 referring to ICTY, *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Appeals Chamber, 1 November 2004, paras 9-10.

⁵³⁹ Internal Rule 74(3).

⁵⁴⁰ Internal Rule 55(5). See, e.g., Case 002 (PTC11), Decision on KHIEU Samphân's Appeals against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, paras 24-25; Case 004 (PTC33), Decision on Appeal against the Decision on AO An's Sixth Request for Investigative Action, 16 March 2017, D276/1/1/3, para. 21.

⁵⁴¹ Internal Rule 55(5).



In other words, the Co-Investigating Judges have a duty, pursuant to Internal Rule 55(5), to investigate both inculpatory and exculpatory evidence.⁵⁴² Accordingly, as the Pre-Trial Chamber has previously found, the Co-Investigating Judges have a “preliminary obligation to first conclude their investigation before assessing whether the case shall go to trial or not.”⁵⁴³ Therefore, the International Judges stress that the Co-Investigating Judges have a fundamental obligation to fully investigate the case and to consider the totality of the evidence in the case file. In addition, the International Judges recall that the Co-Investigating Judges may not disregard pieces of evidence, if deemed procedurally defective and infringing the parties’ rights, without referring it to the Pre-Trial Chamber for annulment under Internal Rule 76(1).⁵⁴⁴

242. At the outset, the International Judges remark that there is only one case file unique to each case at the ECCC. As the National Co-Investigating Judge acknowledged,⁵⁴⁵ both Co-Investigating Judges have access to the case file under the custody of the Office of the Co-Investigating Judges. In addition, the International Judges observe the progressive character of judicial investigations, including those concerning mass crimes falling within the material jurisdiction of the ECCC. Criminal investigations may advance with discovery of new evidence or halt at times to rebound with greater intensity by clearing evidentiary hurdles: for example, locating long-coveted witnesses. Therefore, the International Judges find that the National Co-Investigating Judge was not permitted to rely on his discretion to disregard evidence collected after 29 April 2011 and passively observe, over a period of seven years, the collection and the placement of, at a minimum, several hundreds of Case 003 specific

⁵⁴² Case 002 (PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6 (“Case 002 Decision on Request to Seek Exculpatory Evidence in the Shared Materials Drive (D164/3/6)”), para. 35.

⁵⁴³ Case 002 Decision on Request to Seek Exculpatory Evidence in the Shared Materials Drive (D164/3/6), para. 36. In this respect, the International Judges note that the Co-Investigating Judge’s decision to either send a case for trial or dismiss it requires determination of whether the ECCC has personal jurisdiction over the Charged Person and shall be based on due consideration of both inculpatory and exculpatory evidence. *See also* Case 002 Decision on Request to Seek Exculpatory Evidence in the Shared Materials Drive (D164/3/6), para. 35 (The International Judges note that in this cited decision the Pre-Trial Chamber rejected the Co-Investigating Judges’ “sufficiency” standard, holding that the investigation could not be concluded until “all the acts [...] necessary to ascertaining the truth” had been undertaken).

⁵⁴⁴ *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 47 (“The Pre-Trial Chamber recalls that if a piece of evidence is deemed procedurally defective and infringes the parties’ rights, the Co-Investigating Judges cannot simply disregard it without referring it to the Pre-Trial Chamber for annulment under Internal Rule 76(1)”).

⁵⁴⁵ The National Co-Investigating Judge declared that the Co-Investigating Judges remain “in possession of the case file until the issuance of the closing orders”, *see* Dismissal Order (D266), para. 8.



WRI and other documents⁵⁴⁶ in a case file under his custody, without deeming it part of his constitutive duties to examine them. The National Co-Investigating Judge thus committed a serious error of law in maintaining that the investigation was complete on 29 April 2011 and in relying on his discretion to disregard entire post-29 April 2011 evidence in the Case File. This error fundamentally affected the validity of the Dismissal Order *ab initio*.

243. In light of the above, the International Judges consider it unnecessary to examine in substance the International Co-Prosecutor's claim that the failure to assess all the evidence in the Case File had a determinative impact on the National Co-Investigating Judge's review of personal jurisdiction. The International Judges recall that the National Co-Investigating Judge's conclusion on the Court's lack of personal jurisdiction over MEAS Muth was based on a self-admitted partial review of the Case File.⁵⁴⁷

244. In conclusion, the International Judges uphold Ground B of the International Co-Prosecutor's Appeal.

(b) Ground C

245. The International Judges now turn to discuss the International Co-Prosecutor's claim that the National Co-Investigating Judge committed an error of law by failing to consider and issue a decision on all facts within the scope of Case 003.⁵⁴⁸ The International Co-Prosecutor argues that as a result of this error, a number of facts that were raised in the Introductory Submission and the Supplementary Submission, and pertaining to the scope of Case 003 as well as the seisin of the Office of the Co-Investigating Judges were not considered by the National Co-Investigating Judge.⁵⁴⁹ She adds that the unaddressed facts would have significantly enhanced the gravity of the criminal allegations against MEAS Muth.⁵⁵⁰

246. First, the International Judges recall that pursuant to Internal Rule 55(2), Article 125 of the Cambodian Code of Criminal Procedure and the Pre-Trial Chamber's consistent jurisprudence in this regard, when issuing a closing order, the

⁵⁴⁶ This estimate is based on a Zylab search and review of the contents of the Case File 003 between 30 April 2011 and 28 November 2018.

⁵⁴⁷ Dismissal Order (D266), para. 54.

⁵⁴⁸ International Co-Prosecutor's Appeal (D266/2), paras 63-82.

⁵⁴⁹ International Co-Prosecutor's Appeal (D266/2), paras 64-69.

⁵⁵⁰ International Co-Prosecutor's Appeal (D266/2), paras 70-82.



Co-Investigating Judges shall decide whether to dismiss or indict for all, but only, the allegations that they are seised of in the Introductory and the Supplementary Submissions.⁵⁵¹ The International Judges reaffirm that this decision does not entail the exercise of any discretionary power.⁵⁵² The International Judges reiterate that

the Co-Investigating Judges are also seized of the circumstances surrounding the acts mentioned in the Introductory or the Supplementary Submission. The circumstances in which the alleged crime was committed and that contribute to the determination of its legal characterisation are not considered as being new facts and are thus part of the investigation. The Co-Investigating Judges are guided by the legal characterisation proposed by the Co-Prosecutors to define the scope of their investigation.⁵⁵³

247. The International Judges firstly observe that the National Co-Investigating Judge considered “only seven (7) facts [out of ten (10)]” from the Introductory Submission in his Dismissal Order⁵⁵⁴ since, in his view, only eight facts concern MEAS Muth, and out of which “those related to the suppression of Division 801 and 810 Security Centre interlink”.⁵⁵⁵ The International Judges clarify that contrary to the National Co-Investigating Judge’s assertion, the Introductory Submission makes explicit references to eleven (11) facts, not ten (10): 1. S-21 Security Centre; 2. Overall Purges in Division 502; 3. S-22 Security Centre; 4. Kampong Chhnang Airport Construction Site; 5. Overall Purges in Division 164; 6. Wat Enta Nhien Security Centre; 7. Stung Hav Rock Quarry; 8. DK Navy; 9. Vietnam; 10. Division 801; and 11. Other

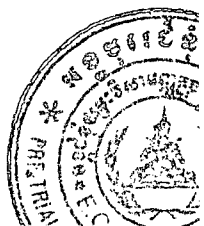
⁵⁵¹ Internal Rule 55(2); Cambodian Code of Criminal Procedure, Art. 125. *See also* Case 001 Decision on Closing Order Appeal (D99/3/42), paras 35-37; Case 004 (PTC39), Considerations on [REDACTED]’s Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 11 August 2017, D345/1/6, Opinion of Judges BEAUVALLET and BAIK, paras 24-26; Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 39; Case 003 (PTC28), Decision related to (1) MEAS Muth’s Appeal against Decision on Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, Opinion of Judges BEAUVALLET and BAIK, para. 175. *See also, e.g.*, French Court of Criminal Cassation, 10 May 2012, n° 12-81.197 (Regarding the Investigating Judge’s obligation to investigate, the French Court of Criminal Cassation has constantly maintained that an Investigating Judge must investigate the facts that it was seised of; such obligation ceases only in the presence of motives affecting public action according to which the facts alleged cannot be prosecuted or cannot receive any legal qualification).

⁵⁵² Case 001 Decision on Closing Order Appeal (D99/3/42), para. 37.

⁵⁵³ Case 001 Decision on Closing Order Appeal (D99/3/42), para. 35 (footnotes omitted).

⁵⁵⁴ Dismissal Order (D266), para. 54 (The facts in the Introductory Submission are, according to the National Co-Investigating Judge: “1. S-21 Security Centre; 2. S-22 Security Centre; 3. Kampong Chhnang Airfield Worksite; 4. Wat Enta Nhien Security Centre; 5. Stung Hav Quarry; 6. Crimes Committed by the DK Navy in the Waters and on the Islands; 7. Armed Conflict with Vietnam; 8. Division 801 and Detention Centre 810; 9. Other RAK Security Centres and Locations; 10. Purge within Division 164”).

⁵⁵⁵ Dismissal Order (D266), para. 54.



Revolutionary Army of Kampuchea (“RAK”) Security Centres and Other Purge Sites.⁵⁵⁶ Secondly, and more importantly, the International Judges remark that while the National Co-Investigating Judge claims to have considered the fact and the allegations related to purges of Division 164, he fails to take into consideration the clarifications on the circumstances related to those purges, and thus the scope of that particular factual allegation, as provided by the International Co-Prosecutor in the Supplementary Submission. As a result, he did not appraise, for example, any factual allegations related to the crimes against humanity of extermination and persecution on racial grounds committed at the Durian Plantation site⁵⁵⁷ or of enslavement at Kang Keng worksite.⁵⁵⁸ Further, by discounting the Supplementary Submission entirely, he fails to consider the factual allegations related to crimes against humanity of forced marriages and rape in the Kampong Som area.⁵⁵⁹ Accordingly, the International Judges find that the National Co-Investigating Judge committed a significant error of law by failing to duly address the full scope of the criminal allegations he was seised of, and declare that such error affects the validity of the Dismissal Order in a fundamental manner.

248. In light of the above, the International Judges find it unnecessary to address the International Co-Prosecutor’s claim that the unaddressed facts would have enhanced the gravity of the crimes alleged against the Charged Person.⁵⁶⁰ In conclusion, the International Judges uphold Ground C of the International Co-Prosecutor’s Appeal.

(c) Conclusion

249. In light of their review of Grounds B and C of the International Co-Prosecutor’s Appeal, the International Judges find that the National Co-Investigating Judge willingly committed a series of errors of law by ignoring the evidence placed onto the Case File after 29 April 2011 and a number of factual allegations of which he was seised. The International Judges emphasise that these violations of his obligations, which are fundamentally determinative of his assessment of the case, invalidate the Dismissal

⁵⁵⁶ Introductory Submission (D1), paras 42-66. The International Judges stress that the National Co-Investigating Judge not only inaccurately enumerates the number of facts presented in the Introductory Submission, but also miscalculates the number of facts related to SOU Met. There are not two (2) facts but three (3): 1. Overall Purges in Division 502; 2. S-22 Security Centre; and 3. Kampong Chhnang Airport Construction Site.

⁵⁵⁷ Supplementary Submission (D120), para. 6.

⁵⁵⁸ Supplementary Submission (D120), paras 7-9.

⁵⁵⁹ Supplementary Submission (D120), paras 20-24.

⁵⁶⁰ International Co-Prosecutor’s Appeal (D266/2), paras 70-82.



Order, which, in effect, constitutes an unfinished order and cannot be considered a valid closing order in the meaning of Internal Rule 67. Therefore, the International Judges do not find it necessary to continue reviewing the merits of the International Co-Prosecutor's Appeal on account of the nullity affecting the Dismissal Order *ab initio* and find all other appeal grounds moot.

250. Further, the International Judges observe that the National Co-Investigating Judge instigated such errors by electing to terminate the judicial investigation on 29 April 2011, while it was validly resumed by the Reserve International Co-Investigating Judge KASPER-ANSERMET on 2 December 2011 and further carried on under the direction of successive International Co-Investigating Judges.⁵⁶¹ The National Co-Investigating Judge persisted in his errors regarding the conduct of the investigation for almost seven years until the issuance of the Dismissal Order on 28 November 2018. It follows that the Dismissal Order, being an unfinished order, was marred with illegality, which rendered it null and void.

ii. Grounds A, D, E, F, G and H

251. While the Co-Prosecutors may appeal against all orders issued by the Co-Investigating Judges,⁵⁶² the International Judges recall that in this case, the National Co-Investigating Judge committed a series of errors of law by electing to disregard a number of factual allegations of which he was seised and the evidence placed onto the Case File after 29 April 2011, which are fundamentally determinative of his assessment of the case and, accordingly, invalidate the Dismissal Order.⁵⁶³

252. Therefore, the International Judges declare Grounds A, D, E, F, G and H of the International Co-Prosecutor's Appeal moot.

C. CONCLUSION ON VALIDITY OF CLOSING ORDERS

253. On 28 November 2018, the International Co-Investigating Judge issued an Indictment, sending MEAS Muth to trial,⁵⁶⁴ while the National Co-Investigating Judge issued a Closing Order dismissing all charges against him.⁵⁶⁵ The International Judges

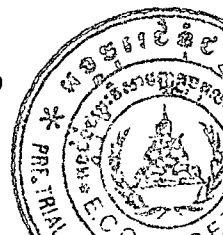
⁵⁶¹ See *supra* paras 228-243.

⁵⁶² See *supra* paras 51, 53 referring to Internal Rules 67(5), 74(2).

⁵⁶³ See *supra* paras 226-250.

⁵⁶⁴ Indictment (D267).

⁵⁶⁵ Dismissal Order (D266).



recall that the Co-Investigating Judges' agreement on the simultaneous issuance of conflicting Closing Orders amounts to an error in law.⁵⁶⁶

254. The International Judges further observe that the Co-Investigating Judges erroneously vested themselves with authority to issue separate and contradicting closing orders on 18 September 2017,⁵⁶⁷ and recorded their disagreement in this regard almost a year later on 17 September 2018.⁵⁶⁸ In light of the foregoing as well as the Parties' submissions regarding the two conflicting Closing Orders,⁵⁶⁹ the International Judges deem it necessary to address the validity of each Closing Order.

1. Relevant Law and Its Application in the Instant Case

a. The Meaning of "[t]he Investigation Shall Proceed"- Articles 5(4) and 7 of the ECCC Agreement and Article 23^{new} of the ECCC Law

255. The International Judges first recall that one Co-Investigating Judge may validly issue an indictment by acting alone.⁵⁷⁰ The International Judges further note Article 5(4) of the ECCC Agreement and Article 23^{new} of the ECCC Law, which provide that in the event of a disagreement between the Co-Investigating Judges, "[t]he investigation shall proceed" unless the Co-Investigating Judges or one of them refers their disagreement to the Pre-Trial Chamber.⁵⁷¹

256. The International Judges observe that this principle of continuation of judicial investigation governs the issue at hand. While the settlement procedure of disagreements

⁵⁶⁶ See *supra* paras 78-109.

⁵⁶⁷ Case 003 Decision on Disclosure concerning Disagreements (D262.2), paras 13-15.

⁵⁶⁸ Indictment (D267), para. 27.

⁵⁶⁹ See *supra* paras 223-225.

⁵⁷⁰ See Internal Rule 1(2) ("[U]nless otherwise specified, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually, whether directly or through delegation"). See, e.g., Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 105; Case 004/2, Decision on Ta AN's Appeal against the Decision Rejecting his Request for Information concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2, para. 11; Case 004, Decision on IM Chaem's Urgent Request to Stay the Execution of her Summons to an Initial Appearance, 15 August 2014, A122/6.1/3, para. 14; Case 004 Decision on IM Chaem's Appeal against the International Co-Investigating Judge's Decision on her Motion to Reconsider and Vacate her Summons dated 29 July 2014, 9 December 2015, D236/1/1/8, para. 30.

⁵⁷¹ ECCC Agreement, Art. 5(4) ("The co-investigating judges shall cooperate with a view to arriving at a common approach to investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, *the investigation shall proceed* unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7") (emphasis added); ECCC Law, Art. 23^{new}, para. 3 ("*The investigation shall proceed* unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions") (emphasis added).



between the Co-Investigating Judges provided by Internal Rule 72 may not be applied to the procedures *after* the issuance of a closing order, it does not preclude application to the procedure of *issuing* the closing order before the conclusion of the investigation.⁵⁷² As stated by the Pre-Trial Chamber in a previous decision, in case one of the Co-Investigating Judges proposes to issue an indictment and the other disagrees, either or both of them can bring the disagreement before the Pre-Trial Chamber pursuant to Internal Rule 72.⁵⁷³ The International Judges further recall the Supreme Court Chamber’s finding that “[i]f [...] the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in *proposing to issue* an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed’”.⁵⁷⁴

257. In the case at hand, neither of the Co-Investigating Judges referred the disagreement to the Pre-Trial Chamber within 30 days⁵⁷⁵ from the registration of the disagreement on 12 July 2018. In this specific situation where one of the Co-Investigating Judges proposes to issue an indictment and the other Co-Investigating Judge disagrees, “the investigation shall proceed” – being the applicable default position in case of unresolved discord between the Co-Investigating Judges– means that the indictment must be issued as proposed.⁵⁷⁶

258. Furthermore, in examining the meaning of “the investigation shall proceed”, the International Judges find that no one may reasonably interpret this language, in its ordinary meaning and in light of its object and purpose, to include the issuance of a dismissal order.⁵⁷⁷ First, in its ordinary meaning, a proposal to issue a dismissal order, the very antithesis of an indictment which makes the case move forward to trial, cannot be recognised as a separate investigative act. It is nothing more than a different characterisation of the National Co-Investigating Judge’s disagreement on the issuance

⁵⁷² Internal Rule 67(1) (“The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order”).

