

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**INTERNATIONAL CO-PROSECUTOR'S REPLY TO YIM TITH'S RESPONSE TO
HER APPEAL OF THE PRE-TRIAL CHAMBER'S FAILURE TO SEND CASE 004
TO TRIAL AS REQUIRED BY THE ECCC LEGAL FRAMEWORK**

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I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby replies to Yim Tith’s Response¹ to her Appeal of the Pre-Trial Chamber’s (“PTC”) Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework.² For the reasons discussed below, the ICP requests the Supreme Court Chamber (“SCC”) to dismiss the Response and grant the relief requested in her Appeal.

II. THE CO-INVESTIGATING JUDGES DO NOT HAVE EXCLUSIVE JURISDICTION

2. Contrary to Yim Tith’s assertion, the Co-Investigating Judges (“CIJs”) do not have “exclusive jurisdiction” of the case for several reasons.³ First, the CIJs are *functus officio* immediately after the issuance of a closing order, except for the administrative functions explicitly set forth in the ECCC framework. Second, the CIJs do not possess any inherent jurisdiction that would supplant the authority of this Chamber, which is currently seized of Case 004. In any event, the Office of the Co-Investigating Judges is not the correct forum to bring certainty as any decision issued would be subject to further appeal. Further, under the ECCC legal framework, the CIJs have no authority to nullify their own Closing Orders. Finally, based on actual bias and appearance of bias, the CIJs are disqualified from considering whether the case should progress to trial because they have predetermined the issue.

A. The CIJs are not seized of Case 004

3. The Response ignores the fact that it is the PTC (and now the SCC)⁴ that “has final jurisdiction in the pre-trial investigation phase”,⁵ not the CIJs. The CIJs are “*functus officio*

¹ Case 004/23-09-2021-ECCC/SC (06)-2/1 Yim Tith’s Response to the International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 1 Nov 2021 (“Response”). As the English version of the Response has incorrect paragraph numbers, the ICP attaches a corrected version for ease of reference (*see* Annex A – Corrected Paragraph Numbering) and cites to those corrected paragraph numbers in this Reply (which match the Khmer version).

² Case 004/23-09-2021-ECCC/SC (06)-2 International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 20 Oct 2021 (“ICP Appeal”). *See* Response, paras 1, 20-26.

³ *See* ICP Appeal, para. 13 (applicable law on SCC’s inherent jurisdiction), section IV (admissibility).

⁴ Case 003-D271/5 & D272/3 Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for Meas Muth Concerning the Proceedings in Case 003, 8 Sep 2021 (“Consolidated PTC Decision”), para. 69 (*citing, inter alia*, Case 001-D99/3/42 Decision on the Appeal Against Closing Order Indicting Kaing Guek Eav *alias* “Duch”, 9 Dec 2008, para. 41; Case 004/2-D359/24 & D360/33 Considerations on Appeals Against Closing Orders, 19 Dec 2019, para. 41; Case 004/2-D360/3 Decision on Ao An’s Urgent Request for Redaction and Interim Measures, 5 Sep 2018, paras 5, 13). *See also* Case 003-D266/27 & D267/35 Considerations on Appeals Against Closing Orders, 7 Apr 2021 (“Case 003 PTC Considerations”), Opinion of Judges Olivier Beauvallet and Kang Jin Baik (“International Judges’ Opinion”), paras 132, 133 (“Article 12(2) of the Practice Direction on Classification and Management of Case-Related Information, [t]he last judicial office seized of a case shall undertake a review of the security classification

after having signed the disposition of a closing order”.⁶ The CIJs’ authority, therefore, only extends to administratively “processing the case in accordance with Rules 77(13) and (14)”,⁷ by sending the case file forward for trial, which they refuse to do.⁸ They no longer have the authority to issue substantive decisions and orders related to the pre-trial stage.⁹

4. Multiple appeals have been filed against the Closing Orders in Case 004, and the CIJs recognise that they do not have jurisdiction where there are other legal avenues “to progress this case either to trial or to a termination”.¹⁰ In Case 004/2, the CIJs refrained from deciding on Ao An’s request to seal and archive the case when the ICP later seised the SCC with her appeal.¹¹ In Case 003, the CIJs requested the ICP to confirm her intention to seise the SCC with the case *and* instructed the Parties that only if the SCC would not be seised could they provide written submissions on the CIJs’ jurisdiction to terminate.¹²

of records in the case file[.] [...] being either the Pre-Trial Chamber or the Supreme Court Chamber”).

