

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

January 2019

Introduction

The Trial Chamber of the Extraordinary Chambers of the Courts of Cambodia (“ECCC”) issued a historic second judgment against Nuon Chea and Khieu Samphan on November 16, 2018 on charges of genocide, crimes against humanity, and war crimes. The court found both accused guilty on a number of the charges and handed them their second sentences of life in prison. This marks the court’s third Trial Chamber Judgment since it began operating in 2006, and by far the most extensive in terms of coverage of Khmer Rouge crimes.

The full judgment will be published when it is translated into Khmer. It was scheduled to be released before the end of 2018, but as of early January, was not yet available. The French translation, French being the third official language of the court in addition to Khmer and English, will likely not be available until the first quarter of 2019.

There is uncertainty about whether cases against three remaining accused (referred to as Cases 003, 004 and 004/02 or as part of the 003/004 series of cases) will be finally resolved consistent with the legal principles and rules of the court. The Co-Investigating Judges, responsible for judicial investigations, have issued conflicting Closing Orders in two of the cases (003 and 004/02)—with the Cambodian judge seeking to dismiss the charges and the international judge issuing indictments.

A third case in the series, Case 004/01, with charges against Im Cham, has been finally dismissed for lack of jurisdiction. The Co-Investigating Judges are scheduled to issue their Closing Order (or Orders) in the second quarter of 2019 in the final of the series—Case 004/02 with charges against Yim Tith. The government of Cambodia’s opposes all of the 003/004 cases, and has claimed that the court’s rules on resolving conflicting Closing Orders are ambiguous. This leads to uncertainty about how these cases will be resolved.

This update concludes with some observations and recommendations for the court.



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224 West 57th Street,
New York, New York, 10019
P. +1 212-548-0600
opensocietyfoundations.org

Background

The Khmer Rouge, a brutal and extremist communist movement, ruled Cambodia from April 1975 to January 1979, when the Vietnamese army finally routed it from power. It played a role as a guerrilla force until 1996, when Prime Minister Hun Sen brought some of the remaining Khmer Rouge leadership in from the jungle with offers of a limited amnesty. Hun Sen was a mid-level Khmer Rouge soldier until he fled to Vietnam in 1977. He returned to Cambodia in 1979 and has held positions of political power ever since, becoming prime minister in 1998, a position that he has held ever since. In the lead-up to elections in 2018, Hun Sen arrested opposition leaders and banned the opposition party, resulting in a landslide election victory. He now rules as a strongman, having weakened any claim to democracy or an independent judiciary in Cambodia. While generally supportive of the ECCC's efforts to bring the most senior living leaders of the Khmer Rouge to justice, he has sought to limit the court's independence with respect to prosecution of other accused.

The ECCC is a unique hybrid court, established to try "senior leaders and those most responsible" for crimes under international and domestic law committed by the Khmer Rouge in Cambodia between April 1975 and January 1979. Nominally a chamber of the Cambodian judicial system, it operates under a Cambodian *Law* and an *Agreement* between the United Nations and the Government of Cambodia.¹ The Cambodian government partially funds the court, but the greatest portion of funding comes from international donors. Its hybrid structure places Cambodians and internationals in positions as judges on trial, pre-trial, and supreme court judicial chambers; as co-prosecutors; as co-investigating judges; and as defense counsel. In each judicial chamber, Cambodian judges outnumber international judges. However, a supermajority voting requirement for each judicial chamber is intended to ensure that at least one international judge concurs on most decisions, including any decision to stop the investigation or prosecution of an accused person. This provision is intended as a method to break judicial deadlocks and ensure that domestic political interference does not protect certain accused persons from prosecution.²

1 See 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 ("*Agreement*"), June 6, 2003 at <https://www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecutio>, and the Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, ("the Law") available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

2 See David Scheffer, The Extraordinary Chambers in the Courts of Cambodia, Abridgement of the much lengthier and footnoted book chapter: David Scheffer, The Extraordinary Chambers in the Courts of Cambodia, in Cherif Bassiouni, ed., International Criminal Law I (Martinus Nijhoff Publishers, 3rd ed., 2008 [forthcoming]), reprinted with permission of Koninklijke Brill NV, pp. 14-15, at http://www.cambodiatribunal.org/assets/pdf/court-filings/Cambodia_Scheffer_Abridged_Chapter_July_2007.pdf

Trial Chamber Cases

Case 001

The court has fully completed three trials, two of which have gone through the appeal process, since it began operating in 2007. Case 001 was the prosecution of Kaing Guek Eav, alias Duch, the warden of the notorious Tuol Sleng Prison in Phnom Penh where the regime sent its perceived enemies to be tortured and executed. The Trial Chamber convicted Duch for crimes against humanity. The Supreme Court Chamber affirmed the judgment on appeal and increased the sentence from 35 years to life imprisonment. Duch, now 76 years old, is serving his sentence in a domestic prison.