⁵⁷³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 94, 116.

⁵⁷⁴ Case 001 Appeal Judgment (F28), para. 65 (emphasis added).

⁵⁷⁵ See ECCC Agreement, Art. 5(4); ECCC Law, Art. 23^{new}; Internal Rule 72(2).

⁵⁷⁶ ECCC Agreement, Arts 5(4), 7(4); ECCC Law, Art. 23^{new}.

⁵⁷⁷ Vienna Convention, Art. 31(1) (“[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).



of the indictment, which must be resolved by the Internal Rule 72 disagreement settlement procedure. Second, the purpose of the ECCC Agreement and the ECCC Law is to *bring to trial* senior leaders of DK and those who were most responsible for the crimes.⁵⁷⁸ It is reasonably inferred from the language of Articles 5(4), 6(4) and 7 of the ECCC Agreement, Articles 20^{new} and 23^{new} of the ECCC Law and Internal Rules 13(5), 14(7), 71 and 72 that the key object of the disagreement settlement mechanism is to prevent a deadlock from derailing the proceedings from moving to trial.⁵⁷⁹

259. The International Judges, thus, find that the International Co-Investigating Judge's issuance of the Indictment, despite his erroneous agreement on the issuance of a simultaneous Dismissal Order by his colleague, is procedurally in conformity with the applicable law before the ECCC, whereas the National Co-Investigating Judge's issuance of the Dismissal Order has no legal basis.

260. The International Judges reaffirm that a closing order of the Office of the Co-Investigating Judges must be a single decision.⁵⁸⁰ They further underline that in the present circumstances, referral of disagreements between the Co-Investigating Judges before the Pre-Trial Chamber is mandatory and that they have no other means of settling their dispute when they fail to uphold their obligation to reach a common position concerning a closing order.⁵⁸¹ The International Judges consider that the issuance of the conflicting Dismissal Order by the National Co-Investigating Judge without referral to the Pre-Trial Chamber is a brazen attempt to entirely circumvent this essential and mandatory requirement, thwarting the ECCC founding legal texts. In particular, Articles 5 and 7 of the ECCC Agreement explicitly provide instructions on the National Co-Investigating Judge's required conduct and the outcome of any disagreement between the Co-Investigating Judges. Therefore, the International Judges find that the issuance of the Dismissal Order, as an attempt to avoid the compulsory disagreement

⁵⁷⁸ ECCC Agreement, Art. 1; ECCC Law, Art. 1.

⁵⁷⁹ The ECCC's negotiating history supports this interpretation. *See, e.g.*, D. SCHEFFER, "The Extraordinary Chambers in the Courts of Cambodia" (2008), p. 231 ("In the absence of that supermajority vote, the investigation or recommendation to indict would proceed"); D. CIORCIARY & A. HEINDEL, *Hybrid Justice* (1st Edition, USA, The University of Michigan Press, 2014), D297.1, p. 31 ("To manage the risk of disagreement and deadlock between the Co-Prosecutors and Co-Investigating Judges, U.S. officials pushed for the establishment of a special judicial panel for that purpose. UN and Cambodian officials soon agreed to create a Pre-Trial Chamber composed of three Cambodian and two international judges empowered to block investigations or indictments only by supermajority vote").

⁵⁸⁰ *See supra* para. 104.

⁵⁸¹ *See supra* paras 101, 106.



procedure, is legally flawed and shall accordingly be considered null and void.

261. Further, the International Judges hold the view that the argument of a possible *lacunae* in the ECCC legal framework in relation to the legal repercussions of issuing conflicting closing orders finds no application in the present case. Even if the Pre-Trial Chamber was to appreciate that such incongruent situation was not envisaged in the ECCC legal framework, the alleged uncertainty is removed through a fair reading of the relevant legal texts, especially Articles 5(4) and 7(4) of the ECCC Agreement and Articles 20 and 23^{new} of the ECCC Law which uphold the principle of continuation of judicial investigation and prosecution.⁵⁸² In addition, the International Judges clarify that pursuant to Internal Rule 77(13)(b), when an indictment is not reversed, it shall stand, the proceedings must be continued and the case must be transferred to trial.

262. Accordingly, the International Judges find that the two Closing Orders in question are not identical in their conformity with the applicable law before the ECCC. The International Judges recall that for reasons stated previously, the Dismissal Order is void⁵⁸³ and conclude that the National Co-Investigating Judge's issuance of the Dismissal Order is *ultra vires* and, therefore, void, as it constitutes an attempt to defeat the default position enshrined in the ECCC legal framework. On the other hand, the International Co-Investigating Judge's Indictment stands as it remains in conformity with the said position.

b. The Supreme Court Chamber's Decision in Case 004/2 Has No Impact on the Present Case

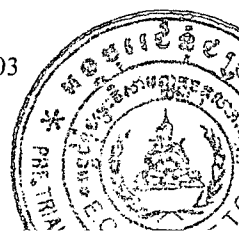
263. On 10 August 2020, the Supreme Court Chamber, in its Decision on Immediate Appeal in Case 004/2, pronounced that the Pre-Trial Chamber unanimously declared that "the actions of the Co-Investigating Judges in producing two separate and conflicting Closing Orders was a nullity"⁵⁸⁴ and, consequently, dismissed the International Co-Prosecutor's Immediate Appeal on the merits.⁵⁸⁵ After reaching the conclusion that the Trial Chamber had not been administratively seised of the Case File 004/2 and upon its finding that "neither Closing Order was valid", the Supreme Court Chamber decided that "the case against AO An is hereby terminated before the

⁵⁸² See *supra* paras 255-256.

⁵⁸³ See *supra* paras 228-250.

⁵⁸⁴ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 53.

⁵⁸⁵ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), Disposition, p. 24.



ECCC.”⁵⁸⁶

264. The next day, the Supreme Court Chamber issued its “Decision on the Civil Party Lawyers’ Request for Necessary Measures to be Taken by the Supreme Court Chamber to Safeguard the Civil Parties Fundamental Right to Legal Representation before the Chamber in Case 004/2” (“Decision on the Civil Party’s Request for Necessary Measures”).⁵⁸⁷ The Supreme Court Chamber proclaimed that Case 004/2 had “been terminated by operation of a decision of the Pre-Trial Chamber”⁵⁸⁸ and re-emphasised its view that “the inescapable fact remains that a necessary valid Closing Order could not be reconciled with the Pre-Trial Chamber’s unanimous findings and declarations.”⁵⁸⁹

265. The Supreme Court Chamber’s overall position appears to rest on two central pillars: first, the Trial Chamber was never administratively seised of the Case File 004/2, as the Case File was never “formally transferred” through the “proper administrative and procedural mechanisms”,⁵⁹⁰ and consequently, the Trial Chamber had no case before it and could not effectively terminate the proceedings;⁵⁹¹ second, the Supreme Court Chamber’s characterisation of the Pre-Trial Chamber’s unanimous holding concerning the two Closing Orders as a legal declaration of “nullity”,⁵⁹² meaning the two Closing Orders were both necessarily found “void” and were “of no legal effect”.⁵⁹³

266. The International Judges wish to address here only the second pillar, which is relevant to this section.⁵⁹⁴ The International Judges will also address the Supreme Court

⁵⁸⁶ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 71(v) and (vi).

⁵⁸⁷ Case 004/2/07-09-2009-ECCC/SC, Decision on the Civil Party Lawyers’ Request for Necessary Measures to be Taken by the Supreme Court Chamber to Safeguard the Civil Parties Fundamental Right to Legal Representation Before the Chamber in Case 004/2, 11 August 2020, E004/2/6 (“Case 004/2 Decision on Civil Party Request for Necessary Measure (E004/2/6)”).

⁵⁸⁸ Case 004/2 Decision on Civil Party Request for Necessary Measure (E004/2/6), para. 22.

⁵⁸⁹ Case 004/2 Decision on Civil Party Request for Necessary Measure (E004/2/6), para. 21.

⁵⁹⁰ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), paras 49-50.

⁵⁹¹ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 57.

⁵⁹² Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 53.

⁵⁹³ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 67.

⁵⁹⁴ Regarding the first pillar on which the Supreme Court Chamber relies, the International Judges reiterate that all necessary and required steps for transferring Case File 004/2 to the Trial Chamber have been duly taken, *see* Case 004/2, Filing and Notification Instruction Form related to the Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Annex A to the International Judges’ Memorandum concerning the Transfer of Case File 004/2, 19 December 2019, D359/36.1 and D360/45.1; Case 004/2, Notification Instructions Form Served by the Pre-Trial Chamber’s Greffier to the CMS for Notification of the Pre-Trial Chamber’s Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33) to the Trial Chamber, Annex 4 to the Interoffice Memorandum of International Judges BAIK and BEAUVALLET concerning the Transfer of Case File 004/2, 28 January 2020, D359/36.4 and D360/45.4. *See also* for an overview of the applicable law and events related to the transfer of Case File 004/2 to the Trial Chamber: Case 004/2, Interoffice Memorandum of the International Judge BAIK and



Chamber's decision to terminate Case 004/2 despite its apparent view that neither Closing Order validly exists in the Case File 004/2.

i. The Separation of Judicial Competence within the ECCC Legal Framework

267. It is clear that the Supreme Court Chamber did not decide several dispositive legal questions concerning the pre-trial stage which would materially determine the crucial issue as to which of the two Closing Orders would prevail under the ECCC legal framework. In explicitly deferring these questions to the Pre-Trial Chamber,⁵⁹⁵ the Supreme Court Chamber recognised the Pre-Trial Chamber's sole and exclusive final competence to decide these dispositive legal questions, which squarely fall within the ambit of the pre-trial stage. The Supreme Court Chamber thereby demonstrated its appreciation of the careful separation of powers etched in the ECCC's judicial architecture. Just as the Supreme Court Chamber exercises unquestionable final competence over the trial and appellate stages,⁵⁹⁶ the Pre-Trial Chamber exercises the ultimate authority over the investigative pre-trial phase,⁵⁹⁷ a power derived from its role as the ECCC's Investigative Chamber, forming a "final jurisdiction over the pre-trial

BEAUVALLET concerning the Notification of the Pre-Trial Chamber's Considerations in Case 004/2, Annex 6 to the Interoffice Memorandum of International Judges BAIK and BEAUVALLET concerning the Transfer of Case File 004/2, 29 January 2020, D359/36.6 and D360/45.6; Case 004/2, Interoffice Memorandum of the International Judges BAIK and BEAUVALLET concerning the Transfer of Case File 004/2, 12 March 2020, D359/36 and D360/45. Furthermore, the International Judges emphasise that the first pillar is based on a serious legal flaw of equating and conflating the administrative formality of transferring the Case File with a jurisdictional bar precluding the Trial Chamber from action. While it may be tempting for one to argue that the Case File should have been transmitted to the Trial Chamber by the Pre-Trial Chamber in order for the Trial Chamber to be seised, this position is without support and contradicts the Internal Rules. First, an absolute administrative precondition of such magnitude cannot simply be inferred contrary to the principle of *la compétence de la compétence* (see, e.g., ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, paras 18-19). Second, the Trial Chamber could and should have ordered transfer of the Case File if it considered that access to the Case File was required to resolve the preliminary questions concerning its jurisdiction to proceed with trial or the termination of prosecution (see Internal Rules 69(3) and 89). With deep regret, the International Judges are forced to conclude that the alleged administrative prerequisites of notification and transmission were crafted as a convenient pretext to bring the proceedings to an end. **Since the Greffier of the Pre-Trial Chamber properly requested the transfer of and the Trial Chamber's access to the Case File, it is difficult to understand how the incertitude of the Administration could lastingly impede the Trial Chamber's seisin of the Case File.**

⁵⁹⁵ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 68 ("The International Co-Prosecutor's submission that the *default position* is governed by Rule 77(13)(b) which, as *lex specialis* relating to Indictments, prevails over the general Rule 77(13)(a) regarding orders "other than an indictment" cannot be determined in a vacuum. **It remains a core issue that could only have been resolved by the Pre-Trial Chamber.** Similarly, whether Rule 1(2) permits an Investigating Judge to act individually **remains to be resolved by the Pre-Trial Chamber**" (italic emphasis in original, bold emphasis added and footnotes omitted)).

⁵⁹⁶ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 64.

⁵⁹⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 49.



stage at the ECCC”⁵⁹⁸ from which no appeal is possible.⁵⁹⁹

268. Consequently, it is beyond doubt that the Supreme Court Chamber would have no competence to overturn a dismissal order or an indictment that has been upheld or not reversed by virtue of a Pre-Trial Chamber decision. As Internal Rule 76(7) ordains, “[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. *No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.*”⁶⁰⁰ The International Judges strongly reject the proposition that the legal status of a pre-trial document could be altered *post hoc* by the Supreme Court Chamber.

269. Nor did the Supreme Court Chamber have the competence to bind the Pre-Trial Chamber as to what the default decision of the Pre-Trial Chamber was under Internal Rule 77(13).⁶⁰¹ Such contravention of the ECCC’s judicial separation of powers would have drastic consequences for the proper functioning of the ECCC.

270. In sum, the Pre-Trial Chamber’s legal pronouncements of pre-trial questions – including, *inter alia*, the validity or the nullity of pre-trial documents and the operation of Internal Rule 77(13) – are binding and supreme. Its pronouncements are not subject to appeal and may not be changed *post hoc* by another ECCC judicial body.

ii. The Supreme Court Chamber’s Interpretation of the Pre-Trial Chamber’s Unanimous Position

271. The Supreme Court Chamber’s characterisation of the Pre-Trial Chamber’s unanimous holding concerning the two Closing Orders as a legal declaration of “nullity”⁶⁰² demonstrates the Supreme Court Chamber’s misreading of the Pre-Trial Chamber’s unanimous position.

272. The Pre-Trial Chamber’s Considerations, taken in their entirety including the

⁵⁹⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 41.

⁵⁹⁹ ECCC Law, Art. 20*new*; Internal Rule 77(13).

⁶⁰⁰ Internal Rule 76(7) (emphasis added).

⁶⁰¹ It is thus particularly disturbing that the Supreme Court Chamber, in its 11 August 2020 Decision on Civil Party Request for Necessary Measures (E004/2/6), interloped further than in the Decision on Immediate Appeal with a proclamation that the case against AO An was “terminated by operation of a decision of the Pre-Trial Chamber”, which also contradicts its holding that the case against AO An was “hereby terminated” on 10 August 2020 (*see* Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 71(vi)).

⁶⁰² Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 53.



separately appended Opinions, cannot faithfully be understood as declaring that both Closing Orders were inherently null, as the Supreme Court Chamber appeared to conclude.⁶⁰³ *All five Pre-Trial Chamber Judges* considered it necessary to provide their opinions on the separate validity of the Closing Orders.⁶⁰⁴ In other words, the Pre-Trial Chamber Judges unanimously held that *at least* one Closing Order retained legal standing after the Pre-Trial Chamber's finding concerning the Co-Investigating Judges' illegal action. The fact that the Supreme Court Chamber deemed the Pre-Trial Judges' separate Opinions as "redundant" and "superfluous" only serves to demonstrate the Supreme Court Chamber's unfortunate misunderstanding of the Pre-Trial Chamber's unanimous declaration.⁶⁰⁵

273. The International Judges must point out the flaws in the Supreme Court Chamber's reasoning. First and most crucially, the Supreme Court Chamber appeared to equivocate the Pre-Trial Chamber's holding that the Co-Investigating Judges' course of action in issuing the Closing Orders was illegal⁶⁰⁶ with the conclusion that the Closing Orders were "void" as such, which is a notable leap of reasoning. The Pre-Trial Chamber unanimously condemned the Co-Investigating Judges' *agreement* to vest themselves with authority to issue split Closing Orders. This *illegal agreement*, which sought to tactically "shield their disagreements from the most effective dispute settlement mechanism available under the ECCC legal framework to ensure a way out of procedural stalemates",⁶⁰⁷ was in contravention of the essential logic of the ECCC legal framework, considering the Pre-Trial Chamber's *raison d'être*.⁶⁰⁸ But the fact that *certain actions* of

⁶⁰³ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 53 ("[N]otwithstanding the *unanimous* declaration that the **actions** of the Co-Investigating Judges in producing two separate and conflicting Closing Orders was a **nullity**, the Judges of the Pre-Trial Chamber provided their Considerations on the **validity** of the separate and conflicting closing orders" (italic emphasis in original, bold emphasis added)); Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 67 ("[The International Co-Prosecutor's] argument [concerning the default position] sidesteps or ignores the consequences of the *unanimous* finding of the Pre-Trial Chamber that the Closing Orders were the results of *unlawful and illegal actions*. A void act cannot create a lawful consequence or result. It therefore logically follows that the source action – each Closing Order – was of no legal effect").

⁶⁰⁴ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 124, footnote 198 referring to Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges PRAK, NEY, HUOT, paras 170-302; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 304-329.

⁶⁰⁵ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 53. The Supreme Court Chamber's such assertion further ignores Article 14 (2) of the ECCC law and Internal Rule 77(14).

⁶⁰⁶ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 120-124.

⁶⁰⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 123.