- ⁶ Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 Jun 2018, para. 33. *See also* Case 003-**D271/5 & D272/3** Consolidated PTC Decision, fn. 186 *citing, inter alia*, Case 003-**D266/27 & D267/35** Case 003 PTC Considerations, International Judges’ Opinion, para. 132. The CIJs’ argument that they cannot be *functus officio* because in Case 004/2 the PTC Judges issued instructions to the Court’s Records and Archives Unit on how to process the case overlooks that those instructions occurred in January *before* the Office of the Co-Investigating Judges was properly reconstituted with the reinstatement of the International CIJ on 22 Apr 2020. *See* Case 003-**D270/7** Decision on International Co-Prosecutor’s Request to Forward Case File 003 to the Trial Chamber, 20 May 2021 (“CIJs’ Refusal Decision”), para. 38; Case 004/2-**D359/36 & D360/45** Interoffice Memorandum from Judges Olivier Beauvallet and Kang Jin Baik entitled “Transfer of Case File 004/2”, 12 Mar 2020, paras 27-28, 31; ECCC Statement, *International Co-Investigating Judge Reinstated*, 24 Apr 2020. *See also* Case 003-**D271/5 & D272/3** Consolidated PTC Decision, para. 72.
- ⁷ Case 003-**D271/5 & D272/3** Consolidated PTC Decision, para. 72; Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 Jan 2015 (“Internal Rule(s)”, “Rule(s)”, or “IR(s)”). *See also* Case 003-**D266/27 & D267/35** Case 003 PTC Considerations, p. 40 (Disposition); **D381/45 & D382/43** Considerations on Appeals Against Closing Orders, 17 Sep 2021 (“Considerations”), p. 49 (Disposition).
- ⁸ The CIJs have not adhered to the express ECCC legal mandate to forward the Indictment and case file, jointly or unilaterally, to the Trial Chamber and, in Case 003, made clear that they would not do so without a clear instruction from the PTC. *See* ICP Appeal, para. 33. *See also* 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, Phnom Penh, 6 Jun 2003 (“ECCC Agreement”), arts 5(4), 7(4); 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 on 27 Oct 2004 (“ECCC Law”), art. 23 new; IR 1(2); Case 003-**D271/5 & D272/3** Consolidated PTC Decision, para. 67 (“as a matter of principle, one Co-Investigating Judge can validly act alone”), including fn. 181.
- ⁹ Case 003-**D271/5 & D272/3** Consolidated PTC Decision, para. 69. This means the CIJs also lack the legal authority to nullify a valid Indictment, *see* ICP Appeal, section V (merits).
- ¹⁰ Case 003-**D270/7** CIJs’ Refusal Decision, para. 42 (“should no other path be found to progress this case *either* to trial or to a termination [...] and *no* other judicial body in this Court be willing to take it upon itself to do either, we would, as an *ultima ratio* and *after all* other jurisdictions have run their course, be open to [...] whether we have an exceptional residual jurisdiction of *last resort* to terminate the case ourselves” (emphasis added)). *See also* para. 40.
- ¹¹ Case 004/2-**D364** Memorandum from the Co-Investigating Judges entitled “Defence Request of 17 March 2020 to seal and archive Case File 004/2 – D363 (“Request”)”, 29 May 2020, p. 1.
- ¹² Case 003-**D273** Order to File Submissions on Residual Jurisdiction to Terminate Case 003, 16 Sep 2021 (“Order for Termination Submissions”), disposition. *See also* paras 5, 7.