Case 002/01

Case 002, based on a 400-page indictment, originally included charges against four persons alleged to have been senior leaders of the Khmer Rouge. Ieng Sary, a member of the Khmer Rouge Central Committee and Foreign Minister, and his wife Ieng Thirith, Minister of Social Affairs, both died before the end of the trial. The case proceeded against Nuon Chea (born 1926), second in command to Khmer Rouge leader Pol Pot, and Khieu Samphan (born 1931), who served as formal head of state. Because the number of crime sites and charges in the case was extremely large—covering the entire country and reign of the Khmer Rouge—the Trial Chamber chose to sever the case into separate trials. The first trial, Case 002/01, ran from November 21, 2011 to October 31, 2013, with a Trial Chamber Judgment issued on August 14, 2014. It covered charges relating only to two forced population movements by the Khmer Rouge—including the forced evacuation of Phnom Penh in 1975, and the execution of hundreds of former Khmer Republic officials at Tuol Po Chrey.

The Trial Chamber found both accused guilty under a theory of Joint Criminal Enterprise (JCE). It determined that they were guilty of the crime against humanity of extermination and murder in connection with the two phases of population evacuations and for the murder and extermination of former Khmer Republic soldiers. It sentenced both accused to life in prison. On appeal, in a decision highly critical of the Trial Chamber Judgment, the Supreme Court Chamber confirmed the conviction of the accused based on a theory of JCE for the crimes against humanity of inhumane acts and persecution in relation to the evacuation of Phnom Penh in April 1975. It also found them guilty of murder and other inhumane acts in relation to subsequent mass movements of populations. However, the Supreme Court Chamber reversed the conviction for crimes against humanity committed at Toul Po Chrey, where hundreds of former Khmer Republic soldiers were executed, finding that a policy to target such persons was not reasonably established so as to justify a finding of JCE liability. It also found that there was insufficient evidence of a large number of deaths during the evacuation of Phnom Penh to justify a finding of the crime of extermination. It reversed that conviction against both accused. Nonetheless, the Supreme Court Chamber affirmed the life sentences of the accused.³

3 Supreme Court Chamber Appeal Judgment in Case 002/02, November 23, 2016, at https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36_EN_0.pdf. See also Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: A Critical Supreme Court Affirms Life Sentences at <https://www.opensocietyfoundations.org/sites/default/files/recent-developments-eccc-december-2016-20161201.pdf>, for further discussion of this decision.

Case 002/02

The Case 002/02 trial, covering some—but not all—of the remaining charges in the original indictment, addressed a broader range of charges than in the first trial and included charges of genocide and war crimes in addition to crimes against humanity. The factual base covered by these charges included five cooperatives and worksites, four security centers, internal purges in the North and East Zones, the treatment of ethnic Vietnamese and Cham Muslim minority populations, and the regulation of marriage, including rape within the context of forced marriage. The remaining charges of the indictment were dropped in recognition that a third trial of the same accused was not feasible or desirable, and that the crime sites selected for the two 002 trials were representative of crimes committed throughout Cambodia.⁴

Evidentiary hearings in Case 002/02 began on January 8, 2015 and closing arguments concluded the trial in June 2017. A summary of the judgment was publicly announced on November 16, 2018.⁵

The Trial Chamber found that a vast array of the Case 002/02 crimes alleged were committed during the Khmer Rouge period, and then analyzed whether the accused were liable as senior leaders of the Khmer Rouge for these atrocities. The court relied heavily on the theory of JCE to evaluate the liability of the accused. It concluded that senior Khmer Rouge leaders formed a JCE that “shared the common purpose of rapidly implementing socialist revolution in Cambodia through a “great leap forward” designed to build the country, defend it from enemies and radically transform the population into an atheistic and homogenous Khmer society of worker-peasants. The common purpose was implemented ... through the execution of at least five policies. These were: (1) the repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another; (2) the establishment and operation of cooperatives and worksites; (3) the establishment and operation of security centers and execution sites to identify, arrest, isolate and “smash” those considered as belonging to the most serious enemy categories, and to re-educate “bad elements”; (4) the targeting of specific groups, including the Cham and Vietnamese, Buddhists, and former Khmer Republic officials including both civil servants and military personnel and their families; and (5) the regulation of marriage.”⁶

The Chamber concluded that both accused were senior leaders of the Khmer Rouge who played a significant role in advancing the Khmer Rouge joint criminal enterprise and shared the necessary direct, discriminatory and specific intent common among the enterprise members. The Chamber held that both Nuon Chea and Khieu Samphan committed, “through a JCE: (a) the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious and

4 Internal Rule 89 quarter allows the Trial Chamber, to exclude certain facts from the trial so long as the remaining facts are sufficiently representative of the scope of the indictment. Rule 66 bis gives similar authority to the co-investigating judges at the close of the judicial investigation. See Internal Rules, (Rev.9) as Revised on 16 January 2015 at https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf.

5 Trial Chamber Summary of Judgment, Case 002/02, November 16, 2018, at https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/20181119%20Summary%20of%20Judgement%20Case%20002-02%20ENG_checked%20against%20delivery_amended%20a.pdf.