⁶⁰⁸ See also Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 99-100 ("[T]he Pre-Trial Chamber is unable to exclude that the Co-Investigating Judges may *have willfully intended to circumvent the application of the law in this case and create the current procedural stalemate*."



the Co-Investigating Judges in producing the Closing Orders were illegal cannot “logically” lead to such a sweeping conclusion without a reasoned demonstration as to why that particular procedural illegality would result in the complete vitiation of the two Closing Orders in question.⁶⁰⁹ Nevertheless, this leap of reasoning constituted the cornerstone upon which the Supreme Court Chamber’s Decision rested.⁶¹⁰

274. Second, the Supreme Court Chamber did not deem it necessary to analyse the body text of the Pre-Trial Chamber’s actual decision to clarify the central question under its review – which led to the termination of Case 004/2⁶¹¹ – of whether the Pre-Trial Chamber unanimously found both Closing Orders null and void. Instead, the Supreme Court Chamber merely relied on the wording in the Disposition section of the Considerations⁶¹² to make a decisive pronouncement on its presumption as to what the unanimous declaration meant. However, assuming the Considerations were unclear and ambiguous, it surely does not allow the Supreme Court Chamber to conclude in a few cursory sentences of reasoning that the Closing Orders were both void and had no legal

Indeed, it clearly appears from their above decisions that they deliberately ensured that any resolution of the matters over which they disagreed would have to be addressed only as part of appellate proceedings before the Pre-Trial Chamber *rather than through the procedure specifically intended for by the ECCC legal framework to conclusively settle disagreements between the Co-Investigating Judges*. The Co-Investigating Judges were aware of the difficulties their actions would cause. Yet, they made sure to *shield their relevant disagreements from the effective legal resolution mechanism* prescribed by the ECCC Agreement, ECCC Law, and Internal Rules. The Pre-Trial Chamber unequivocally denounces and condemns this grave violation of the ECCC legal system” (emphasis added).

⁶⁰⁹ See generally Case 002/1 Appeal Judgment (F36), para. 100 (“In other words, not all procedural errors will lead to a reversal of the judgement, but only procedural errors that resulted in a ‘grossly unfair outcome in judicial proceedings’”). As will be explained below, the particular procedural defect of failure of referral was cured and, in any case, any pre-trial procedural defects cannot be raised before or upheld by the Supreme Court Chamber under Internal Rule 76(7).

⁶¹⁰ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 71(v) (“In light of the Pre-Trial Chamber’s finding in Case 004/2 that the actions of the Co-Investigating Judges were illegal, it *flowed* that neither Closing Order was valid” (emphasis added)). See also Case 004/2 Decision on Civil Party’s Request for Necessary Measures (E004/2/6), para. 20 (recalling its conclusions in the Decision on Immediate Appeal that “it *followed* that neither Closing Order was valid” (emphasis added)). The International Judges understand both expressions used by the Supreme Court Chamber – *i.e.* “flowed” and “followed” – to signify the same meaning. Additionally, the Supreme Court Chamber’s reasoning illustrates a so-called “circular reasoning fallacy”, see Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 67 (The Supreme Court Chamber states that “the Closing Orders were the results of unlawful and illegal actions” after providing that “[a] void act cannot create a lawful consequence or result. It therefore logically follows that the source action – each Closing Order – was of no legal effect”. The Supreme Court Chamber thus assumes the truth of the conclusion that the Closing Orders were of no legal effect by supporting it with the premise, also assumed to be true, that the Orders were void and could not create a lawful result).

⁶¹¹ See Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 68 (According to the Supreme Court Chamber, in “the absence of a valid Closing Order, indictment”, the case “unequivocal[ly]” could not go to trial and had to be terminated. This constitutes a serious error and another big leap of reasoning or self-contradiction. By this reasoning, no valid Closing Order remains. Yet, the case was terminated without any legal basis). See also *infra* paras 276-280.

⁶¹² Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), paras 51-53.



effect.

275. Finally, it bears mentioning that besides its misreading of the Pre-Trial Chamber's unanimous finding on the illegal accord between the Co-Investigating Judges to evade the disagreement settlement procedure and issue two closing orders simultaneously, the Supreme Court Chamber failed to properly appreciate the applicability in Case 004/2 of the injunctions set forth in Article 5(4) of the ECCC Agreement and Article 23^{new} of the ECCC Law that "the investigation shall proceed" as well as in Article 7(4) of the ECCC Agreement that "the investigation or prosecution shall proceed", and their effect on the distinct validity of the Closing Orders.⁶¹³ The International Judges maintain that the said rules constituted the correct application of the law in that case.

iii. The Supreme Court Chamber Cannot Terminate the Case 004/2 Without Valid Closing Order

276. The Supreme Court Chamber, in its Decision on Immediate Appeal, held that "the case against AO An is hereby terminated before the ECCC."⁶¹⁴ The Supreme Court Chamber reached this conclusion according to the following chain of reasoning: (i) in light of the Pre-Trial Chamber's finding in Case 004/2, "it flowed that neither Closing Order was valid";⁶¹⁵ (ii) "the issue in Case 004/2 is whether the case can go to trial in the absence of a valid Closing Order, indictment. The answer is an unequivocal no";⁶¹⁶ and thus (iii) "in the absence of a definitive and enforceable indictment against AO An, Case 004/2 against him should be terminated before the ECCC."⁶¹⁷

277. The International Judges are not persuaded by the Supreme Court Chamber's self-contradictory reasoning. In particular, it is difficult to understand how a case with no valid closing order can be legally "terminated". Further, the International Judges do not follow how the Supreme Court Chamber went from concluding that the case could

⁶¹³ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 319-326.

⁶¹⁴ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 71(vi). Further, the International Judges observe that the Supreme Court Chamber was not directly seised by the International Co-Prosecutor with termination of the proceedings in Case 004/2.

⁶¹⁵ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 71(v). As explained *supra* paras 271-275, the Supreme Court Chamber's premise in this regard rests on an erroneous misreading of the Pre-Trial Chamber's unanimous position as articulated in the Case 004/2 Considerations.

⁶¹⁶ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 68.

⁶¹⁷ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 69.



not *currently* go to trial (due to the absence of a valid indictment), to the breath-taking conclusion that the *entire case should be permanently terminated*. This constituted another significant leap of legal reasoning.

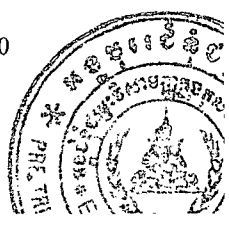
278. Assuming, *arguendo*, that “neither Closing Order was valid” and both were “of no legal effect”, pursuant to what legal basis did the Supreme Court Chamber decide to “hereby terminate” the case? It is beyond doubt that the Supreme Court Chamber, notwithstanding its status as the final court at the trial and appellate stage, has no authority to terminate ECCC proceedings while at the pre-trial investigative stage. If, following the Supreme Court Chamber’s logic, Case 004/2 never reached the Trial Chamber and the trial proceedings never began, the case remains in the pre-trial stage, where the Supreme Court Chamber does not have the competence to legally terminate a case. Yet, this is precisely what the Supreme Court Chamber did, without any dismissal order and without any reasoning.

279. The International Judges appreciate that the Supreme Court Chamber considers itself, as a court of final instance, to be bound by “a duty to bring clarity and finality” to unresolved legal situations.⁶¹⁸ The International Judges also wholeheartedly agree with the Supreme Court Chamber that the parties are entitled to “legal certainty” and a “final determination”.⁶¹⁹ Nevertheless, this impulse to provide legal certainty, however well-intentioned, clearly cannot be transformed into an invitation to shut down a case with no valid dismissal order. Achieving legal finality and clarity on an issue, such as resolving conclusively whether the default position applies, is distinct from bringing an entire case to a total halt. Since both Closing Orders are void according to the Supreme Court Chamber’s position, victims of the Khmer Rouge’s crimes, AO An himself prior to his passing away, the parties to the ECCC Agreement and the Cambodian and the international public do not know what the outcome of the judicial investigation is against AO An – there is no legal document validly setting out the fruits of the investigation as both documents are “of no legal effect”. The Supreme Court Chamber’s arbitrary ending of a case with no closing order does not bring legal certainty, clarity, nor finality.

280. Strikingly, as the Supreme Court Chamber itself admits, it did not have access to

⁶¹⁸ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 64.

⁶¹⁹ Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), paras 60, 64-65, 71(iii).



the Case File in rendering its decision.⁶²⁰ Thus, in the circumstances of Case 004/2, the ultimate decision to conclude proceedings relating to allegations of crimes against humanity and genocide was made by a judicial body that did not look at the evidence of the case, through a termination instruction in the nature of an executive fiat.⁶²¹

iv. Conclusion regarding the Supreme Court Chamber's Misinterpretation

281. In sum, the Pre-Trial Chamber's unanimous Considerations can only be faithfully understood as follows: (i) the Co-Investigating Judges' accord to shield their disagreement concerning the conflicting Closing Orders in Case 004/2 and to issue the Closing Orders was illegal, violating the legal framework of the ECCC; (ii) the Pre-Trial Chamber did *not* hold that both Closing Orders were null and void, despite the Co-Investigating Judges' illegal course of action, as the Pre-Trial Chamber's Judges believed that at least one of the Closing Orders was valid; and (iii) the Pre-Trial Chamber did not assemble an affirmative vote of at least four judges for a decision to overturn either the Closing Order (Dismissal) or the Closing Order (Indictment) in Case 004/2.

282. Bearing in mind the Pre-Trial Chamber's unanimous position regarding the actions of the Co-Investigating Judges, it is thus unfathomable that the Supreme Court Chamber would attribute to the Pre-Trial Chamber a holding of *nullity*. Furthermore, the Supreme Court Chamber may not and cannot terminate the proceedings on account of pre-trial procedural defects as is made clear by the ECCC Internal Rules⁶²² and the entire logic of the ECCC separation of judicial powers. Nor did the Supreme Court Chamber have the competence to void, *post hoc*, any Closing Order in Case 004/2 after it was not overturned by the operation of the Pre-Trial Chamber's default decision. Finally, the Supreme Court Chamber could not have terminated Case 004/2 which, on its logic, remained in the pre-trial investigative phase and had no valid closing orders.

283. Given the careful separation of judicial competence under the ECCC legal framework and the fallacies in reasoning identified above, there is simply no legal basis for the Pre-Trial Chamber to adopt the Supreme Court Chamber's Case 004/2 position

⁶²⁰ Case 004/2 Decision on Civil Party Request for Necessary Measures (E004/2/6), para. 21.

⁶²¹ Furthermore, the Supreme Court Chamber seems to insinuate that the termination of the proceedings was appropriate considering the thirteen-year long investigations (*see* Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), para. 69). To the extent the Supreme Court Chamber was motivated by this reason, this cannot serve as a valid legal basis since the ECCC legal framework does not prescribe a rigid time limit after which the Supreme Court Chamber can close a case by an executive order.

⁶²² *See* Internal Rule 76(7).



as controlling or even persuasive jurisprudence for Case 003. The International Judges, therefore, consider that the Supreme Court Chamber's Case 004/2 holding is not a license for the Pre-Trial Chamber to automatically terminate all the remaining cases with conflicting closing orders. Each case must be carefully examined on its own merits.⁶²³

2. Finding on the Validity of the Closing Orders

284. As stated in the preceding paragraphs, the International Judges find that on account of its substantive defects⁶²⁴ and the impermissible manner through which it was issued,⁶²⁵ the Dismissal Order is both intrinsically and extrinsically null and void. In essence, the International Judges conclude that the National Co-Investigating Judge impermissibly issued a void procedural act deprived of any legal existence. On the other hand, despite the simultaneous issuance of the Closing Orders, the Indictment stands as it is substantively valid and in conformity with the ECCC legal framework, including the default position applicable in case of disagreement between the Co-Investigating Judges and which aims to bring to trial senior leaders of the DK and those most responsible for the crimes committed by the Khmer Rouge.

D. CONCLUSION ON PERSONAL JURISDICTION

285. At the outset, the International Judges consider that the issue of personal jurisdiction, constituting an "absolute jurisdictional element"⁶²⁶ and an issue of general importance to the ECCC's jurisprudence and legacy,⁶²⁷ has to be addressed at this stage of the pre-trial phase. Further, the International Judges recall that the Dismissal Order is invalid due to the errors of law committed by the National Co-Investigating Judge in relation to his incomplete investigation of the criminal allegations in the seisin and his partial examination of the evidence in Case File 003. Therefore, the International Judges consider it relevant and necessary to include in the present examination the reasoning and assertions enunciated by the National Co-Investigating Judge that led him to conclude that the Charged Person did not fall within the personal jurisdiction of

⁶²³ In this regard, the Supreme Court Chamber was careful to eschew potential pre-judgment of the outcome of Case 003 in denying MEAS Muth's Request for Leave to Intervene. *See* Case 004/2, Decision on MEAS Muth's Request for Leave to Intervene and Respond to Immediate Appeal (E004/2/2/1), p. 3.

⁶²⁴ *See supra* paras 228-250.

⁶²⁵ *See supra* paras 255-262.

⁶²⁶ *See supra* para. 67.

⁶²⁷ *See supra* paras 128, 193 for the Pre-Trial Chamber's power to review issues of general significance for the ECCC's jurisprudence and legacy.



the ECCC.

286. The International Judges reaffirm that for the purpose of determining the ECCC's personal jurisdiction, the identification of those who were among the "most responsible" entails the quantitative and the qualitative assessment⁶²⁸ of both the gravity of the crimes alleged or charged, and the level of responsibility of the suspect.⁶²⁹ There is no exhaustive list of factors to be considered in undertaking this review; nor a mathematical threshold for casualties,⁶³⁰ or a filtering standard in terms of positions in the hierarchy.⁶³¹ The determination of personal jurisdiction rather requires a case-by-case assessment, taking into account the general context and the personal circumstances of the suspect.⁶³²

1. Assessment of the Gravity of Alleged or Charged Crimes

a. The Co-Investigating Judges' Findings

287. The International Judges recall that the assessment of the gravity of alleged or charged crimes relies on factors such as, *inter alia*, the number of victims, the geographic and the temporal scope and the manner in which they were allegedly committed, the number of separate incidents, the nature and the scale of the alleged or charged crimes as well as their impact on the victims.⁶³³

i. *The International Co-Investigating Judge's Findings*

288. The International Judges note the International Co-Investigating Judge's

⁶²⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 352.

⁶²⁹ Case 001 Trial Judgment (E188), para. 22. *See also* SCSL, *Prosecutor v. Fofana*, SCSL-04-14-PT-026, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, Trial Chamber, 3 March 2004, para. 38; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-169, Judgement on Prosecutor's Appeal against the Decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrant of Arrest, Article 58", Appeals Chamber, 13 July 2006, para. 76; ICTY, *Prosecutor v. Lukić et al.*, IT-98-32/1-PT, Decision on Referral of Case pursuant to Rule 11bis with Confidential Annex A and Annex B, Referral Bench, 5 April 2007, para. 26.

⁶³⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 352, 555. *See also* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

⁶³¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 352. *See also* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

⁶³² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 352. *See also* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

⁶³³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 141; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 327.

conclusion that the gravity of MEAS Muth's actions and the severity of their impact justify categorising MEAS Muth as one of the "most responsible".⁶³⁴ The International Co-Investigating Judge found that the charges of genocide of the Vietnamese⁶³⁵ and the crime against humanity of extermination of the Thai captured by the DK Navy⁶³⁶ "put him solidly within the bracket of [the ECCC's] personal jurisdiction".⁶³⁷ The International Co-Investigating Judge established that at the very least, 4476 Vietnamese and Thai were victims of those crimes "under MEAS Muth's reign".⁶³⁸ The International Co-Investigating Judge emphasised the grisly manner of the disposal of the bodies ordered by MEAS Muth, which surpasses the "normal" high level of cruelty of the DK regime.⁶³⁹

289. The International Co-Investigating Judge further found MEAS Muth responsible for a number of other crimes against humanity,⁶⁴⁰ war crimes,⁶⁴¹ and the domestic crime of premeditated homicide,⁶⁴² stressing his major role in i) the purges of the RAK Divisions 164, 502, 310 and 117⁶⁴³ during which a minimum of 2,152 persons were executed,⁶⁴⁴ and ii) in the oversight and organisation of worksites in Kampong Som⁶⁴⁵ where he found a minimum of 845 people killed and 15,000 victims of forced labour working and living under appalling conditions.⁶⁴⁶

ii. The National Co-Investigating Judge's Findings

290. The International Judges note that the National-Co-Investigating Judge, while acknowledging the ECCC's personal jurisdiction's criterion of gravity of alleged or charged crimes⁶⁴⁷ and the relevant factors to consider,⁶⁴⁸ did not deem it necessary to address the type of crimes, the legal qualifications or the modes of liability pertinent in

⁶³⁴ Indictment (D267), para. 462.

⁶³⁵ Indictment (D267), paras 482-487.

⁶³⁶ Indictment (D267), paras 501-503.

⁶³⁷ Indictment (D267), para. 463.

⁶³⁸ Indictment (D267), para. 464.

⁶³⁹ Indictment (D267), para. 465.

⁶⁴⁰ Indictment (D267), paras 488-495, 501-510, 515-518, 522-529, 531-534, 536-541, 543-548, 552-553, 555, 557, 561.

⁶⁴¹ Indictment (D267), paras 497-498, 512-513, 550, 559.

⁶⁴² Indictment (D267), paras 499, 514, 520, 530, 542, 551, 560.

⁶⁴³ Indictment (D267), para. 466. *See also* Indictment (D267), paras 271-328.

⁶⁴⁴ Indictment (D267), para. 467. *See also* Indictment (D267), para. 329.

⁶⁴⁵ Indictment (D267), para. 466.

⁶⁴⁶ Indictment (D267), para. 468.

⁶⁴⁷ Dismissal Order (D266), paras 3, 365.