B. The CIJs have no inherent jurisdiction

5. Nor do the CIJs have inherent jurisdiction over the case pursuant to IR 21 or otherwise.¹³ As established above,¹⁴ the CIJs are *not* seized of Case 004 and cannot usurp the authority of the other ECCC Chambers with rightful carriage of this case.
6. In any event, all the ECCC Chambers have been very clear that admissibility pursuant to IR 21 is exceptional and may only be used when particular facts and circumstances so require.¹⁵ Since any fair trial issues that Yim Tith may wish to raise can be heard by the SCC, which is currently seized of Case 004, there are no exceptional reasons warranting the CIJs' intervention.

C. The CIJs have no legal authority to dismiss the Indictment

7. The CIJs do not have jurisdiction to use an SCC decision in one case (Case 004/2) to *render* the Indictment null and void in another case (Case 004).¹⁶ As Case 004 currently stands – *i.e.* after the PTC Considerations did not overturn the Indictment by supermajority,¹⁷ and before the SCC decides the ICP's Appeal – the Indictment *remains valid*. In addition to the cogent reasons to depart from the SCC's Case 004/2 Immediate Appeal Decision,¹⁸ and aside from the fact that the CIJs are *functus officio* under the ECCC legal framework, there is also no provision allowing the CIJs to nullify their own Closing Orders.¹⁹

¹³ *Contra* **D386** Yim Tith's Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004 ("Yim Tith's Termination Request"), paras 9-12, which he indirectly refers to in Response, para. 26 when he states that "the CIJs have exclusive jurisdiction and are seized with the Defence Request to the CIJs".

¹⁴ See paras 3-4, *supra*.

¹⁵ See e.g. SCC: Case 002-E154/1/1/4 Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications, 25 Apr 2012, paras 14-15; PTC: Case 002-A410/2/6 Decision on Appeal Against the Response of the Co-Investigating Judges on the Motion of Confidentiality, Equality and Fairness, 29 Jun 2011, para. 10; OCIJ: **D185/1** Decision on Ta An's Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 22 Apr 2014 ("Ao An Annulment Decision"), para. 29 ("recourse to [IR] 21, as an admissibility avenue for motions not admissible pursuant to other [IRs], has been deemed exceptional and may only be used when particular facts and circumstances so require"), fn. 37 ("While the use of [IR] 21 as a procedural avenue to request various forms of relief has been discussed in the ambit of appellate proceedings, the [ICIJ] finds that the limitations set by the PTC and the [SCC] are appropriately applicable also to motions submitted on first instance.").

¹⁶ See Case 004/2-E004/2/1/1/2 Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 Aug 2020 ("SCC Immediate Appeal Decision"). *Contra* **D386** Yim Tith's Termination Request (in which he asserts the Indictment is already null and void on page 1 and at paras 13-14, and 16), which he indirectly refers to in Response, para. 26 when he states that "the CIJs have exclusive jurisdiction and are seized with the Defence Request to the CIJs"; Case 003-D270/7 CIJs' Refusal Decision, paras 32, 36.

¹⁷ See **D381/45 & D382/43** Considerations, p. 49 (Disposition).

¹⁸ See Section III, *infra*. As explained further below, SCC decisions from one ECCC case cannot simply be transplanted into another, especially where, as here, cogent reasons exist for departing from the SCC's Case 004/2 holding that two closing orders issued illegally are null and void.