6 Ibid. at p. 19.

racial grounds, and the other inhumane acts through attacks against human dignity, conduct characterized as enforced disappearances, forced transfer, forced marriage and rape in the context of forced marriage; (b) the crime of genocide by killing members of the Vietnamese ethnic, national and racial group; and (c) grave breaches of the Geneva Conventions of willful killing, torture, inhuman treatment, willfully causing great suffering or serious injury to body or health, the willful deprivation of the rights of a fair and regular trial and unlawful confinement against persons protected under the Geneva Conventions at S-21 Security Centre.”⁷

With respect to the Cham Muslim population, the court found that neither accused were liable under a theory of JCE. It ruled so because there was not sufficient proof that either held the necessary intent to “destroy or eliminate in whole or in part” the target populations as is required to establish genocide under a theory of JCE as the state of the law existed in 1975 to 1979. However, the court found Nuon Chea guilty for genocide by killing members of the Cham ethnic and religious group under a theory of superior responsibility. The court did this because the evidence showed that he both “exercised ultimate decision-making power together with Pol Pot and possessed the authority to discipline insubordinate members of the Part and the military” and “at the very least had reason to know that genocide had been, or was about to be, committed against the Cham.”⁸

In contrast, the court was “not satisfied that Khieu Samphan was a superior in the sense of having had the ability to prevent or punish the commission of crimes.” Therefore, the court acquitted Khieu Samphan of liability for the crime of genocide by killing members of the Cham ethnic and religious group.⁹

The judgment handed both accused their second sentence of life in prison. The accused are entitled to appeal the judgment to the Supreme Court Chamber. The court expects any appeal to be completed in the second half of 2020.

There were 3,865 Civil Parties admitted in Case 002/02. To become a Civil Party a person must demonstrate that as a “direct consequence of at least one of the crimes alleged ... he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.”¹⁰ The Chamber found that the defendants’ crimes caused immeasurable harm to the Civil Parties, as well as a very large number of additional victims. This included physical suffering, economic loss, loss of dignity, psychological trauma, and grief arising from the loss of family members or close relations. The court endorsed 13 assistance and educational projects submitted as “collective and moral reparations,” the only kind of reparations allowed by the court’s rules, by the lawyers representing the consolidated group of civil parties.¹¹ Outside donors have funded each of these projects, which are either completed or ongoing. The accused both claim to be indigent and therefore reparations against them personally were not feasible.

7 Ibid. at pp. 22 and 26.

8 Ibid. pp. 22-23.

9 Ibid. p. 27.

10 Internal Rules, Rule 23 bis (1).

11 Internal Rules, Rule 23 quinquie.

In a bizarre twist following the announcement of the Summary of the 002/02 judgment, the Bar Association of Cambodia notified the Trial Chamber that it has struck Victor Koppe from its list of foreign lawyers authorized to practice before the ECCC. Koppe served as lead international counsel for Nuon Chea. The Bar Association informed the Trial Chamber on December 11 that it had taken this action in August of 2018 because Mr. Koppe's Amsterdam Bar Association membership had lapsed in January of 2016. The Cambodian Bar Association takes the position that continuous membership of a foreign lawyer in his or her home bar association is a condition for qualification to practice before the ECCC. Mr. Koppe acknowledges that he is not been a member of the Amsterdam Bar Association since January of 2016 but asserts that membership in his home bar association is a requirement only at the time the lawyer applies for authorization to represent clients before the ECCC and is not a continuing requirement. It is unclear how this issue will be resolved and if it will have any impact on the judgment against Nuon Chea or his ongoing representation.

Impact of the case 002/02 verdict

The judgment against Nuon Chea and Khieu Samphan is an undeniable accomplishment for the ECCC. Although the full judgment is not yet available for review, the summary establishes that the judgment covers an astonishing range of crimes and crime sites throughout Cambodia. Nuon Chea and Khieu Samphan are the most senior leaders of the Khmer Rouge still alive. Although they generally refused to testify at the trial, the evidence presented, and as will be detailed further in the judgment, will likely go a long way toward explaining the nature of the Khmer Rouge's criminality. This spread havoc over the entire country and affected nearly every Cambodian alive at the time, killing 1.5 to 2 million. While it is easy to lament that Cambodians waited too long to see justice and that many who suffered died before it occurred, it is heartening to know that some justice did come before all of the senior leaders of the Khmer Rouge atrocities passed away. Future generations will benefit from this accomplishment and an enhanced understanding of Cambodian history.

The judgment is also significant in that, unlike the two previous judgments of the court, it includes guilty verdicts on three counts of genocide: two against Nuon Chea for genocide committed against Vietnamese and Cham Muslim minority populations, and one against Khieu Samphan for genocide committed against the Vietnamese population in Cambodia. This is a grave element of the Khmer Rouge history not often discussed in modern Cambodia. Many Cambodians, as well as others around the world, see Khmer Rouge killings as a genocide against the Cambodian population generally. However, the crime of genocide, as defined by the Genocide Convention and international law, requires that murder and other atrocities be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" in order to qualify for a conviction.¹² While many Cambodians were killed or persecuted for political or class reasons, those crimes do not fall within the formal definition of genocide. The fact that the genocide convictions relate to minority populations and not the majority of Cambodians will be surprising and perhaps unsettling to many Cambodians with no background in the formal requirements of the crime. To ensure that misunderstandings or resentments do not fester,

¹² See Convention on the Prevention and Punishment of the Crime of Genocide, entered into force January 1951, available at <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>.

it will be important for the court's outreach program as well as civil society actors and educators to provide comprehensible explanations about the genocide convictions.