⁶⁴⁸ Dismissal Order (D266), para. 366.



a discussion on the existence or the absence of sufficient evidence against MEAS Muth, on the basis that such analysis is required only for an indictment.⁶⁴⁹

291. The International Judges further observe that regarding the number of victims, the National Co-Investigating Judge found that MEAS Muth may be held responsible for the arrest of 42 to 67 soldiers of Division 164 and “some others” who were then sent to S-21 Security Centre in 1977⁶⁵⁰ and concluded on this basis that the number of victims who suffered as a result of MEAS Muth’s direct acts “differs greatly” from the number of victims who suffered as a result of Duch’s.⁶⁵¹ The National Co-Investigating Judge further found that MEAS Muth reported several military actions undertaken to the upper echelons, including the firing at a Vietnamese boat in Koh Kyang, the capture of 21 Thai at Koh Wai and 76 Vietnamese at Koh Tang as well as the execution of another 120 Vietnamese.⁶⁵² The National Co-Investigating Judge established that arrests and detentions happened at Wat Enta Nhien,⁶⁵³ but found no evidence showing that killings “truly” occurred at that site during the DK regime.⁶⁵⁴ The National Co-Investigating Judge finally made findings on the work and the living conditions at Stung Hav Rock Quarry.⁶⁵⁵

b. Discussion

i. *Review of the International Co-Investigating Judge’s Assessment on the Gravity of the Crimes Alleged or Charged*

292. The International Judges concur, for the most part, with the International Co-Investigating Judge’s factual findings on MEAS Muth’s alleged crimes.⁶⁵⁶ Firstly, they agree with the International Co-Investigating Judge’s analysis of crimes committed at sea by the DK Navy,⁶⁵⁷ especially with regard to criminal acts targeting the Vietnamese and the Thai,⁶⁵⁸ which amount, at the closing order stage, to the crime of genocide of the Vietnamese⁶⁵⁹ and the crime against humanity of extermination of the

⁶⁴⁹ Dismissal Order (D266), para. 3.

⁶⁵⁰ Dismissal Order (D266), para. 426.

⁶⁵¹ Dismissal Order (D266), para. 428.

⁶⁵² Dismissal Order (D266), paras 313-314.

⁶⁵³ Dismissal Order (D266), paras 290-295.

⁶⁵⁴ Dismissal Order (D266), para. 296.

⁶⁵⁵ Dismissal Order (D266), paras 303-304.

⁶⁵⁶ For errors made in relation to the calculation of victims, *see supra* paras 166-168.

⁶⁵⁷ *See* Indictment (D267), paras 217-257.

⁶⁵⁸ *See* Indictment (D267), paras 219-224, 232-247.

⁶⁵⁹ *See* Indictment (D267), paras 482-487.



Thai.⁶⁶⁰

293. The criminal acts characterising genocide were committed on a large scale with the *mens rea* to destroy in whole or in part a specific national or ethnic group, resulting in a devastating impact on this target population.⁶⁶¹ It is generally accepted in the jurisprudence that there is no hierarchy among the most serious crimes before international or hybrid jurisdictions.⁶⁶² On the other hand, it is equally accepted that the criminal intent constituting genocide, by its firm resolution to destroy a human group as such, is exceptionally serious.⁶⁶³ This plurality of considerations is an element that the International Judges will take into consideration.

294. The described acts constitutive of crimes against humanity of extermination were committed following a widespread and systematic pattern of open-ended capture-and-kill policy.⁶⁶⁴ In addition, some of the Vietnamese and the Thai captured by the DK Navy at sea were not executed immediately, but were sent to S-21 Centre where they were invariably subject to torture to extract incriminating confessions.⁶⁶⁵ These findings constitute strong indicators of the gravity of MEAS Muth's actions.

295. The International Judges further find that on the whole, the International Co-Investigating Judge sufficiently substantiated MEAS Muth's criminal conduct in the crimes committed against the members of the RAK Divisions 164,⁶⁶⁶ 502,⁶⁶⁷ 310⁶⁶⁸ and 117⁶⁶⁹ as well as the crimes committed at the worksites of the Ream area⁶⁷⁰ and Stung

⁶⁶⁰ See Indictment (D267), paras 501-503.

⁶⁶¹ See Indictment (D267), paras 484-487.

⁶⁶² The question of hierarchy of international crimes has been debated extensively, particularly in relation to sentencing. A clear-cut, unanimous position on whether some international crimes are invariably graver than others still has to emerge, see ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, paras 800-802. However, for case-law discussing the seriousness of international crimes, see, e.g., ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgement (Reasons), Appeals Chamber, 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgment (ICTR)"), para. 367; ICTY, *Prosecutor v. Tadić*, IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, Appeals Chamber, 26 January 2000, para. 69; ICTY, *Prosecutor v. Furundžija*, IT-95-17/1, Judgement, Appeals Chamber, 21 July 2000 ("*Furundžija* Appeal Judgment (ICTY)"), para. 243.

⁶⁶³ See, e.g., ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 August 2001, para. 700; ICTR, *Prosecutor v. Kambanda*, ICTR-97-23-S, Judgement and Sentence, Trial Chamber I, 4 September 1998, paras 14, 16-17.

⁶⁶⁴ See Indictment (D267), paras 231-257, 464, 488.

⁶⁶⁵ See Indictment (D267), paras 492, 507.

⁶⁶⁶ See Indictment (D267), paras 271-291.

⁶⁶⁷ See Indictment (D267), paras 292-294, 300-303.

⁶⁶⁸ See Indictment (D267), paras 295-297, 304-315.

⁶⁶⁹ See Indictment (D267), paras 298-299, 316-328.

⁶⁷⁰ See Indictment (D267), paras 339-354.



Hav Rock Quarry,⁶⁷¹ at the security centres of Toek Sap⁶⁷² and Wat Enta Nhien,⁶⁷³ and in relation to forced marriages in Kampong Som.⁶⁷⁴ The International Judges further find that the International Co-Investigating Judge correctly determined whether those facts may amount to crimes against humanity, war crimes and the domestic crime of premeditated homicide.⁶⁷⁵

296. With respect to the assessment of the number of victims, the International Judges note that as in Cases 004/1 and 004/2,⁶⁷⁶ the International Co-Investigating Judge applied a method based on conservative minimum thresholds to calculate the number of deaths and victims for which MEAS Muth may be held responsible.⁶⁷⁷ The International Co-Investigating Judge explained that this approach was adopted to avoid double-counts of victims and to tally solely victims whose victimhood can be connected with certainty to the temporal scope of the investigation.⁶⁷⁸ He clarified that as a result, “the actual victims numbers are very likely to be *much higher than estimated* in this Closing Order.”⁶⁷⁹ While the International Judges agree that death toll is an indicator, among others, to consider in assessing the impact of criminal conduct,⁶⁸⁰ they reiterate that an accurate and precise number of victims is not required at this pre-trial stage of the proceedings.⁶⁸¹ The International Judges highlighted in their Case 004/1 Considerations that “it may be impractical to insist on a high degree of specificity in cases of mass crimes, and that it is not necessary that the precise number of victims be known.”⁶⁸² Hence, it is sufficient

⁶⁷¹ See Indictment (D267), paras 371-402.

⁶⁷² See Indictment (D267), paras 411-425.

⁶⁷³ See Indictment (D267), paras 430-443.

⁶⁷⁴ See Indictment (D267), paras 444-455.

⁶⁷⁵ See Indictment (D267), paras 480-561.

⁶⁷⁶ Case 004/1 Closing Order Reasons (D308/3), paras 318-321; Case 004/2 Indictment (D360), paras 137-154.

⁶⁷⁷ Indictment (D267), para. 133. See also, e.g., Indictment (D267), paras 257 ii., 289, 442, 464.

⁶⁷⁸ Indictment (D267), para. 133.

⁶⁷⁹ Indictment (D267), para. 133 (emphasis added).

⁶⁸⁰ See Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 330.

⁶⁸¹ See *supra* paras 167-168. See also Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 86; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 214.

⁶⁸² Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 214 referring to ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-424, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 134; ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para. 112; *Stakić* Trial Judgement (ICTY), para 201; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para. 30. See also Case 002 Closing Order (D427), para. 1382.



that the International Co-Investigating Judge establishes, on a balance of probabilities, a reasonable estimate of the number of victims.⁶⁸³ The International Co-Investigating Judge's failure to do so resulted in an incomplete and undervalued assessment of the number of victims, as he himself acknowledged, which further highlights the artificial character of such approach.⁶⁸⁴

297. As a conclusion, the International Judges find that overall, the International Co-Investigating Judge's legal and factual determinations on the scale, the nature, the scope and the impact of the crimes alleged against MEAS Muth reveal a level of gravity that undoubtedly places such crimes within the category of the most severe and deleterious criminal conducts. The International Judges reiterate their finding that were the estimation of the number of victims determined according to the appropriate method, the International Co-Investigating Judge would have found, in all likelihood, that the charges laid against MEAS Muth assumed an even graver character.

ii. Review of the National Co-Investigating Judge's Assessment on the Gravity of Crimes Alleged or Charged

298. At the outset, the International Judges observe that the National Co-Investigating Judge did not find it necessary to make any legal finding on account that such determinations are required only for an indictment.⁶⁸⁵ In this regard, the International Judges reaffirm that all decisions from judicial bodies need to be reasoned as per international standards.⁶⁸⁶ More specifically, Internal Rule 67(4) and Article 247 of the Cambodian Code of Criminal Procedure stipulate that closing orders ought to be reasoned. In Case 001, the Pre-Trial Chamber found that the "decision to either dismiss acts or indict the Charged Person shall be reasoned as specifically provided by Internal

⁶⁸³ See *supra* para. 168. See also Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 86; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 330.

⁶⁸⁴ See *supra* paras 166-168.

⁶⁸⁵ Dismissal Order (D266), para. 296.

⁶⁸⁶ See Case 002 (PTC06), Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, para. 21 referring to United Nations Human Rights Committee ("HRC"), *General Comment 32: Art. 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, 19th session, 23 August 2007, U.N. Doc. CCPR/C/GC/32, para. 49; HRC, *Van Hulst v. The Netherlands*, Communication No. 903/1999, 15 November 2004, para. 6.4; HRC, *Bailey v. Jamaica*, Communication No. 709/1996, 21 July 1999, para. 7.2; HRC, *Morrison v. Jamaica*, Communication No. 663/1995, 3 November 1998, para. 8.5; ICTY, *Prosecutor v. Milutinović*, IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, Appeals Chamber, 3 July 2003, para. 22; *Furundžija* Appeal Judgment (ICTY), para. 69; European Court of Human Rights, *Suominen v. Finland*, Application No. 37801/97, Judgment, 1 July 2003, para. 36. See also Case 001 Decision on Closing Order Appeal (D99/3/42), para. 38 and footnote 40.



Rule 67(4).⁶⁸⁷ The Pre-Trial Chamber further established in its Case 004/1 Considerations that “as an appellate Chamber, [the Pre-Trial Chamber] must be able to review the findings that led to [the determination on the lack of personal jurisdiction], including those regarding the existence of crimes or the likelihood of [a suspect’s] criminal responsibility.”⁶⁸⁸

299. Accordingly, the International Judges, finding no ground in the National Co-Investigating Judge’s assertion that only an indictment requires legal findings, consider that a closing order dismissing the case against a suspect on personal jurisdiction basis shall contain factual and legal findings, such as determinations refuting the legal qualifications of the alleged crimes as set forth in the Introductory and the Supplementary Submissions, and the modes of liability upon which criminal responsibility is alleged. The International Judges, therefore, conclude that in omitting any form of legal findings in his Closing Order, the National Co-Investigating Judge gravely misconceived applicable rules and standards, and committed a serious error of law.

2. Assessment of MEAS Muth’s Role and Responsibility

300. The International Judges reaffirm that the level of responsibility of a suspect may be evaluated on the basis of considerations such as the level of participation in the crimes, the hierarchical rank or position, including the number of subordinates and hierarchical echelons above, and the permanence of the position.⁶⁸⁹

a. The Co-Investigating Judges’ Findings on the MEAS Muth’s Roles

i. *The International Co-Investigating Judge’s Findings*

301. The International Judges note the International Co-Investigating Judge’s determination that MEAS Muth was among the most responsible persons for the crimes committed during the DK regime due to his superior hierarchical positions and his authority within the DK.⁶⁹⁰ The International Co-Investigating Judge found that MEAS Muth, in his position as (i) Commander of Division 164 responsible, *inter alia*, for the

⁶⁸⁷ Case 001 Decision on Closing Order Appeal (D99/3/42), para. 38.

⁶⁸⁸ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 26.

⁶⁸⁹ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 332; Case 001 Trial Judgment (E188), para. 22.

⁶⁹⁰ Indictment (D267), paras 456, 459-461, 469.



territorial water of the DK;⁶⁹¹ (ii) reserve member of the General Staff Committee and one of SON Sen's Deputies⁶⁹² and (iii) from late 1978, reserve member of the Central Committee,⁶⁹³ was working at the highest level of the DK military command structure, below the national political leaders, and was thus "very close to the senior leadership level".⁶⁹⁴ The International Co-Investigating Judge specified that MEAS Muth's position as well as the impact and the essence of his actions clearly surpassed those of AO An, IM Chaem, and KAING Guek Eav *alias* Duch.⁶⁹⁵

302. Further, the International Co-Investigating Judge observed that MEAS Muth, as Division 164 Commander, significantly contributed to the implementation, *via* a joint criminal enterprise committed together with other senior RAK cadres, of the criminal CPK policies aimed at (i) establishing cooperatives and forced labour worksites;⁶⁹⁶ (ii) re-educating "bad elements" and killing "enemies both inside and outside the military";⁶⁹⁷ (iii) targeting specific groups, especially Vietnamese and Thai ethnics or nationals, former military personnel and civilians⁶⁹⁸ and (iv) implementing forced marriages of civilians and soldiers of the RAK.⁶⁹⁹ The International Co-Investigating Judge found that because of his various positions, MEAS Muth was the primary person responsible for implementing the CPK policies in his area of responsibility and was thus aware that such policies were to be carried through the commission of the crimes charged.⁷⁰⁰

303. The International Judges further note the International Co-Investigating Judge's findings that most of the international and the domestic crimes MEAS Muth was indicted for were committed in furtherance of the CPK policies under his direct responsibility and authority as he was decisively involved in establishing and mapping out their implementation, and that his criminal liability was not diminished by the fact that he was not physically present at S-21 Centre.⁷⁰¹ The International Co-Investigating Judge

⁶⁹¹ Indictment (D267), paras 156-158, 459.

⁶⁹² Indictment (D267), paras 162, 459.

⁶⁹³ Indictment (D267), paras 150, 459.

⁶⁹⁴ Indictment (D267), paras 459, 461.

⁶⁹⁵ Indictment (D267), para. 460.

⁶⁹⁶ Indictment (D267), paras 173-180, 562, 566.

⁶⁹⁷ Indictment (D267), paras 181-189, 562, 567.

⁶⁹⁸ Indictment (D267), paras 190-199, 562, 568-569.

⁶⁹⁹ Indictment (D267), paras 200-205, 562, 570.

⁷⁰⁰ Indictment (D267), para. 565.

⁷⁰¹ Indictment (D267), paras 571, 577.



further found MEAS Muth responsible for ordering most of the international and the domestic crimes.⁷⁰² Lastly, the International Co-Investigating Judge found that MEAS Muth was liable as a superior for most international crimes.⁷⁰³

ii. The National Co-Investigating Judge's Findings

304. The International Judges observe that the National Co-Investigating Judge reached the opposite finding that MEAS Muth was not part of those “most responsible” as his participation was neither active nor proximate to the commission of the crimes.⁷⁰⁴

305. Regarding the personal jurisdiction’s criterion of level of responsibility and the relevant factors for its assessment, the International Judges note the National Co-Investigating Judge’s assertion that the scope of one’s direct acts and the effective authority of those acts are the “areas for proper consideration”.⁷⁰⁵ He avers that this reasoning is supported by the Trial Chamber’s analysis of the ECCC’s personal jurisdiction over Duch,⁷⁰⁶ which focuses mainly on his direct participation, authority, power of decision-making and management.⁷⁰⁷ The National Co-Investigating Judge further asserts that the drafters of the ECCC Law inserted the phrase “most responsible” specifically for Duch⁷⁰⁸ which demonstrates, in his view, that those most responsible, like Duch, should have played a key role in committing the alleged crimes, and should have been proximate to their commission, autonomous and held *de facto* authority.⁷⁰⁹ He further claims that the number of victims showed the consequences of Duch’s direct and practical actions.⁷¹⁰

306. The International Judges note the National Co-Investigating Judge’s following factual discussion related to MEAS Muth’s role in the crimes alleged. Firstly, the National Co-Investigating Judge claimed that MEAS Muth was not involved in any of the crimes committed in relation to S-21 Centre⁷¹¹ since he had no right to arrest

⁷⁰² Indictment (D267), paras 573, 577.

⁷⁰³ Indictment (D267), paras 574-575.

⁷⁰⁴ Dismissal Order (D266), paras 427-429.

⁷⁰⁵ Dismissal Order (D266), paras 368-369.

⁷⁰⁶ Dismissal Order (D266), paras 370-372 *referring to* Case 001 Trial Judgment (E188), paras 18, 23, 119, 128, 131, 140-141, 154, 174, 177, 395.

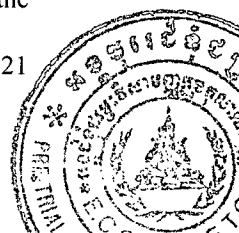
⁷⁰⁷ Dismissal Order (D266), para. 373.

⁷⁰⁸ Dismissal Order (D266), para. 396.

⁷⁰⁹ Dismissal Order (D266), para. 397.

⁷¹⁰ Dismissal Order (D266), para. 374.