¹⁹ The power to annul a closing order at the pre-trial stage resides with the PTC following appeals under IRs

D. The CIJs' predetermination of whether the case should progress to trial has also disqualified them

8. The Response also overlooks that the CIJs are disqualified because they have predetermined the outcome of the case. Applying the legal test for bias that has been consistently applied at the ECCC and taking into account the presumption of impartiality and high threshold of proof,²⁰ the CIJs are disqualified from considering whether this case should progress to trial based on their actual bias and appearance of bias. In Case 003, the CIJs openly declared in two decisions that termination of the case is the only option they will consider.²¹ They also suggested in a judicial order that any application the ICP might make to the SCC should be one for termination.²²
9. Although the CIJs' predeterminations were made in Case 003, both cases concern the failure to send the case to trial as mandated by the ECCC legal framework, including on the basis of the default position,²³ and the CIJs made explicitly clear that their position applied equally to all the remaining cases, including Case 004.²⁴ Indeed, Yim Tith's current

67(5), 73, 74, and 77. (Closing Orders are not amenable to the IR 76 procedure. *See* IR 76(2) and (4); Case 003-**D158/1** Decision on Meas Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order & to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 Apr 2016, paras 17-18.)

²⁰ *Furundžija*, IT-95-17/1-A, Judgement, Appeals Chamber, 21 Jul 2000, paras 189 (“there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. [...] [T]he following principles should direct it in interpreting and applying the impartiality requirement of the Statute: A. A Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if [...] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”), 190 (the “reasonable observer” is “an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold”); Case 002-**C11/29** Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 Feb 2008, paras 19-21; Case 002/31-10-2019-ECCC/SC (03)-**11** Decision on Khieu Samphan's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 Jul 2020, paras 63-64. *See also* Case 002-**F36** Appeal Judgement, 23 Nov 2016, para. 112.

²¹ *See* Case 003-**D270/7** CIJs' Refusal Decision, paras 19, 36-37, 42; Case 003-**D273** Order for Termination Submissions, paras 5-6. *See also* Case 003-**D271/5 & D272/3** Consolidated PTC Decision, para. 74(2) (noting that the CIJs “have already ruled on ‘the fate of the case’ in the event it were to come back to them”).

²² Case 003-**D273** Order for Termination Submissions, para. 7.

²³ *See* the dispositions at Case 003-**D266/27 & D267/35** Case 003 PTC Considerations, p. 40, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, p. 42, International Judges' Opinion, p. 145; **D381/45 & D382/43** Considerations, p. 49, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, p. 56, Opinion of Judges Kang Jin Baik and Olivier Beauvallet, p. 225. *See also* Case 003-**D271/5 & D272/3** Consolidated PTC Decision, paras 72, 76.

²⁴ *See* **D270/7** CIJs' Refusal Decision, para. 19 (“Had we been given such notice of the PTC's allegedly joint views [on the lawfulness of split Closing Orders] in a timelier manner, all remaining cases could have been dealt with as soon as possible by joint decision – which [...] could only have meant *the immediate termination of all cases remaining* after the dismissal in case 004/1.” (emphasis added)). No reasonable observer could believe that the CIJs will adopt a different position hereafter. *See e.g. Rudnichenko v. Ukraine*, No. 2775/07, Judgment, 11 Jul 2013, paras 116 (a judge “had earlier examined the merits of the case of the applicant's co-

application before the CIJs notes that the CIJs' "inclination to terminate the case" in Case 003 makes it "imperative for the CIJs" to do the same in Case 004.²⁵ Such pre-determination disqualifies them from considering this case; allowing them to do so would egregiously violate the right of *all* parties to a fair determination of the issues presented, and gravely undermine the impartial assessment of issues required of all credible judicial proceedings.

III. COGENT REASONS EXIST TO DEPART FROM THE CASE 004/2 IMMEDIATE APPEAL DECISION

10. At the ECCC, as with other international courts and tribunals,²⁶ there exists *no* absolute obligation to retain the reasoning and conclusions of earlier cases. Although typically it is legally sound for a court to follow its previous decisions in pursuit of legal certainty, this is only on the presumption that those decisions are correct.²⁷ Similarly, the European Court of Human Rights ("ECtHR") has been very clear that "the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law".²⁸ The ICP concurs with Yim Tith that, even where two cases

defendant, B., in the framework of which she had expressed her view on the involvement and roles of both B. and the applicant [...]. Both aforementioned cases concerned the same event and implied the evaluation of the same evidence."), 118; *Buscemi v. Italy*, No. 29569/95, Judgment, 16 Sep 1999, paras 68 (a judge "publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it clearly appears incompatible with the impartiality required of any court"), 69; *Olujic v. Croatia*, No. 22330/05, Judgment, 5 Feb 2009, paras 59, 65, 68; *Lavents v. Latvia*, No. 58442/00, Judgment, 28 Nov 2002, paras 119 (a pre-formed view that a full acquittal was not a possibility at all was a real stance on the undecided case and a clear preference for a finding of guilt), 121.