Cases 003/004

Recent press coverage of the ECCC predicts that the Case 002/02 judgment will be the last from the court.¹³ Cambodian Minister of Interior Sar Kheng stated immediately following the announcement of the 002/02 judgment that “[t]here are no more [top Khmer Rouge leaders left to try], and our policy [is that] now this process has ended.”¹⁴ This position assumes that three remaining cases, at various pre-trial stages, will never be tried because the government of Cambodia is opposed to prosecution of the named accused. However, this result would not be consistent with the court's basic legal principles or rules. If the court shuts down without legally concluding proceedings in the outstanding 003/004 series of cases, it would diminish all that the court has accomplished to provide independent justice for Cambodians. It would be a particular blow to victims of the alleged crimes, many of whom have invested time, expense, and emotional energy participating in the case as Civil Parties.

Five accused, alleged to be perpetrators at a lower level of seniority than the senior leaders in Case 002, were originally named in the cases designated as 003 and 004. One accused died, the court dismissed the case against one for lack of jurisdiction, and the cases against three others remain unresolved. Vocal opposition from government officials, including Prime Minister Hun Sen, has plagued these cases since the investigation into them opened in 2009. Cambodian court officials have refused to participate in advancing the cases on their merits.

It is uncertain how the three remaining cases will be resolved in the face of opposing positions by the court's international and Cambodian legal officials. The Cambodian Co-Prosecutor, the Cambodian judges on the Pre-Trial Chamber and the Cambodian Co-Investigating Judge have all consistently stated the 003 and 004 cases should be dismissed—without investigation or trial. The International Co-Prosecutor and judges on the Pre-Trial Chamber have steadfastly held that the facts support proceeding with the merits of the cases. The International Co-Investigating Judge has issued indictments in two of the cases and is preparing final Closing Orders, which may also include an indictment, in one more. In a fourth case investigated at the same time, the Co-Investigating Judges agreed to dismiss the accused on jurisdictional grounds—finding she

13 See for instance Hannah Ellis-Peterson, Khmer Rouge leaders found guilty of genocide in Cambodia's 'Nuremberg' moment, *The Guardian*, November 16, 2018, at <https://www.theguardian.com/world/2018/nov/16/khmer-rouge-leaders-genocide-charges-verdict-cambodia>; Luke Hunt, Guilty Verdicts Mark the Start of the End for Cambodia's Genocide Trial, *VOA News*, November 19, 2018 at <https://www.voanews.com/a/guilty-verdicts-mark-the-start-of-the-end-for-cambodia-s-genocide-trial/4664553.html>; Khmer Rouge Leaders Found guilty of Cambodia Genocide, *BBC News*, November 16, 2018 at <https://www.bbc.com/news/world-asia-46217896>; Sopheng Cheang, Last Khmer Rouge Leaders Guilty of Genocide, *Get Life Terms*, *Washington Post*, November 16, 2018, at https://www.washingtonpost.com/world/asia_pacific/cambodian-tribunal-session-set-for-verdicts-on-khmer-rouge/2018/11/15/8de489ee-e94b-11e8-8449-1ff263609a31_story.html?utm_term=.b219c25beb45; Peter Maguire, November 14, 2018 at *The Khmer Rouge Trials: The Good, the Bad, and the Ugly* As the Extraordinary Chambers in the Courts of Cambodia Prepares its Final Verdict, a Look Back at its Legacy, *The Diplomat*, November 14, 2018, at <https://thediplomat.com/2018/11/the-khmer-rouge-trials-the-good-the-bad-and-the-ugly/>.

14 Mech Dara, 'No more Khmer Rouge leaders left to stand trial', *Phnom Penh Post*, December 18, 2019 at <https://www.phnompenhpost.com/national-kr-tribunal/no-more-khmer-rouge-leaders-left-stand-trial>

was neither a senior leader nor a person most responsible for crimes, as required to invoke the court's jurisdiction.

The Co-Investigating Judges divided the 003 and 004 series of investigations into separate cases with one accused each during the late stages of the investigation. They are thus designated as Cases 003, 004, 004/01 and 004/02. The status of each is described below.