⁷¹¹ Dismissal Order (D266), paras 279-280. *See also* Dismissal Order (D266), paras 263-287 for the alleged crimes committed in relation to S-21.



individuals,⁷¹² was not consulted on arrest decisions,⁷¹³ was merely implementing decisions to take individuals into custody,⁷¹⁴ and maintained no direct communication with Duch.⁷¹⁵ Regarding the crimes committed in relation to Wat Enta Nhien Security Centre,⁷¹⁶ the National Co-Investigating Judge explained that MEAS Muth was not present during arrests or the inspection of the Security Centre.⁷¹⁷ Further, although Battalion 450, a section of Division 164, controlled Stung Hav Rock Quarry, the National Co-Investigating Judge averred that MEAS Muth never visited that crime site and was only transmitting orders from SON Sen for that Battalion to arrest people and send them to the worksite.⁷¹⁸ Concerning the crimes allegedly committed by the DK Navy,⁷¹⁹ the National Co-Investigating Judge found that MEAS Muth was hospitalised during the Mayaguez incident,⁷²⁰ not able to make any decision without prior permission from superiors regarding the capture and execution of fishermen,⁷²¹ and that only a few victims were reported.⁷²² The National Co-Investigating Judge further found that MEAS Muth might not have been involved in the conflict with Vietnam⁷²³ and in the crimes pertaining to this conflict.⁷²⁴ Moreover, the National Co-Investigating Judge proclaimed that MEAS Muth had no legal or factual relationship with Division 801⁷²⁵ nor was he connected to crimes allegedly committed by that Division⁷²⁶ based on its structure and roles.⁷²⁷ Finally, the National Co-Investigating Judge determined that no evidence showed MEAS Muth's involvement with the RAK Security Centres.⁷²⁸

307. Regarding MEAS Muth's roles during the DK regime, the International Judges observe that despite the National Co-Investigating Judge's own acknowledgement that

⁷¹² Dismissal Order (D266), paras 281-283.

⁷¹³ Dismissal Order (D266), para. 284.

⁷¹⁴ Dismissal Order (D266), para. 286.

⁷¹⁵ Dismissal Order (D266), para. 282.

⁷¹⁶ Dismissal Order (D266), paras 288-297.

⁷¹⁷ Dismissal Order (D266), para. 297.

⁷¹⁸ Dismissal Order (D266), para. 305. *See also* Dismissal Order (D266), paras 298-305 for the alleged crimes committed in relation to Stung Hav Rock Quarry.

⁷¹⁹ Dismissal Order (D266), paras 306, 322.

⁷²⁰ Dismissal Order (D266), para. 311.

⁷²¹ Dismissal Order (D266), paras 316, 321.

⁷²² Dismissal Order (D266), paras 313-314.

⁷²³ Dismissal Order (D266), para. 327.

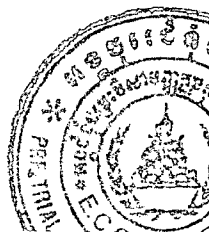
⁷²⁴ Dismissal Order (D266), paras 323-329.

⁷²⁵ Dismissal Order (D266), para. 351.

⁷²⁶ Dismissal Order (D266), paras 330-351.

⁷²⁷ Dismissal Order (D266), para. 351.

⁷²⁸ Dismissal Order (D266), para. 352.



MEAS Muth “had several roles”,⁷²⁹ *i.e.*, Commander of Division 164⁷³⁰ and assistant in the Central Committee,⁷³¹ he found that MEAS Muth was *not* one of the thirteen individuals who had the right to order arrests and executions.⁷³² Furthermore, the National Co-Investigating Judge found that MEAS Muth “did not exercise much power”⁷³³ since he hierarchically ranked below approximately fifty other cadres⁷³⁴ and only implemented orders from, and reported to, his superiors.⁷³⁵

308. The National Co-Investigating Judge concluded that MEAS Muth was not one of the most responsible⁷³⁶ in light of the above factual discussion. In the National Co-Investigating Judge’s view, no evidence showed MEAS Muth’s initiatives and ability to order arrests and executions⁷³⁷ during the Division 164 purges that he was involved in.⁷³⁸ To the contrary, the evidence demonstrated a lesser likelihood for MEAS Muth to hold the required power to facilitate or organise prisoner transfers to S-21 and to suppress enemies in territorial waters.⁷³⁹

b. Discussion

i. MEAS Muth’s Background and Roles

309. The International Judges consider it necessary to recall MEAS Muth’s background before establishing his various roles within the CPK throughout the DK regime.

310. MEAS Muth stated that he joined the Khmer Rouge in 1970.⁷⁴⁰ He held the position of medical officer in Pou Village and later in Angkor Chey District, also known as District 102, in Sector 13.⁷⁴¹ In late 1970 or early 1971, MEAS Muth became the

⁷²⁹ Dismissal Order (D266), para. 428.

⁷³⁰ Dismissal Order (D266), paras 416-417.

⁷³¹ Dismissal Order (D266), paras 418-419.

⁷³² Dismissal Order (D266), para. 418 (emphasis added). *See also* Dismissal Order (D266), para. 169.

⁷³³ Dismissal Order (D266), para. 428.

⁷³⁴ Dismissal Order (D266), para. 419.

⁷³⁵ Dismissal Order (D266), paras 421-425, 428.

⁷³⁶ Dismissal Order (D266), paras 427-429.

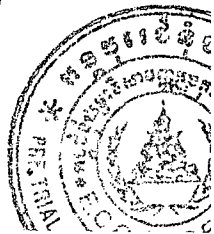
⁷³⁷ Dismissal Order (D266), paras 258, 423.

⁷³⁸ Dismissal Order (D266), paras 258, 422-423.

⁷³⁹ Dismissal Order (D266), para. 425.

⁷⁴⁰ Statement of MEAS Muth (POW/MIA), 5 December 2001, D22.2.181 (“Statement of MEAS Muth (D22.2.181)”), at ERN (EN) 00249693, p. 10.

⁷⁴¹ Statement of MEAS Muth (D22.2.181), at ERN (EN) 00249693, p.10; Statement of MEAS Muth (POW/MIA), 30 May 2002, D22.2.182 (“Statement of MEAS Muth (D22.2.182)”), at ERN (EN) 00249703.



Deputy Commander of District 102 military, supervising around two hundred troops.⁷⁴² He was then appointed to Sector 13 Committee within the Southwest Zone, in charge of the military until at least 1973.⁷⁴³ During that period prior to the fall of Phnom Penh in 1975, MEAS Muth became a full-rights member of the CPK.⁷⁴⁴

311. MEAS Muth maintained a close relationship with *Ta Mok*, a Khmer Rouge Zone Secretary and a member of the Standing Committee. Indeed, MEAS Muth married Khom, *Ta Mok*'s daughter⁷⁴⁵ and Secretary of Tram Kak District (District 105)⁷⁴⁶ before 1973, making him the son-in-law of one of the most senior Khmer Rouge leaders. MEAS Muth stayed loyal to *Ta Mok*, taking orders from him some 18 years following the fall of the Khmer Rouge regime.⁷⁴⁷ MEAS Muth was described as a "savage man" by his underlings⁷⁴⁸ and as scary by his superiors.⁷⁴⁹

312. The International Judges note that MEAS Muth's roles within the CPK were very diversified and deem it necessary to address each of these roles to assess his responsibilities comprehensively.

⁷⁴² Statement of MEAS Muth (D22.2.182), at ERN (EN) 00249703.

⁷⁴³ Statement of MEAS Muth (D22.2.181), at ERN (EN) 00249693-00249694; Written Record of Interview of MOENG Vet, 13 February 2014, D54/62 ("MOENG Vet WRI (D54/62)") at ERN (EN) 00982726 (A15); Book by Ben KIERNAN: *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*, D114/29.1.4, at ERN (EN) 00678538.

⁷⁴⁴ Written Record of Interview of LON Seng, 23 June 2014, D54/110 ("LON Seng WRI (D54/110)") at ERN (EN) 01331646 (A27); Written Record of Interview of MEAS Voeun, 20 January 2014, D54/54 ("MEAS Voeun WRI (D54/54)"), at ERN (EN) 00978531 (A5).

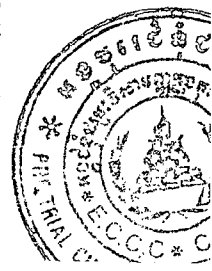
⁷⁴⁵ Written Record of Interview of MUT Mao, 11 March 2014, D54/70 ("MUT Mao WRI (D54/70)"), at ERN (EN) 00983618 (A15).

⁷⁴⁶ MUT Mao WRI (D54/70), at ERN (EN) 00983618-00983619 (A13, A18).

⁷⁴⁷ Written Record of Interview of KAING Guek Eav *alias* Duch, 1 February 2016, D114/158 ("Duch WRI (D114/158)"), at ERN (EN) 01213413 (A20).

⁷⁴⁸ *See, e.g.*, Written Record of Interview of CHET Bunna, 28 April 2015, D114/65 ("CHET Bunna WRI (D114/65)"), at ERN (EN) 01180851 (A8). *See also* Written Record of Interview of SOEM Ny, 13 November 2013, D54/37 ("SOEM Ny WRI (D54/37)"), at ERN (EN) 00969993 (R6). *See also* DC-Cam Interview of SOEM Ny, 22 June 2011, D54/30.1 ("SOEM Ny DC-Cam Interview (D54/30.1)"), at ERN (EN) 01070553-01070554 ("[Q]: How was his stare? [A]: He stared without blinking. I was fine. I went to have my hair cut. He had had a house built for guests next to the house of his late wife, Kham. I am not sure about the builder's appearance. When he saw that the builder had constructed the roof in a different way that he wanted, he called that builder to come down from the roof. Then he took a small axe and chopped his head, and he fell down. [Q]: Did he die? [A]: He died. [...] [Q]: Did you witness that? [A]: I [witnessed] that").

⁷⁴⁹ Case 002/2 Transcript of 2 February 2016, D234/2.1.95, at ERN (EN) 01394375-01394376, pp. 23:19-24:9 ("My question, Mr. Witness, do you recall saying this about Ta Saom and Ta Muth being reprimanded as too cruel by Ta Mok? [...] I recalled he made mention of the fact that the cadres shall engage in the production [...]. Then he turned his head to Saom and Muth <who were sitting beside him>, and he said that also for Saom and for Muth, [...] I was told that people were afraid of you. And when you go to meet the people, you had to make them have confidence in you and not to get scared of you").



(a) Central Committee Member

313. Regarding MEAS Muth's membership to the Central Committee, the International Judges note the evidence suggesting that MEAS Muth became part of the Central Committee as early as in 1975.⁷⁵⁰ The International Judges observe that both KHIEU Samphân and Duch identify MEAS Muth either as a "member" or an "assistant" to the Central Committee.⁷⁵¹ Having reached the rank of Division 164 Commander in 1975,⁷⁵² MEAS Muth became an *ex-officio* member of the General Staff Committee,⁷⁵³ the highest structure of the RAK in charge of Centre Divisions and dealing with military affairs under the supervision of the Central Committee.⁷⁵⁴ Moreover, the International Judges note that as of 1978, MEAS Muth became a reserve member of the Central Committee.⁷⁵⁵ As a consequence, and based on the evidence available, the International Judges conclude that MEAS Muth's prerogatives within the Central Committee evolved, from assistant in 1975 to reserve member in late 1978, to be perceived as the representative of the Central Committee during certain missions outside of Kampong Som Autonomous Sector.⁷⁵⁶

314. Accordingly, the International Judges find that both the National Co-Investigating Judge, by only considering MEAS Muth's role as an assistant to the Central Committee,⁷⁵⁷ and the International Co-Investigating Judge, by only concluding to MEAS Muth's role as a reserve member from 1978 onwards,⁷⁵⁸ failed to appropriately

⁷⁵⁰ Written Record of Interview of KAING Guek Eav *alias* Duch, 28 November 2008, D4.1.405, at ERN (EN) 00244242 ("[Nat] was jealous when MEAS Mut and Sam Bit were nominated to the Central Committee in 1975").

⁷⁵¹ Written Record of Interview of KHIEU Samphân, 13 December 2007, D1.3.33.15, at ERN (EN) 00156751; Written Record of Interview of KAING Guek Eav *alias* Duch, 27 April 2011, D12, at ERN (EN) 0680796-0680797; Written Record of Interview of KAING Guek Eav *alias* Duch, 4 December 2007, D1.3.33.13, at ERN (EN) 00154911. *See also* LON Seng WRI (D54/110), at ERN (EN) 01331645 (A20, A22, A23) (This witness makes reference to an "alternative committee" supporting the Central Committee and to which MEAS Muth belonged).

⁷⁵² *See infra* paras 315-316.

⁷⁵³ *See infra* paras 325-327; LON Seng WRI (D54/110), at ERN (EN) 01331643 (A9).

⁷⁵⁴ Case 002/1, Case 002/01 Judgement, 7 August 2014, E313, para. 242.

⁷⁵⁵ Written Record of Interview of KAING Guek Eav *alias* Duch, 2 February 2016, D114/159 ("Duch WRI (D114/159)"), at ERN (EN) 01213422 (A18).

⁷⁵⁶ Written Record of Interview CHEANG Chuo, 22 February 2015, D114/52 ("CHEANG Chuo WRI (D114/52)"), at ERN (EN) 01076750 (A40), 01076753 (A54); Written Record of Interview of SENG Soeun, 11 November 2009, D4.1.810 ("SENG Soeun WRI (D4.1.810)"), at ERN (EN) 00412180 (A26, A27).

⁷⁵⁷ Dismissal Order (D266), paras 111-121, 418.

⁷⁵⁸ Indictment (D267), paras 150, 459. The International Judges find it important to clarify that the International Co-Investigating Judge acknowledges, at paragraph 150 of his Indictment, MEAS Muth's role as an assistant to a military committee chaired by POL Pot which assisted the Central Committee, among other committees. Based on the International Judges' reading of the Indictment, the International



describe the full scale of MEAS Muth's participation and membership in the Central Committee.

(b) *Division 164 Commander*

(i) *Beginning as Commander of Division 3*

315. At the outset, the International Judges find, on the basis of corroborated evidence, that MEAS Muth held the position of Division 3 Commander⁷⁵⁹ since the establishment of that Division in late 1973 or early 1974.⁷⁶⁰

316. Evidence in the Case File makes it clear that MEAS Muth was the Division 3 Commander in 1975, during the assault of Phnom Penh⁷⁶¹ and when Division 3 was sent to Kampong Som very shortly after the taking over of the capital.⁷⁶²

(ii) *Establishment of Division 164 and Role of MEAS Muth*

317. The International Judges note that MEAS Muth remained in charge when

Co-Investigating Judge does not conclude that the Charged Person was similarly an assistant or member of the Central Committee itself, prior to becoming a reserve member of that Committee in 1978.

⁷⁵⁹ CHET Bunna WRI (D114/65), at ERN (EN) 01180851 (A6, A9); Written Record of Interview of SAY Born, 6 September 2010, D2/8, at ERN (EN) 00613011 (A27), 00613012 (A32).

⁷⁶⁰ According to a corroborated statement from MEAS Muth, he became Division 3 Commander during the year 1974, at the latest. *See* Statement of MEAS Muth (D22.2.181), at ERN (EN) 00249693 (“In 1974 [...] he was appointed the political officer for the newly formed Khmer communist 3rd Division”(emphasis added)); [Corrected 1] Written Record of Interview of MAO Ran, 8 October 2015, D114/132 (“MAO Ran WRI (D114/132)”), at ERN (EN) 01172482 (A17); CHET Bunna WRI (D114/65), at ERN (EN) 01180850-01180851 (A5-A6); Written Record of Interview of SOK Ngon, 18 February 2015, D114/48, at ERN (EN) 01076706 (A8, A9, A10); Written Record of Interview of SATH Chak, 14 March 2016, D114/186 (“SATH Chak WRI (D114/186)”), at ERN (EN) 01251768 (A8-A9, A14); Written Record of Interview of NHOUNG Chrong, 24 August 2010, D2/6, at ERN (EN) 00607257 (A10). Some witnesses gave accounts of MEAS Muth being in the position of Division 3 Commander as of late 1973, when it was established, *see* Written Record of Interview of HEANG Reth, 26 May 2014, D54/98 (“HEANG Reth WRI (D54/98)”), at ERN (EN) 01076848 (A38); Written Record of Interview of KOEM Men, 3 September 2015, D114/113, at ERN (EN) 01170530-01170531 (A15, A17); Written Record of Interview of SEM Kol, 1 March 2016, D114/181 (“SEM Kol WRI (D114/181)”), at ERN (EN) 01226305-01226306 (A6, A7, A8, A9).

⁷⁶¹ Written Record of Interview of LON Seng, 10 December 2013, D54/43, at ERN (EN) 00975215-00975216 (A1, A6-A7); Written Record of Interview of CHUM Chy, 14 September 2016, D114/261, at ERN (EN) 01479448 (A25); Written Record of Interview of MAK Chhoeun, 21 October 2014, D114/18, at ERN (EN) 01040422 (A2-A3); MAO Ran WRI (D114/132), at ERN (EN) 01172481 (A15-A16); DC-Cam Interview of PRAK Sokha, 21 May 2011, D54/35.1 (“PRAK Sokha DC-Cam Interview (D54/35.1)”), at ERN (EN) 00971209; Case 002/2 Transcript of 25 January 2016 (PRUM Sarat), D234/2.1.91, at ERN (EN) 01405386, p. 79:4-79:12 (“Q. [...] Do you remember who the commander was of Division 3? A. The commander of Division 3 was MEAS Muth. Q. [...] Do you remember your division [3] being involved in the attack on Phnom Penh in April 75? A. My division was engaged in the attack on the battlefield in Phnom Penh in 1975. It is true” (emphasis added)).

⁷⁶² Statement of MEAS Muth (D22.2.181), at ERN (EN) 00249694 (“At 1600 hours on 17 April 1975, the 3rd Division was ordered to Kampong Som”); SATH Chak WRI (D114/186), at ERN (EN) 01251769 (A17); MAO Ran WRI (D114/132), at ERN (EN) 01172482 (A18-19); Written Record of Interview of UY Nhik, 1 April 2014, D54/77 (“UY Nhik WRI (D54/77)”), at ERN (EN) 00987497 (A6).