²⁵ **D386** Yim Tith's Termination Request, paras 29, 40.

²⁶ See e.g. Statute of the International Court of Justice, 18 Apr 1946, 33 UNTS 993, arts 38(1)(d), 59; Rome Statute of the International Criminal Court, 17 Jul 1998 ("Rome Statute"), 2187 UNTS 90, art. 21(2). See further *South West Africa*, Second Phase, Judgment, 18 Jul 1966, ICJ Reports 1966, Separate Opinion of Judge Van Wyk, p. 67; *Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment, 24 Jul 1964, ICJ Reports 1964, Separate Opinion of Judge Tanaka, p. 65. Regarding the ICTY, ICTR and ECtHR, see *infra*, fn. 29.

²⁷ See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 Aug 2007 ("General Comment No. 32"), para. 26 ("Article 14 [of the International Covenant on Civil and Political Rights ("ICCPR")] guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal."). The CIJs have noted that the ECCC operates in a civil law system where the principle of *stare decisis* does not apply (see e.g. Case 004/1-**D308/3** Closing Order (Reasons), 10 Jul 2017 ("Im Chaem Closing Order (Reasons)"), para. 10; Case 003-**D87/2/1.7/1** Decision on Meas Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus With Armed Conflict, 5 Apr 2016, para. 13). Indeed, the CIJs have previously refused to follow the PTC's rulings, the appellate chamber at the pre-trial stage (see e.g. Case 004/2-**D360** Closing Order (Indictment), 16 Aug 2018, paras 35-38). Further, the PTC has rightly stated that "[t]he principle of equal treatment before the law cannot be construed to imply that an error in one case should be repeated in a future case, even if the error in question is beneficial to the Charged Person" (see Case 002-**D390/1/2/4** Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 Sep 2010, para. 15).

²⁸ *Stanković and Trajković v. Serbia*, Nos 37194/08 and 37260/08, Judgment, 22 Dec 2015, para. 40(vi) (confirming that "[c]ase-law development is not, in itself, contrary to the proper administration of justice,

are similar, if there are cogent reasons to depart from a previous decision, the court must do so in the interests of justice.²⁹ As set out in her Appeal,³⁰ and contrary to Yim Tith's claims,³¹ the ICP demonstrated cogent reasons for the SCC to depart from its Case 004/2 Immediate Appeal Decision, in particular a "clear error in the SCC's reasoning or a change in circumstances" warranting such departure.³²

11. The ICP respectfully submits that the Case 004/2 Immediate Appeal Decision derived directly from the PTC's flawed finding that the simultaneous issuance of two conflicting Closing Orders was illegal,³³ which led the SCC to erroneously conclude that, consequently, such issuance rendered each closing order null and void.³⁴ As detailed in the ICP Appeal, there are numerous clear and cogent reasons for the SCC to depart from its

since failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement"). See also *Unédic v. France*, No. 20153/04, Judgment, 18 Dec 2008, para. 74 (Unofficial translation: The Court considers, however, that the requirements of legal certainty and the protection of the legitimate expectations of litigants do not establish an acquired right in consistent case law.); *Atanasovski v. the Former Yugoslav Republic of Macedonia*, No. 36815/03, Judgment, 14 Jan 2010, para. 38. The ICP notes that Yim Tith's reference to *Ștefănică and others v. Romania*, No. 38155/02, Judgment, 2 Nov 2010 ("*Ștefănică*"), paras 37-38 in **D386** Yim Tith's Termination Request, fn. 38 does not change this conclusion. Contrary to Yim Tith's contention in **D386** Yim Tith's Termination Request, paras 17 and 42, *Ștefănică* is not authority for the proposition that Courts must follow prior erroneous decisions. Rather, the ECtHR found an art. 6 violation based on the arbitrary application of the law leading to "the inconsistent adjudication of claims brought by many persons in similar situations [which] led to a state of uncertainty" (*Ștefănică*, para. 38). The ECtHR is protecting persons against arbitrary and persistent divergence in the application of the law, not the considered development of the law, which includes the correction of erroneous jurisprudence.

²⁹ Response, para. 18 ("When an immediate appeal requests the SCC to depart from its previous decisions, the interests of legal certainty and predictability require that the appellant demonstrate 'cogent reasons in the interests of justice.'). See e.g. *Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 Mar 2000, paras 107-108 ("in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*"); *Semanza*, ICTR-97-23-A, Decision, Appeals Chamber, 31 May 2000, para. 92; *Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 Nov 2006, para. 117; *Kordić & Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 Dec 2004, para. 1040; *Šainović et al.*, IT-05-87-A, Judgement, Appeals Chamber, 23 Jan 2014, para. 1650 ("Consequently, the Appeals Chamber [...] unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard."); *Cossey v. The United Kingdom*, No. 10843/84, Judgment, 27 Sep 1990, para. 35 (the Court noted that although not strictly bound, it would normally follow its previous decisions and would only depart from them if there were cogent reasons for doing so). Regarding the CIJs' prior practice, see Case 004/1-**D308/3** Im Chaem Closing Order (Reasons), para. 10 (CIJs stating that to maintain "clarity and uniformity of the law" they will give practical deference to SCC jurisprudence but will depart from it where there are "exceptional reasons"); Case 003-**D181** Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction, 1 Feb 2016, para. 28 ("it is in the interests of legal certainty and equality before the law for the CIJs to apply legal principles and rules consistently with the views of the SCC unless there are good reasons to the contrary.").

³⁰ ICP Appeal, section V (merits).

³¹ Response, paras 27, 31-32, 36-38, 40, 42.

³² Response, para. 18.

³³ ICP Appeal, paras 18-20, 36-44.

³⁴ Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, paras 51 (recalling the PTC's unanimous disposition), 53, 61, 67-69, 71.

previous findings: (i) contrary to the PTC’s position, the issuance of two conflicting closing orders was not illegal;³⁵ (ii) even if it was, such issuance does not render the closing orders null and void nor does it warrant terminating the case;³⁶ and (iii) the Indictment was not overturned by a PTC supermajority, so Case 004 should be sent to trial.³⁷

IV. APPROPRIATE REMEDY IS ORDERING CASE 004 TO TRIAL

12. The appropriate remedy for the current impasse is to order the case to be transferred to the Trial Chamber for Yim Tith’s trial, not terminating the case. Yim Tith has suffered no material prejudice or egregious harm that would justify terminating the proceedings against him.³⁸ His unsubstantiated claim that “the lack of a final determination to the *15-year* investigation” of his case over whether he falls within the ECCC’s personal jurisdiction “raises ‘grave consequences’ for his fair trial rights, making termination the appropriate remedy”,³⁹ must fail.
13. There has been no undue delay in this case. The starting point for determining whether proceedings have been conducted within a reasonable time is from when he was officially notified that he would be prosecuted, *i.e.* from when the competent authority informed him of an allegation that he has committed a criminal offence.⁴⁰ For Yim Tith, this occurred on 24 February 2012, when Reserve CIJ Laurent Kasper-Ansermet informed him that he was a suspect in an ongoing investigation.⁴¹ Thus the relevant time period is less than 10 years, not 15.⁴²
14. Cases are to be determined within a *reasonable* time without *undue* delay.⁴³ The assessment of what is “undue” must be made “in light of the circumstances” of the case which, amongst

³⁵ ICP Appeal, paras 18-20, 36-44.