Case 004/01 with Charges against Im Chaem Dismissed

In an action that is remarkable because it evidenced *agreement* on a substantive issue in one of the 003/004 Cases, the Co-Investigating Judges issued a joint Closing Order on February 22, 2017 dismissing the charges that had been under investigation since 2009 against Im Chaem.¹⁵ The judges agreed that she was not a "person most responsible" for the crimes outlined in the submission of the international prosecutor. The international Co-Prosecutor appealed the dismissal decision to the Pre-Trial Chamber. The Chamber split along national lines with the Cambodian judges voting to affirm the dismissal and the international judges voting to overrule it and issue an indictment. Without a supermajority vote to reverse the joint dismissal decision, it stands by default. The opposing reasoning of the international and Cambodian judges is published as "considerations" rather than as a decision.¹⁶

The Cambodian Pre-Trial Chamber Judges signed their brief considerations revealing essentially no legal or factual analysis. They merely conclude that Im Chaem does not fall within the personal jurisdiction of the court and that the case should be dismissed. The written views of the international judges include an extensive review of the evidentiary and legal points raised by the international prosecutor and the civil parties in their appeals. After finding numerous errors and abuses of discretion, they conclude "the Co-Investigating Judges failed to take into account the full magnitude of the gravity of the crimes alleged or charged against Im Chaem, and her full role and responsibilities during the Democratic Kampuchea Regime."¹⁷ They conclude that the evidence supports the finding at the investigation stage that Im Chaem is amongst the most responsible for Khmer Rouge crimes and thus falls under the ECCC's personal jurisdiction. Further appeals of the dismissal of this case are not possible under the rules of the court.

Case 004/02 with Charges against Ao An

Case 004/02 encompasses charges against Ao An, Deputy Secretary of the Central Zone under the Khmer Rouge. The case is currently in a state of limbo with contradictory Closing Orders issued by the Co-Investigating Judges. The Cambodian judge has issued a Closing Order dismissing all charges against Ao An. His rationale is that while "[e]vidence produced through the investigation shows existence of killings, starvation and forced

¹⁵ See, Statement by the Office of the Co-Prosecutors on Case 004/2, August, 31, 2017 at <https://www.eccc.gov.kh/sites/default/files/media/Statement%20by%20the%20Office%20of%20the%20Co-Prosecutors%20on%20Case%20004-02%20English.pdf>.

¹⁶ ECCC Pre Trial Chamber, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), June 29, 2018, at https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D308_3_1_20_EN.pdf.

¹⁷ Ibid at p. 135.

labor resulted from the enforcement of policies of the Democratic Kampuchea (DK),”¹⁸ there is not evidence to show that the role of Ao An in such crimes was sufficiently large to justify finding him a “person most responsible” as is necessary to exercise the jurisdiction of the ECCC.

In contrast, the International Co-Investigating Judge issued an indictment against Ao An with charges of genocide (against the Cham Muslim minority) and crimes against humanity. The indictment concluded that Ao An is subject to the ECCC’s personal jurisdiction as one of the persons most responsible for crimes committed during the Khmer Rouge period, based on his position in the regime’s hierarchy and the gravity of his crimes. It finds that “[h]e held an elevated position in the [Khmer Rouge] hierarchy which he used to destroy the Cham and kill at least tens of thousands of people in the Central Zone, and to cause severe harm and suffering to countless more, creating a nightmarish environment which one witness described as ‘hell in the human world’.”¹⁹

Case 003 with Charges against Meas Muth

Meas Muth, Commander of the Democratic Kampuchea Navy during the Khmer Rouge reign, is the accused in Case 003. On November 28, 2019 the Co-Investigating Judges issued separate and contradictory Closing Orders. The Cambodian judge penned a dismissal and the international judge issued an indictment. Both orders are lengthy, but, unfortunately, the dismissal order is only in Khmer and the indictment only in English. Translations are in progress, but the court has provided a summary of the orders in English and Khmer.²⁰

The Cambodian Co-Investigating Judge, who declined to participate in the investigation of the case since its inception, reasoned, “[Meas Muth’s] participation was neither proximate to nor active in the commission of the crimes.”²¹

The International Co-Investigating Judge, in contrast, found:

Meas Muth held an elevated role in the DK hierarchy, working at the highest level of the DK military command structure below the national political leadership. He was called upon to implement purges of the Revolutionary Army of Kampuchea (“RAK”) beyond his main theatre of operations in Kampong Som and his duties as the Commander of the DK Navy. In addition to Meas Muth’s elevated formal position, the gravity of his actions and the severity of their

18 ECCC Press Release, “Co-Investigating Judges issue Two Separate Closing Orders in Case against Ao An, Case No 004/02-09-2009-ECCC/OCIJ, August 16, 2018, at <https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-ao-case-no-004207>.

19 *Ibid.*; For a more detailed description of the competing Closing Orders see Open Society Justice Initiative, *Recent Developments in the Extraordinary Chambers of the Courts of Cambodia*, September 2018, at <https://www.opensocietyfoundations.org/sites/default/files/recent-developments-at-the-extraordinary-chambers-in-the-courts-of-cambodia-20180914.pdf>.

20 ECCC Office of the Co-Investigating Judges, *Co-Investigating Judges Issue Two Separate Closing Orders in the Case Against Meas Muth*, Case No. –3/07-09-2009-ECCC/OCIJ, November 28, 2018, at <https://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%20PRESS%20RELEASE%2028%20NOV%202018%20ENGLISH.pdf>.