Division 3 became Division 164.⁷⁶³ The Judges note that Division 164 originates from a combination of the entire South West Zone Division 3 and, *inter alia*, militaries from Sector 37.⁷⁶⁴ According to the National Co-Investigating Judge, Division 164 was established on 22 July 1975⁷⁶⁵ and led to the creation of the DK Navy on 9 October 1975 during a Standing Committee meeting.⁷⁶⁶ However, the International Judges' examination of evidence indicates that Division 164 was created and operated as the DK Navy within the two-month period following the fall of Phnom Penh,⁷⁶⁷ hence possibly following the 22 July 1975 meeting at the Olympic Stadium in Phnom Penh. Further, the evidence suggests that MEAS Muth was introduced as the Navy Commander, in charge of protecting the DK territorial waters and islands, during that same meeting in 1975.⁷⁶⁸ The International Judges further note that the National Co-Investigating Judge, in support of his assertion that the DK Navy was established in October 1975, puts forward minutes of a Standing Committee meeting, which mentions the "organi[sation] of the new [...] Navy",⁷⁶⁹ not its creation. Therefore, the International Judges conclude that the National Co-Investigating Judge relied on inconclusive, if not irrelevant, evidence to provide details on the establishment of Division 164, and find that said Division, under MEAS Muth's command, was established at the latest by 22 July 1975 and already incorporated the DK Navy.

318. Another element demonstrating MEAS Muth's particular status within the RAK

⁷⁶³ Statement of MEAS Muth (D22.2.181), at ERN (EN) 00249698-00249699 ("At the end of 1975, the 3rd Division was re-designated the 164th Division [...]. The composition of the command committee remained the same"); Written Record of Interview of EK Ny, 23 November 2016, D114/282, at ERN (EN) 01373277 (A10); PRAK Sokha DC-Cam Interview (D54/35.1), at ERN (EN) 00971209; SATH Chak WRI (D114/186), at ERN (EN) 01251768 (A16); Written Record of Interview of CHUM Chy, 10 November 2016, D114/281 ("CHUM Chy WRI (D114/281)"), at ERN (EN) 01390008 (A11); SEM Kol WRI (D114/181), at ERN (EN) 01226313 (A44).

⁷⁶⁴ CHUM Chy WRI (D114/281), at ERN (EN) 01390008 (A10); Written Record of Interview of MEAS Voeun, 15 June 2015, D54/51 ("MEAS Voeun WRI (D54/51)"), at ERN (EN) 00978409 (A9).

⁷⁶⁵ See Dismissal Order (D266), para. 187 and footnote 563.

⁷⁶⁶ See Dismissal Order (D266), para. 187 and footnote 564.

⁷⁶⁷ See UY Nhik WRI (D54/77), at ERN (EN) 00987497 (A6); *Revolutionary Flag*, August 1975, D4.1.861 ("*Revolutionary Flag*, August 1975 (D4.1.861)"), at ERN (EN) 00401488; Written Record of Interview of EM Sun, 27 November 2013, D54/47 ("EM Sun WRI (D54/47)"), at ERN (EN) 00974944 (A18). For indirect evidence that other Divisions were created at that moment, see Written Record of Interview of CHHAOM Se, 31 October 2009, D4.1.801, at ERN (EN) 00406211. See also Written Record of Interview of CHHAOM Se, 8 November 2009, D4.1.805, at ERN (EN) 0040622 (A3).

⁷⁶⁸ Written Record of Interview of MEAS Voeun, 14 January 2014, D54/50 ("MEAS Voeun WRI (D54/50)"), at ERN (EN) 00978403 (A25); MEAS Voeun WRI (D54/51), at ERN (EN) 00978407 (A1), 00978408-00978409 (A7) compare with *Revolutionary Flag*, August 1975 (D4.1.861), at ERN (EN) 00401500-00401503 (for details on POL Pot's speech which exactly matches this witness statement).

⁷⁶⁹ Dismissal Order (D266), para. 187 and footnote 564 referring to CPK Standing Committee Minutes, 9 October 1975, D1.3.27.1, at ERN (EN) 00183397.



hierarchy is the fact that as a Centre Division Commander, he reported directly to the Party Centre. Contrary to the National Co-Investigating Judge's assertion that all secretaries reported to the Party Centre,⁷⁷⁰ only the Commander of Centre Divisions followed this reporting line⁷⁷¹ as other Divisions were subordinated to the Zone level, such as Division 3 (South West Zone Division)⁷⁷² or Division 1 (West Zone Division).⁷⁷³ Therefore, the International Judges consider that MEAS Muth's hierarchical position, being Centre Division 164 Commander, was higher than that of other Division Commanders.⁷⁷⁴ Moreover, in 1978, MEAS Muth was not only the Commander of a Centre Division, but also the leader of purges.⁷⁷⁵ This shows MEAS Muth's senior leader status in the Army during the Khmer Rouge regime.

319. Further, MEAS Muth became a Central Committee reserve member in November 1978⁷⁷⁶ and was sent to Kratie until at least the end of 1978.⁷⁷⁷ Contrary to the International Co-Investigating Judge's finding,⁷⁷⁸ the evidence reviewed by the International Judges demonstrates that his mandate as Division 164 Commander *de jure* ended at that period⁷⁷⁹ as TIM Seng took over that position.⁷⁸⁰ However, the International Judges find that MEAS Muth was still *de facto* active as a superior in Division 164 until January 1979⁷⁸¹ as he continued to receive reports from TIM Seng

⁷⁷⁰ Dismissal Order (D266), para. 188.

⁷⁷¹ Written Record of Interview of LIET Lan, 11 August 2015, D114/103 ("LIET Lan WRI (D114/103)"), at ERN (EN) 01148763 (A31-32); Written Record of Interview of HEANG Reth, 29 November 2016, D114/286, at ERN (EN) 01390019 (A30).

⁷⁷² CHET Bunna WRI (D114/65), at ERN (EN) 01180851 (A9).

⁷⁷³ Written Record of Interview of MEAS Voeun, 16 January 2014, D54/52 ("MEAS Voeun WRI (D54/52)"), at ERN (EN) 00978510-00978511 (A2, A4, A5, A6); MEAS Voeun WRI (D54/54), at ERN (EN) 00978530 (A4); MEAS Voeun WRI (D54/50), at ERN (EN) 00978399-00978400 (A6).

⁷⁷⁴ MEAS Voeun WRI (D54/52), at ERN (EN) 00978511 (A4, A5, A6); MEAS Voeun WRI (D54/54), at ERN (EN) 00978530 (A4); MEAS Voeun WRI (D54/50), at ERN (EN) 00978399-00978400 (A6).

⁷⁷⁵ See *infra* para. 328.

⁷⁷⁶ See *supra* para. 313.

⁷⁷⁷ See *infra* paras 328-329.

⁷⁷⁸ Indictment (D267), para. 163.

⁷⁷⁹ Written Record of Interview of PRUM Sarat, 29 April 2014, D54/87 ("PRUM Sarat WRI (D54/87)"), at ERN (EN) 01055468-01055469 (A45), 01055472-01055473 (A73, A75, A76); [Corrected 2] Site Identification Report (Toek Sap; Wat Enta Nhlen Security Center; Worksite and Dam Site Bet Trang; Kampong Som Area – Other Relevant Div.164 Sites; Koh Rong Somloem – Battalion 386 HQ and execution), 6 March 2015, D114/54, at ERN (EN) 01074085, p. 10.

⁷⁸⁰ DC-Cam Interview of LAY Bunhak, 20 May 2007, D54/99.1 ("LAY Bunhak DC-Cam Interview (D54/99.1)"), at ERN (EN) 01115988; HEANG Reth WRI (D54/98), at ERN (EN) 01076847-01076848 (A35-36); DC-Cam Interview of HIENG Ret, 20 April 2007, D59/1/1.11a ("HIENG Ret DC-Cam Interview (D59/1/1.11a)"), at ERN 00974098; Written Record of Interview of HING Uch, 22 April 2014, D54/81, at ERN (EN) 01056690-01056691 (A14-15).

⁷⁸¹ See, e.g., DC-Cam Interview of PRUM Sarat, 19 May 2007, D59/1/1.8a ("PRUM Sarat DC-Cam Interview (D59/1/1.8a)"), at ERN (EN) 00974227 ("[Q] After [MEAS Muth] had gone to Memot, did he still control the division and make orders? [A]: He still kept in touch through telegraphs. [Q]: Both of them



and retained enough power to order the Kampong Som evacuation when the Vietnamese troops arrived in 1979.⁷⁸²

320. Regarding MEAS Muth's responsibilities within Division 164 or the DK Navy, which was designed in itself to protect the territorial waters,⁷⁸³ the International Judges note the contemporaneous evidence showing his involvement in the military actions⁷⁸⁴ and political reporting⁷⁸⁵ of Division 164 as well as his supervision of administrative affairs related to Division 164 (e.g., the level of rice consumption).⁷⁸⁶ MEAS Muth assumed command responsibilities through ordering subordinates to capture foreign vessels and enemies in the DK waters and on DK islands.⁷⁸⁷ Further, MEAS Muth gave direct instructions to a special elite unit, Battalion 450, later renamed as Battalion 165,⁷⁸⁸ which was in charge of defence and security issues, including managing security centre Wat Enta Nhien, and investigating and arresting most of Division 164 combatants suspected of being "bad elements" or traitors.⁷⁸⁹

still kept in touch through telegraphs? [A]: Sure! [Q]: Did he make orders when there were any incidents at sea? [A]: He would use the telegraph. [Q]: He used the telegraph. Did he still make orders directly through the telegraph? [A]: Yes, he still could make orders").

⁷⁸² LAY Bunhak DC-Cam Interview (D54/99.1), at ERN (EN) 01115988; HIENG Ret DC-Cam Interview (D59/1/1.11a), at ERN (EN) 00974119.

⁷⁸³ MEAS Voeun WRI (D54/51), at ERN (EN) 00978408-00978409 (A7); MEAS Voeun WRI (D54/52), at ERN (EN) 00978512 (A12).

⁷⁸⁴ See, e.g., DK Military Meeting Minutes, 9 October 1976, D54/105.1, at ERN (EN) 01147560-01147583; DK Telegram, 13 August 1976, D1.3.34.10, at ERN (EN) 00233647-00233648; DK Telegram, 5 January 1976, D1.3.30.2, at ERN (EN) 00231824.

⁷⁸⁵ DK Telegram, 11 June 1976, D1.3.14.1, at ERN (EN) 00233960-00233961; Confidential Telephone Messages, 1 April 1978, D54/11.1, at ERN (EN) 01147584-01147585; DK Telegram, 13 July 1977, D4.1.636, at ERN (EN) 00143509-00143513; DK Telephone, 12 August 1977, D4.1.639, at ERN (EN) 00233972.

⁷⁸⁶ Rice Consumption Plan for 1976 by Unit, 4 January 1976, D1.3.12.1, at ERN (EN) 00233962.

⁷⁸⁷ See, e.g., Written Record of Interview of OU Dav, 11 September 2014, D114/24, at ERN (EN) 01074596 (A91); Written Record of Interview of MOUL Chhin, 17 December 2014, D114/31, at ERN (EN) 01056677 (A153-A154) (The witness mentions orders from Division 164 to capture boats and people); Written Record of Interview of IM Sokhan, 27 August 2015, D114/112, at ERN (EN) 01170525 (A39); Written Record of Interview of PAK Sok, 19 October 2013, D54/25, at ERN (EN) 00977713 (A6).

⁷⁸⁸ See, e.g., Written Record of Interview of EM Sun, 26 November 2013, D54/46 ("EM Sun WRI (D54/46)"), at ERN (EN) 00974936 (A38); Written Record of Interview of TOUCH Soeuli, 10 November 2010, D2/15 ("TOUCH Soeuli WRI (D2/15)"), at ERN (EN) 00628187-00628188 (A22-A24); Written Record of Interview of DOL Song, 18 June 2013, D54/7, at ERN (EN) 00976898-00976899 (A10-11, A13); Written Record of Interview of MEU Ret, 22 June 2013, D54/10, at ERN (EN) 00977236 (A27).

⁷⁸⁹ TOUCH Soeuli WRI (D2/15), at ERN (EN) 00628187-00628188 (A14, A20, A23-A24); Written Record of Interview of MUT Mao, 12 March 2014, D54/71, at ERN (EN) 00983632-00983633 (A39-A40, A42, A45); Written Record of Interview of EK Ny, 2 April 2014, D54/101, at ERN (EN) 01001465 (A10); Written Record of Interview of EK Ny, 4 June 2014, D54/105, at ERN (EN) 01025192-01025193, 01025197-01025198 (A6, A18).



(c) Kampong Som Autonomous Sector Secretary

321. The International Judges note that in addition to his military functions as Division 164 Commander, MEAS Muth performed political duties as Secretary of the CPK Committee in Kampong Som Autonomous Sector⁷⁹⁰ and, as such, maintained control over that entire area.⁷⁹¹ After having reviewed pertinent witness testimonies, the International Judges consider that Kampong Som Autonomous Sector stretched at least from Toek Sap through Kang Keng, Ream, Kampong Som and the DK islands.⁷⁹² Moreover, that Sector was not under any Zone leadership and received its instructions from and reported directly to the Central Committee.⁷⁹³

322. Further, the International Judges found that MEAS Muth was the most senior officer in the CPK Committee in Kampong Som and, as such, possessed the overall political control of the Sector.⁷⁹⁴ Evidence shows that MEAS Muth had control over, *inter alia*, the civilians and the Port of Kampong Som⁷⁹⁵ as well as the Naval Port of

⁷⁹⁰ The Communist Party of Kampuchea Statute: Article 8, January 1976, D1.3.22.1, at ERN (EN) 00184039; Duch WRI (D114/159), at ERN (EN) 01213421 (A10); Chinese Delegation Visits Kampong Som Area 12 Dec, 14 December 1977, D54/47.3 (“Chinese Delegation Visit (D54/47.3)”), at ERN (EN) 00168349-00168350; Written Record of Interview of LAY Bunhak, 29 May 2014, D54/100 (“LAY Bunhak WRI (D54/100)”), at ERN (EN) 01076814-01076815 (A28-29, A33); Zonal Leadership of the Communist Party of Kampuchea and the People’s Committees, 6 August 1978, D114/266.1.2 (“Zonal Leadership (D114/266.1.2)”), at ERN (EN) 01519466.

⁷⁹¹ Written Record of Interview of YOEM Sroeung, 27 July 2015, D114/95 (“YOEM Sroeung WRI (D114/95)”), at ERN (EN) 01137210 (A195, A196, A197, A198, A199); DC-Cam Interview of SANN Kan, 29 May 2007, D54/106.2 (“SANN Kan DC-Cam Interview (D54/106.2)”), at ERN (EN) 01509187; Written Record of Interview of CHENG Laung, 25 July 2015, D114/96, at ERN (EN) 01142619 (A10-11); OCP Interview of SIENG, 12 August 2008, D1.3.13.11, at ERN (EN) 00217564.

⁷⁹² CHET Bunna WRI (D114/65), at ERN (EN) 01180851 (A9); YOEM Sroeung WRI (D114/95), at ERN (EN) 01137210 (A194, A197)

⁷⁹³ LAY Bunhak WRI (D54/100), at ERN (EN) 01076814 (A28, 29).

⁷⁹⁴ Written Record of Interview of PAK Sok, 17 October 2013, D54/24 (“PAK Sok WRI (D54/24)”), at ERN (EN) 00977544 (A20); EM Sun WRI (D54/47), at ERN (EN) 00974946 (A32); DC-Cam Interview of SIM Ny, 22 May 2011, D59/2/2.16a (“SIM Ny DC-Cam Interview (D59/2/2.16a)”), at ERN (EN) 01332612; Written Record of Interview of SOEM Ny, 7 November 2013, D54/31 (“SOEM Ny WRI (D54/31)”), at ERN (EN) 00974915 (A11-A12). EM Sun WRI (D54/46), at ERN (EN) 00974933 (A25).

⁷⁹⁵ Written Record of Interview of PAK Sok, 18 October 2013, D54/23, at ERN (EN) 00977532 (A15); Duch WRI (D114/159), at ERN (EN) 01213421 (A10); CHET Bunna WRI (D114/65), at ERN (EN) 01180851-01180852 (A9-10); Written Record of Interview of SORN Sot, 23 March 2016, D114/194, at ERN (EN) 01475851 (A40, A41, A42, A43); PAK Sok WRI (D54/24), at ERN (EN) 00977544 (A20); Written Record of Interview of EK Ny, 3 June 2014, D54/104 (“EK Ny WRI (D54/104)”), at ERN (EN) 01008087 (A16); Written Record of Interview of YIN Teng, 7 October 2014, D114/6, at ERN (EN) 01050329 (A151, A153, A154); Written Record of Interview SOK Vanna, 16 October 2014, D114/16, at ERN (EN) 01053540 (A14-15).



Ream,⁷⁹⁶ which was directly under the authority of the Central Committee.⁷⁹⁷ MEAS Muth was assisted by two deputies in charge of civilian affairs:⁷⁹⁸ Krin, Deputy Secretary of the CPK Committee in Kampong Som,⁷⁹⁹ and Launh,⁸⁰⁰ a member of the said Committee.⁸⁰¹

323. As Secretary of Kampong Som Autonomous Sector, MEAS Muth was present on various sites where the alleged crimes were committed. For example, he was seen a number of times in Stung Hav Rock Quarry worksites⁸⁰² and at Kang Keng airfield,⁸⁰³ where he was even spotted giving a speech about traitors and the content of their confessions.⁸⁰⁴ He conducted meetings and training on the CPK policies⁸⁰⁵ and witnesses recounted MEAS Muth's role in promoting the forced marriage policy⁸⁰⁶ and in instructing subordinates to arrange forced marriages.⁸⁰⁷ MEAS Muth gave orders to his troops regarding the management of forced labour sites (for instance, at Stung Hav Rock

⁷⁹⁶ Written Record of Interview of CHHENG Cheang, 6 August 2016, D114/241, at ERN (EN) 01479328 (A96); Written Record of Interview of OU Dav, 3 November 2014, D114/25, at ERN (EN) 01055685 (A7).