21 *Ibid.*

impact, described in detail in the Closing Order, justify the conclusion that he was one of the most responsible persons.²²

The indictment includes charges of genocide of the Vietnamese as well as the extermination of Thai persons captured by the DK Navy in the waters and islands off the Cambodian coast. The Judge found “Meas Muth turned these waters into a giant trap for anyone who entered them. Meas Muth did not encourage the exercise of restraint by his subordinates, quite the contrary: his orders to kill were open-ended. The Vietnamese were invariably killed and it was only by chance that some of the captured Thai evaded death by being traded for commodities.”²³ In addition, the indictment discusses extensive facts to support charges of a number of crimes against humanity, war crimes, and domestic crimes.

Case 004 with Charges against Yim Tith

The judicial investigation into charges against Yim Tith has concluded and the court is awaiting a Closing Order (or Closing Orders) from the Co-Investigation Judges, which will include either a dismissal order, an indictment, or both. The court’s completion plan estimates that the order will be issued in the second quarter of 2019.²⁴ The last public statements concerning the investigation come from the Co-Prosecutors after they made final submissions in anticipation of Closing Orders.

The International Co-Prosecutor concluded:

Yim Tith was one of the most powerful cadres in the Communist Party of Kampuchea (“CPK”), holding several high-level positions across two zones and thereby controlling a large portion of the DK population. During the early part of the regime, Yim Tith was a powerful figure in the Southwest Zone, rising from deputy secretary of Kirivong District to district secretary, then deputy secretary and secretary of Sector 13. He controlled multiple districts where many security centres and execution sites were located. In approximately 1977 when the CPK central leadership began to purge its own cadres in the Northwest Zone, Yim Tith also assumed authority over vast parts of the Northwest, including Sectors 1, 2, 3, 4, and 7, and he was ultimately appointed deputy zone secretary. Additionally, he served as the acting zone secretary in the absence of Ta Mok, who frequently travelled outside the area. Through these positions, Yim Tith ordered and facilitated crimes that resulted in the commission of large-scale atrocities in the Northwest Zone. Simultaneously, he maintained his power and influence in Sector 13 of the Southwest Zone where the same criminal plan was being implemented by members of the same joint criminal enterprise. Yim Tith was also among those individuals “most responsible” for the crimes committed in DK, including genocide, and he played an important role in the perpetration of

²² Ibid.

²³ Ibid.

²⁴ Extraordinary Chambers in the Courts of Cambodia (ECCC) Completion Plan, Revision 18, September 30, 2018, at https://www.eccc.gov.kh/sites/default/files/Completion%20Plan%20rev%2018.final_.pdf.

these crimes. Yim Tith helped shape and propagate the criminal policies and ensured that they were implemented by his subordinates.²⁵

The International Co-Prosecutor argued that Yim Tith should be indicted and tried for the genocide of the Vietnamese and Khmer Krom group in Cambodia. He also argued that Yim Tith should be charged with the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture, persecution, and other inhumane acts—specifically, inhumane treatment, forced transfer, forced marriage, rape within the context of forced marriage, rape and sexual violence outside of forced marriage, and enforced disappearances.

As with the other accused in 003 and 004 Cases, the Cambodian Co-Prosecutor did not participate in the preliminary investigation carried out by the Office of the Co-Prosecutors and the Office of the Co-Investigating Judges, and has maintained that Yim Tith was not a person most responsible and therefore subject to the jurisdiction of the court.²⁶

Uncertainty about Future of Cases 003, 004 and 004/02

A Closing Order that includes an indictment can be appealed by the accused to the Pre-Trial Chamber on jurisdictional grounds. Likewise, a Closing Order of dismissal can be appealed to the same Chamber by one or both of the Co-Prosecutors. The pattern of Pre-Trial Chamber decisions on conflicting positions from the Cambodian and the International Co-Investigating Judges in the 003 and 004 series of cases is clear. The Cambodian judges generally vote summarily to end the cases and the international judges analyze the merits and commonly vote that the evidence supports proceeding with the investigations and prosecutions.

It might be argued that this pattern is a mere coincidence and that each judge is exercising independent analysis. But such a conclusion is severely undercut by the government's clear opposition to the prosecution of the accused in the 003 and 004 series of cases, and by its exertion of influence on the Cambodian judges to rule to eliminate the cases regardless of the evidence before them.²⁷ It seems clear from the pattern of decisions that, like the Cambodian Co-Prosecutor and the Cambodian Co-Investigating judge, the Cambodian judges on the Pre-Trial Chamber are determined to end the cases regardless of the evidence of criminal liability. If the pattern holds, there will be no

25 Statement by the International Co-Prosecutor on Case 004, June 4, 2018, at <https://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-case-004>.

26 Statement by the Office of the National Co-Prosecutors on Case 004, May 18, 2018, at <https://www.eccc.gov.kh/en/articles/statement-office-national-co-prosecutors-case-004>.