⁷⁹⁷ LAY Bunhak DC-Cam Interview (D54/99.1), at ERN (EN) 01115976; HIENG Ret DC-Cam Interview (D59/1/1.11a), at ERN (EN) 00974101; PRUM Sarat DC-Cam Interview (D59/1/1.8a), at ERN (EN) 00974215.

⁷⁹⁸ SOEM Ny WRI (D54/31), at ERN (EN) 00974914-00974915 (A10-A12) *reiterated in* SOEM Ny DC-Cam Interview (D54/30.1), at ERN (EN) 01070550; EM Sun WRI (D54/47), at ERN (EN) 00974946 (A33).

⁷⁹⁹ Written Record of Interview of NEAK Khoeurn, 24 March 2016, D114/195, at ERN (EN) 01238796 (A5); SOEM Ny WRI (D54/31), at ERN (EN) 00974914 (A10); EM Sun WRI (D54/47), at ERN (EN) 00974946 (A33); PRUM Sarat DC-Cam Interview (D59/1/1.8a), at ERN (EN) 00974215.

⁸⁰⁰ SOEM Ny DC-Cam Interview (D54/30.1), at ERN (EN) 01070550 (“*Ta* Launh was the fishery chairman”); SIM Ny DC-Cam Interview (D59/2/2.16a). ERN (EN) 01332612 (“[...] *Ta* Launh was responsible for the fishing unit to supply to all state units”).

⁸⁰¹ Chinese Delegation Visit (D54/47.3), at ERN (EN) 00168349; Zonal Leadership (D114/266.1.2), at ERN (EN) 01519466; SOEM Ny WRI (D54/31), at ERN (EN) 00974914 (A10); EM Sun WRI (D54/47), at ERN (EN) 00974946 (A33); SIM Ny DC-Cam Interview (D59/2/2.16a), at ERN (EN) 01332598.

⁸⁰² MEAS Muth visited Stung Hav worksites with different frequencies, depending on the period (*see, e.g.*, Written Record of Interview of LONG Phansy, 20 May 2016, D114/208, at ERN (EN) 01320072 (A26); Written Record of Interview of MEAS Im, 10 June 2016, D114/215 (“MEAS Im WRI (D114/215)”), at ERN (EN) 01333470 (A12), 01333475 (A39, A43).

⁸⁰³ *See, e.g.*, Written Record of Interview of EK Ny, 3 April 2014, D54/102 (“EK Ny WRI (D54/102)”), at ERN (EN) 01001469-01001470 (A1); Written Record of Interview of KUY Sambath, 1 May 2015, D114/68, at ERN (EN) 01111723 (A5); Written Record of Interview of SENG Sin, 24 June 2015, D114/89 (“SENG Sin WRI (D114/89)”), at ERN (EN) 01128189 (A56, A60-A63).

⁸⁰⁴ SENG Sin WRI (D114/89), at ERN (EN) 01128189 (A56, A60-A63); EK Ny WRI (D54/102), at ERN 01001469-01001470 (A1).

⁸⁰⁵ *See, e.g.*, Written Record of Interview of ING Chhon, 9 November 2013, D54/33, at ERN (EN) 00977855 (A15, A16, A17).

⁸⁰⁶ LIET Lan WRI (D114/103), at ERN (EN) 01148784 (A204).

⁸⁰⁷ *See, e.g.*, Written Record of Interview of LIET Lan, 24 October 2013, D54/29, at ERN (EN) 00976572-00976574 (A3, A6); YOEM Sroeng WRI (D114/95), at ERN (EN) 01137217 (A248, A253); Written Record of Interview of VUN Bunna, 7 March 2017, D114/304, at ERN (EN) 01505880 (A68, A70), 01505882-01505884 (A86, A96, A98, A100, A107); Written Record of Interview of SVAY Sameth, 28 May 2015, D114/78, at ERN 01115933 (A29).



Quarry worksites)⁸⁰⁸ and gave directives to conduct arrests and executions of perceived enemies in the Ream area⁸⁰⁹ and generally throughout his area of responsibility in Kampong Som.⁸¹⁰ MEAS Muth is believed to have personally ordered that the bodies of executed enemies, including civilians, be used as fertiliser at the Durian Plantation execution site.⁸¹¹ MEAS Muth remained in charge of Kampong Som Autonomous Sector until 1979.⁸¹²

324. Therefore, the International Judges conclude that the National Co-Investigating Judge erred in omitting to give due consideration to MEAS Muth's role as Secretary of Kampong Som Autonomous Sector in his Dismissal Order as this function constitutes an indispensable factor to assess MEAS Muth's level of responsibility. The International Judges also find that MEAS Muth, in addition to occupying a top military position, held a leadership role with regard to civilian and political affairs for the whole Sector from 1975 to 1979, allowing him to have a direct relationship with the political leaders at the national level in the Central Committee.

(d) Positions in RAK's General Staff Committee

325. The International Judges note that in addition to his other roles, MEAS Muth, as a Centre Division Commander,⁸¹³ became a member of the RAK's General Staff Committee as early as in 1975 upon the Committee's creation, and served there in his capacity of Navy Commander.⁸¹⁴ At least from 1976, MEAS Muth regularly attended General Staff meetings in Phnom Penh⁸¹⁵ where he presented reports, was privy to

⁸⁰⁸ See, e.g., MEAS Im WRI (D114/215), at ERN (EN) 01333480 (Q and A70); Written Record of Interview of OEM Sokhan, 24 February 2016, D114/178, at ERN (EN) 01226274 (A10).

⁸⁰⁹ DK Telegram, 24 September 1976, D4.1.699, at ERN (EN) 00143240.

⁸¹⁰ CHET Bunna WRI (D114/65), at ERN (EN) 01180851(A9); Duch WRI (D114/159), ERN (EN) 01213426 (A30); EK Ny WRI (D54/104), at ERN (EN) 01008086-01008087 (A14, A16).

⁸¹¹ EK Ny WRI (D54/102), at ERN (EN) 01001474 (A29), 01001476 (A43-A44).

⁸¹² See SANN Kan DC-Cam Interview (D54/106.2), at ERN (EN) 01509188.

⁸¹³ LON Seng WRI (D54/110), at ERN (EN) 01331643-01331644 (A9, A18).

⁸¹⁴ See, e.g., Written Record of Analysis, 18 July 2007, D234/2.1.52, at ERN (EN) 00142852; LON Seng WRI (D54/110), at ERN (EN) 01331643 (A10); Duch WRI (D114/158), at ERN (EN) 01213413 (A24); Duch WRI (D114/159), at ERN (EN) 01213423 (A23); Case 002 Transcript of 5 April 2012 (KAING Guek Eav *alias* Duch), D53/2.1.42, at ERN (EN) 00799904, paras 8-13. The International Judges clarify here that while Duch specified in one statement that MEAS Muth was a reserve member of the General Staff Committee, most other witnesses state that MEAS Muth was a member of that Committee. While the International Co-Investigating Judge decided to follow Duch's qualification and consider MEAS Muth a reserve member, the International Judges regard the Accused Person as a member since 1975 and SON Sen's Deputy since 1978.

⁸¹⁵ SOEM Ny WRI (D54/37), at ERN (EN) 00969996 (A30, A31).



colleagues' accounts and witnessed SON Sen's allocutions.⁸¹⁶ Despite being a member of the General Staff Committee, MEAS Muth did not stay in Phnom Penh.⁸¹⁷

326. The International Judges further find that contrary to the International Co-Investigating Judge's assertion,⁸¹⁸ MEAS Muth was promoted as SON Sen's Deputy of the General Staff in 1978,⁸¹⁹ after all of SON Sen's Deputies had been removed years earlier.⁸²⁰ From 1978 onwards, MEAS Muth moved to Phnom Penh⁸²¹ and got new prerogatives.⁸²² By becoming the Deputy Chief of the Army, MEAS Muth exercised control over all three branches of the military forces.⁸²³ The International Judges note that MEAS Muth may have even become the *de facto* Chief of General Staff, together with SOU Met, in late 1978 after SON Sen lost the political leaders' trust.⁸²⁴ The

⁸¹⁶ See DK Military Meeting Minutes, 01 June 1976, D1.3.8.2, at ERN (EN) 00233958; DK Military Meeting Minutes, 3 August 1976, D1.3.8.3, at ERN (EN) 00234012-00234013; DK Military Meeting Minutes, 19 September 1976, D1.3.27.18, at ERN (EN) 00195340-00195341. See also Book by Stephen HEDER and Brian TITTEMORE: *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouges*, D1.3.17.6, at ERN (EN) 00393604.

⁸¹⁷ Written Record of Interview of KAING Guek Eav *alias* Duch, 3 February 2016, D114/160, at ERN (EN) 01213431 (A8).

⁸¹⁸ See Indictment (D267), para. 162 (The International Co-Investigating Judge explains that MEAS Muth became SON Sen's Deputy from the DK Navy's establishment, *i.e.*, since 1975).

⁸¹⁹ [Corrected 1] Written Record of Interview of BUN Sarath, 28 November 2016, D114/285, at ERN (EN) 01375316-01375317 (A206-207); MOENG Vet WRI (D54/62), at ERN (EN) 00982727 (A22-23); CHET Bunna WRI (D114/65), at ERN (EN) 01180851-01180853 (A9, A12-13).

⁸²⁰ Duch WRI (D114/159), at ERN (EN) 01213423 (A23).

⁸²¹ SATH Chak WRI (D114/186), at ERN (EN) 01251781 (A126, A129); HEANG Reth WRI (D54/98), at ERN (EN) 01076845-01076846 (A28); PRUM Sarat DC-Cam Interview (D59/1/1.8a), at ERN (EN) 00974225; LAY Bunhak DC-Cam Interview (D54/99.1), at ERN (EN) 01115988. See also LAY Bunhak WRI (D54/100), at ERN (EN) 01076824.

⁸²² See, *e.g.*, MOENG Vet WRI (D54/62), at ERN (EN) 00982727-00982728 (A22, A25).

⁸²³ See Written Record of Interview of MOENG Vet, 14 February 2014, D54/63 ("MOENG Vet WRI (D54/63)"), at ERN (EN) 00982737 (A11). See also Written Record of Interview of SENG Soeun, 11 February 2016, D114/169 ("SENG Soeun WRI (D114/169)") at ERN (EN) 01237988 (A25).

⁸²⁴ Transcript of Interview of IENG Sary, 17 December 1996, D4.1.964, at ERN (EN) 00417616 ("There were many troubles inside the revolution. So then POL Pot ceased to trust anyone at all. There was just NUON Chea, the two of them. So then they worked directly with Duch. They did not go through VORN Vet. They did not go through SON Sen any more"(emphasis added)); MOENG Vet WRI (D54/63), at ERN (EN) 00982740-00982741 (A31) ("Q: In your interview with the Documentation Center of Cambodia in English on page 22 you said 'They no longer had confidence in SON Sen. At that time, SON Sen just had a job in the General Staff. Ta Mut and Ta Met were in charge'. And you added that 'Ta Khieu no longer had power over the army. At that time, only Ta Met and Ta Mut did.' Please explain to us why you said this. A31: Because in late 1978 SON Sen was sent to Suong without being assigned any clear tasks. At that time all of the requests to the General Staff were answered by Ta Met and Ta Mut. I knew this from the telegrams" (emphasis added)). In addition, the International Judges recall that personal jurisdiction determination requires both quantitative and qualitative assessment. Thus, although MEAS Muth possibly held the position of Deputy Chief of General Staff for a short period of time, as noted by the National Co-Investigating Judge, it is essential to consider, for the purpose of personal jurisdiction determination, the length of the period during which he held the said position, the senior ranking of that position as well as the gravity of the crimes committed in that capacity. The International Judges emphasise that it is during that short period that the purges in the East Zone occurred and for which MEAS Muth was criminally charged.



International Judges finally note that his role in Kratie illustrates his rise within the RAK hierarchy and the General Staff Committee.⁸²⁵

327. Accordingly, the International Judges concur with the International Co-Investigating Judge's finding that MEAS Muth was part of the General Staff Committee,⁸²⁶ the highest RAK echelon, as a member since 1975. The International Judges specify that MEAS Muth's advancement to the position of Deputy Chief of the General Staff in 1978 commanding all three branches of the Army and *a fortiori* his possible accession to the *de facto* position of Chief of the General Staff undoubtedly characterises him as a senior leader of the RAK during the Democratic Kampuchea.

(e) Roles in the East Zone and Kratie

328. The International Judges note that MEAS Muth's seniority within the RAK is evidenced by his responsibilities in the East Zone, and more precisely in Kratie. MEAS Muth was sent to that area to conduct two different types of mission. First, MEAS Muth led the purge of cadres of the East Zone within Division 117 in Kratie, following a decision made at the Party General Assembly held in Phnom Penh in early 1978 and at a meeting in the Military Headquarters near Boeng Trabèk, which MEAS Muth attended along with other "high-level military Commanders".⁸²⁷ According to his own statement, MEAS Muth was sent to Kratie as soon as February 1978 while remaining Division 164 Commander.⁸²⁸ Although there is no specific account of his endeavours in Kratie in early 1978, the International Judges find that MEAS Muth was, *inter alia*, directly involved in the transfer of 11 cadres from Division 117 to S-21⁸²⁹ and held at least one meeting in November 1978⁸³⁰ regarding the organisation of Division 117⁸³¹ in which he appointed a replacement of the Chairman of that Division.

⁸²⁵ See *infra* paras 328-329.

⁸²⁶ Indictment (D267), para. 162.

⁸²⁷ Written Record of Interview of CHOUK Rin, 21 May 2008, D4.1.408, at ERN (EN) 00268871-00268872.

⁸²⁸ Audio Recording of Interview with MEAS Muth, April 2009, D54/16/1R, 34:37-35:28 ("I was assigned to work in Kratie province, near the Lao border. Q: So he left Division 164 entirely in February 1978? A: No. I still had my position but I was assigned for another mission in Kratie" (emphasis added)). See also PRUM Sarat WRI (D54/87), at ERN (EN) 01055473 (A75).

⁸²⁹ SENG Soeun WRI (D4.1.810), at ERN (EN) 00412181 (A35); MOENG Vet WRI (D54/63) at ERN (EN) 00982736 (A2); MOENG Vet WRI (D54/62), at ERN (EN) 00982731 (A38); Written Record of Interview of SAO Sarun, 2 April 2016, D114/193 at ERN (EN) 01235787 (A64).

⁸³⁰ CHEANG Chuo WRI (D114/52), at ERN (EN) 01076750-01076751 (A42).

⁸³¹ MOENG Vet WRI (D54/63), at ERN (EN) 00982735 (A1); CHEANG Chuo WRI (D114/52), at ERN (EN) 01076750 (A40, A41).



329. MEAS Muth's second mission consisted of travelling to the East Zone at the latest in October 1978 to "check the situation at the front line" as the Vietnamese were leading a powerful attack.⁸³² In order to carry out this mission, he brought with him soldiers from at least one, possibly three, Regiments (161, 162 and 163) of Division 164.⁸³³ MEAS Muth was still present in Kratie in December 1978 before he left for Phnom Penh⁸³⁴ and fled through the forest.⁸³⁵

ii. Conclusion on MEAS Muth's Level of Responsibility

330. Having reviewed the various roles and positions held by MEAS Muth within the DK regime, the International Judges will now review the respective Co-Investigating Judges' findings regarding the Charged Person's level of responsibility *vis-à-vis* the alleged crimes.

331. Firstly, the International Judges concur with the International Co-Investigating Judge's assessment of MEAS Muth's level of responsibility for his participation in the crimes alleged or charged. In particular, the International Judges find that the International Co-Investigating Judge properly assessed MEAS Muth's participation in the implementation of the four CPK criminal policies constitutive of the joint criminal enterprise, by way of committing, with the intent to further the common plan, various serious international and domestic crimes. The International Judges consider that the Charged Person's participation with the highest-ranking leaders of the DK's armed forces in a criminal enterprise with murderous and annihilating consequences for the population is indicative of a sufficiently serious level of responsibility to place him among the most responsible. Further, MEAS Muth's contribution was of key importance in the successful implementation of those policies in his area of responsibility. The International Judges are of the view that without MEAS Muth's contribution to the implementation of the CPK policies, the number of casualties and victims resulting from crimes in Kampong Som area, at sea, and in the East Zone would have been much lower. Moreover, the International Judges hold that the International Co-Investigating Judge

⁸³² MOENG Vet WRI (D54/63), at ERN (EN) 00982736 (A3); CHEANG Chuo WRI (D114/52), at ERN (EN) 01076748 (A28); MOENG Vet WRI (D54/62), at ERN (EN) 00982727 (A22); LON Seng WRI (D54/110), at ERN (EN) 01331642 (A6).

⁸³³ MOENG Vet WRI (D54/63), at ERN (EN) 00982739 (A21, A24); LON Seng WRI (D54/110), at ERN (EN) 01331642 (A7).

⁸³⁴ SENG Soeun WRI (D4.1.810), at ERN (EN) 00412180 (A25, A26, A27); SENG Soeun WRI (D114/169), at ERN (EN) 01237988 (A28).

⁸³⁵ Written Record of Interview of MUT Mao, 14 March 2014, D54/73, at ERN (EN) 00983655 (A17).



correctly found that by virtue of his different roles, MEAS Muth co-perpetrated homicides, planned and gave orders for the commission of multiple serious alleged or charged crimes.

332. Furthermore, the International Judges adhere to the International Co-Investigating Judge's views on MEAS Muth's positions, despite having reached contrasting conclusions on the Charged Person's roles in the Central Committee⁸³⁶ and the General Staff Committee.⁸³⁷ In the International Judges' view, MEAS Muth's position and role as Division 164 Commander alone, or together with his position and role as Kampong Som Autonomous Sector Secretary, are sufficient to determine that he falls within the category of "most responsible".