27 Literature on the Cambodian government's political objection to Case 003 and 004 and presence of influence on the Cambodian judges is extensive. See, for instance See Justice Initiative Report, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update," <https://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20110614.pdf>, and Justice Initiative Report, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015," <https://www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf>; John D. Ciorciari, UN Credibility on Trial in Cambodia, Yale Global Online, May 14, 2015 at <https://yaleglobal.yale.edu/content/un-credibility-trial-cambodia>; Nisha Valabhji, Political Interference and Judicial Misconduct Impede Justice in Cambodia, Jurist Legal News and Research, December 6, 2011 at <https://www.jurist.org/commentary/2011/12/nisha-valabhji-cambodian-interference/#/>; Cambodia Center For Human Rights, Media Comment: CCHR Commends Calls for ECCC to be Free from Political Interference, June, 29, 2011 at https://cchrcambodia.org/index_old.php?title=CCHR-commends-calls-for-ECCC-to-be-free-from-political-interference&url=media/media.php&p=press_detail.php&pid=174&id=5.

supermajority vote on the Pre-Trial Chamber to defeat either the dismissal order or the indictment. There will be a deadlock.

Unfortunately, there is, arguably, a lack of precision in the court's rules about how to resolve such a deadlock. The International Co-Investigating Judge described this problem in his Closing Order indicting Ao An:

[There is] procedural uncertainty resulting from the opposing closing orders, as a result of which it is unclear under Internal Rule 77 (13) [regarding deadlocks at the Pre-Trial Chamber] whether the indictment will stand should there be no supermajority upon appeal in the Pre-Trial Chamber.²⁸

As described above, the ECCC is structured with a supermajority voting requirement to ensure that cases move forward in the investigation and prosecution process and are not derailed solely by the vote of Cambodian judges. The supermajority voting requirement is combined with provisions in the *Agreement*, the *Law* and the Internal Rules that, in the event of either a split decision between the Co-Prosecutors or the Co-Investigating Judges, or a failure to reach a supermajority on the Pre-Trial Chamber (resulting in a “non-decision”), the impasse is resolved in favor of the “prosecution or the investigation” moving forward. It is the combination of the two provisions that gives the result that a prosecution or investigation cannot be dismissed without a supermajority vote, which necessarily requires the concurrence of at least one international judge.

It is likely that Meas Muth and/or Ao An will appeal the indictment issued by the International Co-Investigating Judge, and that the international prosecutor will appeal the dismissal issued by the Cambodian Co-Investigating Judge. The Pre-Trial Chamber, consistent with its historic practice, is likely to split on both appeals—with the Cambodian judges voting to uphold the dismissal and quash the indictment, and the international judges voting the opposite. Then the court is faced with a non-decision on both sides of the appeal. Such a “non-decision” is inherent in the supermajority requirement and occurs where there is no supermajority to support a question on appeal. The Court's Rules and the *Agreement*, however, provide a general mechanism to resolve such impasses. That mechanism is the presumption that cases move forward rather than face dismissal or inaction.²⁹

Unfortunately the Rules do not address the precise situation of competing Closing Orders, as would be ideal.³⁰ Nonetheless, the most compelling position is that this ambiguity or gap must be resolved with due consideration of the overall architecture of the ECCC system—resulting in the conclusion that the cases move to the Trial Chamber in the event of competing Closing Orders and an impasse on appeal to the Pre-Trial Chamber.

28 Closing Order (Indictment), against Ao An, August 18, 2018, para. 854, at https://www.eccc.gov.kh/sites/default/files/documents/court/indictment/20180818/AoAn_ClosingOrder_Indictment_EN.pdf.

29 See for instance Internal Rules, Rules 71(4), 72(4), 77 (13), Law, Article 20, and Agreement, Article which direct application of the presumption in various situations.

30 The Agreement does not address the issue because the right of the accused and the Co-Prosecutor to appeal issues related to a Closing Order was not contemplated in the Agreement, but rather added by the judges of the court in the Internal Rules. Apparently, the judges overlooked the problem of competing Closing Orders in this process.

The reason for the claimed gap in the rules arises from Internal Rule 77 (13), which concerns the procedure for pre-trial appeals to the Pre-Trial Chamber. The rule addresses what happens if the chamber cannot reach a supermajority decision on an appeal regarding the issuance of an indictment:

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

...

b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seized on the basis of the Closing Order of the Co-Investigating Judges.

This provision is reasonably interpreted to require that the indictment stands as the default decision. However, the contrary argument is that the rule only applies if both co-investigating judges agree on issuing the indictment—and not if there are competing Closing Orders. The use of the plural of “judges” in the rule may support this interpretation at first glance. However, this is defeated by the interpretation provision in the Internal Rules providing the singular shall include the plural and *visa versa*.³¹

Under such contrary arguments, the rule provides no answer regarding what happens with competing Closing Orders and no supermajority vote in the Pre-Trial Chamber. An interpretation of the rules that results in a stalemate non-decision is absurd and is not satisfactory or persuasive statutory analysis.³² Thus, the more persuasive position is that any ambiguity in the rules must be resolved in a manner that is consistent with the overall principles established by the *Agreement*, the *Law* and the Internal Rules. Applying this principle, the indictment moves to the Trial Chamber in the event of an impasse on the Pre-Trial Chamber.

Dealing with the 003/004 Cases in the Trial Chamber

Assuming the cases get to the Trial Chamber after a trip through a divided Pre-Trial Chamber, it is likely that the first step the accused will take is to file a motion to dismiss on the grounds that they are not “persons most responsible” and thus the court does not have jurisdiction to try them.

Internal Rule 89 provides for such an objection:

1. A preliminary objection concerning:
 - a) the jurisdiction of the Chamber; b) any issue which requires the termination of prosecution; c) nullity of procedural acts made after the indictment is filed shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible.

³¹ Internal Rules, Rue 1 (2), “In the present document, the masculine shall include the feminine and the singular the plural, and vice-versa.”

³² See Mia Swart, *Is There a Text in This Court? The Purposive Method of Interpretation and the ad hoc Tribunals*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2010, p. 773 available at http://www.zaoerv.de/70_2010/70_2010_4_a_767_788.pdf.

3. The Chamber shall, as appropriate, issue its reasoned decision either immediately or at the same time as the judgment on the merits. The proceedings shall continue unless the Chamber issues immediately a decision which has the effect of terminating the proceedings.

Internal Rule 98(4) governs Trial Chamber decision-making and provides:

Pursuant to the ECCC Law, the Chamber shall attempt to achieve unanimity. If this is not possible, a conviction shall require the affirmative vote of at least 4 (four) judges. If the required majority is not attained, the default decision shall be that the Accused is acquitted.

The outstanding question is what happens if the Trial Chamber, in ruling on a motion to dismiss on jurisdictional grounds, cannot reach a supermajority decision—i.e. if the international judges vote there are adequate facts and grounds to proceed to trial and the Cambodian judges vote to dismiss? The ordinary rule is that a motion fails for lack of supermajority support. Thus, the motion to dismiss for lack of jurisdiction should fail and “the proceedings shall continue.” Logically, the cases should proceed through a factual trial at which evidence relating to the jurisdictional question would be relevant and might change to view of the Cambodian or the international judges. Alternatively, a reasonable action would be for the Trial Chamber to take a jurisdiction motion under advisement and rule on it at the end of trial when all the relevant facts are available.

However, the contrary argument is that the ruling on a jurisdictional motion to dismiss should be treated like a conviction vote. Under this reasoning, the failure to achieve a supermajority vote to *affirm* jurisdiction should result in the cases being dismissed. This, however, is not consistent with the language of Rule 89 (3), which mandates the trial proceed absent a supermajority decision on such a preliminary motion. The stronger argument supports a divided Trial Chamber deferring ruling on a motion to dismiss until after a full trial. Nonetheless, a pragmatist could argue that a trial is a wasted endeavor if it is clear that in the end the accused will be acquitted because the Cambodian judges can accomplish this result without the concurrence of any of the international judges.

Thus, if the Cambodian judges or the government want to scuttle any of trials in Cases 003/004, they will have to proceed outside the strict confines of the *Agreement*, the *Law* and the Internal Rules.

Observations and Recommendations

The accomplishments of the ECCC over the last six months, which include a major Trial Chamber Judgment, two extensive Closing Orders, and time-efficient and substantive decisions by the Pre Trial Chamber, place it in a strong position to move toward credible completion of its workload and mission to provide some justice for Khmer Rouge atrocity crimes. Past delays, inefficiencies, and problems with political interference have tarnished the court’s reputation and planted skepticism about its ability to accomplish these goals. Nonetheless, proactive planning and preparation for efficiently carrying out any appeal of the Case 002/02 judgment and trials in at least two of the remaining 003/004 series of cases can minimize damage done and prove the court up to its mission. The court will have a short hiatus before further appeals or trials, and this time should be used to consolidate and build on its accomplishments.

The following recommendations are submitted to help ensure proactive planning for successful completion of the ECCC's mission:

1. Consider amending the court's Internal Rules to consolidate lessons learned about how to more efficiently conduct appeals and trials. Possible amendments could include reduced time deadlines, eliminating the requirement for translations into French (none of the 003/004 accused or primary defense counsel are primarily French speaking), and providing detail on how to conduct two or possibly three overlapping trials.
2. Consider further narrowing the crime sites tried in any of the 003/004 series per Internal Rule 89 *quarter* to address representative crimes in an efficient manner.
3. In the event that either political interference or judicial decisions work to end proceedings in any of the remaining 003/004 Cases, initiate, independently and in association with civil society, extensive outreach. This would ensure that Civil Parties as well as Cambodians more generally have easy access to complete information, so that they understand the reason for any premature conclusion to Cases 003/004.
4. Begin serious planning for a residual mechanism to handle court matters once the court concludes its current caseload. Such a mechanism should include:
 - (a) Ensuring preservation and access to complete archives of the court in accordance with international standards.
 - (b) Provisions for ongoing witness and victim protection measures as necessary.
 - (c) Provisions for judicial supervision of enforcement of sentences or modification of judgments.
 - (d) Provisions for ongoing judicial availability to address issues such as contempt and false testimony.
 - (e) Provisions to assist with ongoing outreach to Civil Parties and Cambodians generally to enhance understanding of the court's work.