333. With respect to the National Co-Investigating Judge's assessment of MEAS Muth's level of responsibility, the International Judges reaffirm that his refusal to make findings on the Charged Person's criminal responsibility constitutes an error of law since such findings are an indispensable element in the personal jurisdiction determination in relation to MEAS Muth.⁸³⁸ The International Judges note his statement that "anyone in lower ranks may be regarded as those who were most responsible, depending on their *personal participation* in brutal acts. The scope of one person's *direct acts* and effective authority of those acts are the areas for proper consideration."⁸³⁹ The National Co-Investigating Judge arrived at this finding by drawing on the example of Duch who, he argued, was the reason for the inclusion of the category of persons "most responsible" in the ECCC Law.⁸⁴⁰ Finally, the National Co-Investigating Judge determined that in comparison with Duch, MEAS Muth's "participation was inactive, unimportant, and not proximate to the commission of the crimes."⁸⁴¹

334. In examining the arguments put forward by the National Co-Investigating Judge, the International Judges recall that the factors to consider when assessing the level of responsibility for crimes under the jurisdiction of the ECCC have already been

⁸³⁶ See *supra* paras 313-314.

⁸³⁷ See *supra* paras 325-327.

⁸³⁸ See *supra* paras 298-299.

⁸³⁹ Dismissal Order (D266), para. 368 (emphasis added).

⁸⁴⁰ Dismissal Order (D266), paras 396-397.

⁸⁴¹ Dismissal Order (D266), para. 428.



established in the jurisprudence of the Court.⁸⁴² Such factors include the level of participation in the crimes, the hierarchical rank or position, including the number of subordinates and hierarchical echelons above, and the permanence of the position.

335. Regarding the level of participation, the National Co-Investigating Judge places an almost exclusive emphasis on direct participation in the commission of the crimes alleged, which, in the International Judges' view, amounts to an affirmation that "most responsible" individuals must have physically, directly committed the underlying acts and conducts constitutive of a crime. Such analysis is flawed and unsound since it has been recognised in international jurisprudence that different forms of contribution and acts can be indicative of participation in a crime,⁸⁴³ in addition to physical or direct participation.⁸⁴⁴ In this case, more significantly, MEAS Muth's leadership in spearheading various military operations conducted by his Division, as well as, *inter alia*, his presence on certain crime sites,⁸⁴⁵ his participation in some of these operations,⁸⁴⁶ and his role in furthering CPK policies by, *inter alia*, encouraging forced marriages in his main area of responsibility indicate to a sufficient level that MEAS Muth actually participated in the crimes for which he is charged.

336. Accordingly, the International Judges find that the National Co-Investigating Judge committed errors of law and fact by basing his assessment of MEAS Muth's level of responsibility on the absence of "direct acts and effective authority of those acts", omitting to consider his contributions as well as his roles in the alleged crimes. Such omission is all the more problematic given that the wide geographical scope of the crimes in question is a testament to the high-ranking positions held by MEAS Muth within the RAK and the CPK.

337. Secondly, in relation to the National Co-Investigating Judge's assertion that the category of "most responsible" was created solely for Duch, the International Judges firstly remark that this claim is in total contradiction with, *inter alia*, his former finding

⁸⁴² See, e.g., Case 001 Trial Judgment (E188), para. 22; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 332.

⁸⁴³ See, e.g., ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, paras 679, 691; *Kayishema and Ruzindana* Appeal Judgment (ICTR), para. 185.

⁸⁴⁴ See, e.g., ICTY, *Prosecutor v. Ademi and Norac*, IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11bis, Referral Bench, 14 September 2005, para. 30.

⁸⁴⁵ See *supra* paras 321-324.

⁸⁴⁶ See *supra* para. 328.



that IENG Thirith was among the most responsible by sole virtue of being part of a joint criminal enterprise.⁸⁴⁷ Further, the International Judges, recalling their previous findings on the category of “those most responsible”, note that such statement does not withstand a careful analysis of the language used in the ECCC legal framework nor the well-established legal approach used by international tribunals, including before this Court, to determine the substance of such term.⁸⁴⁸

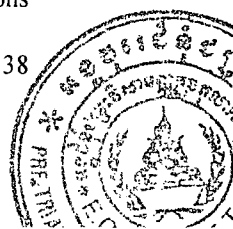
338. In light of the foregoing, considering the errors of law and fact committed by the National Co-Investigating Judge, the International Judges deem it unnecessary to address in more detail his findings and conclusion regarding MEAS Muth’s level of responsibility.

3. Conclusion

339. The International Judges find that the International Co-Investigating Judge properly assessed the gravity of the crimes alleged or charged and MEAS Muth’s positions and responsibilities in the commission of those crimes. Hence, the International Co-Investigating Judge judiciously exercised his discretion in determining that MEAS Muth falls squarely within the category of most responsible individuals. Therefore, the

⁸⁴⁷ The International Judges recall that the National Co-Investigating Judge found that IENG Thirith was among the most responsible for the crimes of the DK simply due to her being part of a joint criminal enterprise: he neither found that she was a member of the Standing or Central Committee nor made any specific finding on her direct participation in the investigated crimes (*see* Case 002 Closing Order (D427), paras 1207-1295, 1328).

⁸⁴⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 336, 350-352. Additionally, the International Judges reviewed a number of elements indicating that already at the time of the ECCC Agreement negotiations, both the Royal Government of Cambodia and the UN were in agreement that the discussed category did not concern only one individual (*see* Deputy Prime Minister of Cambodia, SOK An’s allocution at the Cambodian National Assembly, Transcript of the First Session of the Third Term of Cambodian National Assembly: Debate and Approval of Amendments to Law on Trying Khmer Rouge Leaders, 4-5 October 2004, pp. 30-31, available at: http://law.scu.edu/wp-content/uploads/krt_law_debate.pdf (accessed 7 April 2021) (“If we ask the question ‘who shall be indicted?’, neither the United Nations nor the Task Force of the Royal Government of Cambodia are able to give a response. Because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: *senior leaders* and those *most responsible*. [...] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That’s why we use the term those most responsible. *There is no specific amount of people in the second group to be indicted*. Those committing odd and atrocious crimes shall be possibly indicted” (emphasis added)); Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, 16 March 1999, UN Docs A53/850 and S/1999/231, annex, paras 109-110 (“[The targets for investigation] would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. [The group of Expert] *do not wish to offer a numerical limit on the number of such persons* who could be targets of investigation. [...] [T]he persons to be tried might well be *in the range of some 20 to 30*”) (emphasis added)).



International Judges conclude that the National Co-Investigating Judge erred both in law and in fact in his assessment of the gravity of the crimes alleged or charged against MEAS Muth, and in his review of MEAS Muth's level of responsibility during the Democratic Kampuchea.

340. Accordingly, having reviewed the scope of the criminal allegations in the Introductory and the Supplementary Submissions as well as the pertinent evidence discovered during the judicial investigation, and considering MEAS Muth's rank and responsibilities throughout the DK regime, the International Judges uphold the International Co-Investigating Judge's determination that MEAS Muth is among the most responsible and thus falls within the ECCC's personal jurisdiction.

E. FINAL CONCLUSION

1. Findings on the Appeals and Effect of the Present Considerations

341. For the foregoing reasons, the International Judges summarily dismiss the National Co-Prosecutor's Appeal. With respect to the International Co-Prosecutor's Appeal, while the International Judges uphold Grounds B and C of the Appeal, they find other Grounds of the Appeal moot due to the Dismissal Order being void and deprived of legal effects.

342. Regarding the legal consequences of the present Considerations, the International Judges highlight the following points that guided them in forming their conclusion in this case. First, the Dismissal Order of the National Co-Investigating Judge, as discussed above,⁸⁴⁹ is null and void as an unfinished legal document and by entirely circumventing the essential and mandatory legal framework of the ECCC. Thus, it cannot reasonably be considered as carrying any legal effect. Second, there is a *de facto* unanimous finding of the Pre-Trial Chamber in the present case: albeit for distinct reasons as explained in the separate Opinions appended to the Considerations, the National and the International Judges of the Chamber have concurrently found the Indictment valid.⁸⁵⁰

343. Therefore, the International Judges conclude that pursuant to Internal Rule

⁸⁴⁹ See *supra* paras 228-250, 284.

⁸⁵⁰ See *supra* para. 115 (Opinion of Judges PRAK, NEY, HUOT); *supra* para. 284, *infra* p. 145 (Opinion of Judges BEAUVALLET and BAIK).



77(13), the required majority of at least 4 (four) affirmative votes is attained in the present appeal proceedings against the opposite Closing Orders and that the Pre-Trial Chamber upholds, as a matter of fact, the Indictment by unanimity. Consequently, the Trial Chamber shall be seised on the basis of the International Co-Investigating Judge's Indictment. The International Judges clarify that by virtue of Internal Rule 77(14), the present Considerations with the appended Opinions shall be notified to the Co-Investigating Judges, the Co-Prosecutors, the Accused and the Civil Parties in the present case. Furthermore, the Co-Investigating Judges shall immediately proceed in accordance with the present Considerations, namely the decision reached by unanimity by the Pre-Trial Chamber.⁸⁵¹

344. In addition, since no judicial organ of the ECCC ever found that the alleged crimes in the present case had not been committed or that the facts under investigation were not attributable to MEAS Muth, the Cambodian authorities, should the present case not proceed to the ECCC Trial Chamber, shall consider resuming the prosecution of such crimes before national courts and, generally, prosecute all suspects for the Khmer Rouge-era crimes of which the ECCC has not been seised.⁸⁵²

2. Security Measures

345. The International Co-Investigating Judge, in the Indictment, considered that provisional detention of MEAS Muth pending trial was not a necessary measure to avert any of the risk factors under Internal Rule 63(3)(b)⁸⁵³ and that "the procedural uncertainty resulting from the opposing closing orders" was a further reason against ordering detention.⁸⁵⁴ The Co-Investigating Judge did not contemplate any other security measures at his disposal.

346. The International Judges find that the reasoning of the International Co-Investigating Judge demonstrates serious errors.

⁸⁵¹ See Internal Rule 77(14).

⁸⁵² See *supra* para. 176. Regarding the inherent jurisdiction of Cambodian courts for Khmer Rouge-era crimes, see Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 59; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 79.

⁸⁵³ Indictment (D267), para. 578.

⁸⁵⁴ Indictment (D267), para. 579.



a. Applicable Law

347. The International Judges observe that Internal Rule 63 regulates provisional detentions. More specifically, Rule 63(3)(b) provides the following:

3. The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:

i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;

ii) preserve evidence or prevent the destruction of any evidence;

iii) ensure the presence of the Charged Person during the proceedings;

iv) protect the security of the Charged Person; or

v) preserve public order

348. Internal Rule 65 states, in relevant parts, that:

1. On their own motion, or at the request of the Co-Prosecutors, the Co-Investigating Judges may order that a Charged Person remain at liberty or be released from detention. [...] The order by the Co-Investigating Judges shall [...] impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others [...].

[...]

6. If the Charged Person violates any of the bail conditions in such an order, the Co-Investigating Judges may issue a warning or issue a Provisional Detention Order in respect of the Charged Person [...].

349. Internal Rule 68 further provides the following:

1. The issuance of a Closing Order puts an end to Provisional Detention and Bail Orders once any time limit for appeals against the Closing Orders have expired. However, where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail under Rules 63 and 65 are still met, they may, in specific, reasoned decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.



b. Discussion

350. The International Judges note that at the time of charging, the Co-Investigating Judges must examine if the conditions for ordering provisional detention or bail under Internal Rules 63(3)(b) and 65 exist and accordingly determine whether they may order provisional detention, bail or that the Charged Person remain at liberty.⁸⁵⁵

351. In the case at hand, the International Co-Investigating Judge, however, issued a *sui generis* and, in the view of the International Judges, questionable order (“Order on Implementation of Voluntary Assurances given by MEAS Muth”)⁸⁵⁶ by which, *inter alia*, MEAS Muth was bound “in the event that he obtains a valid passport to surrender it to the Police Chief of Ta Sanh police station, located in Ta Sanh Commune, Samlout District, Battambang province, no later than seven days from receipt of this order or of receipt of the [...] passport, whichever is earlier”,⁸⁵⁷ and “inform the [Co-Investigating Judges] when he wishes to leave the country for medical treatment and when he returns.”⁸⁵⁸

352. The International Co-Lawyer for MEAS Muth, Mr Michael KARNAVAS, in response to the Judges’ questions during the Hearing on the Appeals,⁸⁵⁹ stated with remorse that:

[W]hether [MEAS Muth] has a passport or doesn't have a passport, with all due honesty, it doesn't really make a difference. He can leave to go to Thailand [near Samlout where there is several border crossings to Thailand and easily to go through even with a simple identification] for medical purposes. [...] I learned this morning that he has a new passport and he has it since 2016. I was not aware of that. And it's on him. [...] [H]e has not turned over the passport to the police. [...] [H]e has had it.⁸⁶⁰

353. The International Judges observe that MEAS Muth obtained a passport in 2016 and had travelled abroad since then without notifying the ECCC authorities. Consequently, the International Judges find that MEAS Muth has not complied with the

⁸⁵⁵ Internal Rule 65.

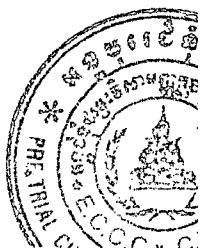
⁸⁵⁶ Order on Implementation of Voluntary Assurances (D174/2).

⁸⁵⁷ Order on Implementation of Voluntary Assurances (D174/2), p. 2.

⁸⁵⁸ Written Record of Initial Appearance (D174), p. 11.

⁸⁵⁹ Case 003 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D267/23.2), at ERN (EN) 01639993, p. 22:06 to 22:16 *referring to* MEAS Muth’s Request to Dispense with Personal Appearance at the Hearings on the Appeals against the Closing Orders, 18 November 2019, D266/13 and D267/18 (“MEAS Muth’s Request to Dispense with Personal Appearance (D266/13 and D267/18)”), para. 2.

⁸⁶⁰ Case 003 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D267/23.2), at ERN (EN) 01639993-01639994, pp. 22:25 to 23:23.



assurances that he had personally and voluntarily given to the International Co-Investigating Judge since 2016.

354. In light of the foregoing, the International Judges find that the Co-Investigating Judges, before the issuance of their Closing Orders, failed to scrutinise whether the Voluntary Assurances given by MEAS Muth were duly honoured, and thus to properly consider orders of provisional detention or bail with necessary conditions imposed to ensure the presence of MEAS Muth during the proceedings and the protection of others in accordance with the Internal Rules 63 and 65.

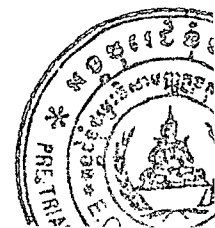
355. More importantly, the International Judges find that the International Co-Investigating Judge, in his issuance of the Indictment, failed to clearly establish the legal framework in accordance with the Internal Rules.

356. The International Co-Investigating Judge, in the Indictment, firstly erroneously concluded that no security measure was necessary. The International Judges note that MEAS Muth is charged with the most serious of crimes, namely genocide, crimes against humanity, and murder for which he faces a heavy sentence of imprisonment, and consider that it is imperative to bring MEAS Muth to justice. The International Judges recall that no undue burden shall be placed on the witnesses, especially those who were given a letter of assurance from the Co-Investigating Judge pursuant to Internal Rule 28.⁸⁶¹ Given the grave nature of the acts, so detrimental to humanity that statutory limitation is inapplicable, and the serious disturbance brought to the public order of both national and international society, the International Judges find that a provisional detention of or other security measures that were at the International Co-Investigating Judge's disposal against MEAS Muth was duly called for.

357. Secondly, the International Co-Investigating Judge failed to properly assess the risk factors under Internal Rule 63(3)(b). In this regard, the International Judges note the fact that MEAS Muth had acquired a new passport in 2016 and travelled to Thailand since then, without notifying the Co-Investigating Judges,⁸⁶² against his voluntary

⁸⁶¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 691. Regarding the letters of assurance given by the International Co-Investigating Judge to witnesses, *see* Indictment (D267), para. 147.

⁸⁶² Case 003 29 November 2019 Transcript of Appeal Hearing (D266/18.2 and D267/23.2), at ERN (EN) 01639994, p. 23:20 to 23:21; MEAS Muth's Request to Dispense with Personal Appearance (D266/13 and D267/18), para. 2.



commitment to remain at the disposal of the ECCC as well as his voluntary assurances in this regard given to the International Co-Investigating Judge.⁸⁶³

358. Accordingly, pursuant to Internal Rule 44 and the facts on the record, the International Judges find that the International Co-Investigating Judge erred by failing to properly consider the issuance of an arrest warrant. Such wilful avoidance of taking any provisional measures demonstrate the International Co-Investigating Judge's intention to minimise the meaning and effectiveness of his Indictment.

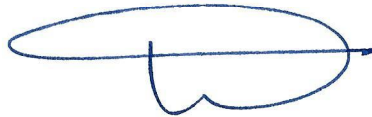
⁸⁶³ See Written Record of Initial Appearance (D174), p. 11; Order on Implementation of Voluntary Assurances (D174/2), p. 2.



**FOR THESE REASONS, THE INTERNATIONAL JUDGES OF THE
PRE-TRIAL CHAMBER HEREBY:**

- **DISMISS** the National Co-Prosecutor's Appeal;
- **FIND** that the Grounds B and C of the International Co-Prosecutor's Appeal are upheld and **DECLARE** that other Grounds of the Appeal are moot;
- **FIND** that the Dismissal Order is intrinsically and extrinsically null and void;
- **CONFIRM** the Indictment;
- **FIND** that the Trial Chamber must be seised of Case 003 on the basis of the Indictment pursuant to Internal Rule 77(13).

Phnom Penh, 7 April 2021



Judge Olivier BEAUVALLET



Judge Kang Jin BAIK