³⁶ ICP Appeal, paras 21-24, 45-51.

³⁷ ICP Appeal, paras 25-30, 52-57.

³⁸ ICP Appeal, paras 46-51.

³⁹ Response, para. 39 (emphasis added).

⁴⁰ See Case 003-**D120/3/1/8** Considerations on Meas Muth’s Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on Meas Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 Apr 2016, Opinion of Judges Beauvallet and Baik (The “Undersigned Judges”) Regarding the Merit of the Appeal (“International Judges’ Motion to Strike Considerations”), para. 35, *fn.* 134 citing *Eckle v. Germany*, No. 8130178, Judgment, 15 Jul 1982, para. 73; *Hozee v. The Netherlands*, No. 21961/93, Judgment, 22 May 1998, para. 43; *Coème and others v. Belgium*, Nos 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, Judgment, 22 Jun 2000 (“*Coème v. Belgium* Judgment”), para. 133.

⁴¹ **D109** Notification of Suspect’s Rights [Rule 21(1)(D)], 24 Feb 2012.

⁴² The ECtHR has placed great emphasis on the time that the person was officially made *aware* of the proceedings, contrasted with the mere existence of an investigation. See *e.g.* *Ustyantsev v. Ukraine*, No. 3299/05, Judgment, 12 Jan 2012, para. 91; *Kechev v. Bulgaria*, No. 13364/05, Judgment, 26 Jul 2012, para. 47.

⁴³ See *e.g.* IR 21(4) (“Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.”); ECCC Law, art. 35 new, which erroneously says “to be tried without delay” in the English version but

other factors, include the legal and factual complexity of the proceedings⁴⁴ (*inter alia*, the number of crimes charged, the varying modes of responsibility, the geographic and temporal scope of the case, and the quantity of evidence on the Case File⁴⁵). The assessment must also weigh any alleged prejudice against “the general necessity for the investigation and judicial processes to advance”.⁴⁶ In this regard, there are four crucial considerations in Case 004: (i) Yim Tith has never been in custody and there have been no meaningful restrictions on his personal freedom;⁴⁷ (ii) the charges against him are of the utmost seriousness;⁴⁸ (iii) the ECCC’s mandate is to bring to trial those within its jurisdiction;⁴⁹

correctly says “À être jugée sans retard *excessif*” (emphasis added) in the French version; ICCPR, 16 Dec 1966, 999 UNTS 171, art. 14(3)(c) (“everyone shall be entitled to the following minimum guarantees, in full equality [...] (c) To be tried *without undue delay*” (emphasis added)); (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov 1950, 213 UNTS 221 (as amended), art. 6(1) (“entitled to a fair and public hearing within a reasonable time”); African (Banjul) Charter on Human and Peoples’ Rights, 27 Jun 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 7(1)(d) (“right to be tried within a reasonable time”); American Convention on Human Rights: “Pact of San José, Costa Rica”, San José, 22 Nov 1969, 1144 UNTS 143, art. 8(1) (“right to a hearing [...] within a reasonable time”); Rome Statute, art. 67(1)(c) (“To be tried without undue delay”); *Frydlender v. France*, No. 30979/96, Judgment, 27 Jun 2000, para. 45 (“right to a final decision within a reasonable time”). See also *Halilović*, IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, Appeals Chamber, 27 Oct 2006 (“*Halilović* Appeal Hearing Decision”), para. 17 (“the right to be tried without undue delay does not protect against any delay in the proceedings; it protects against *undue* delay” (original emphasis)); *Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, Appeals Chamber, 14 Dec 2015 (“*Nyiramasuhuko* AJ”), para. 364.

⁴⁴ See e.g. *Halilović* Appeal Hearing Decision, para. 17; *Nyiramasuhuko* AJ, paras 360, 362; *Renzaho*, ICTR-97-31-A, Judgement, Appeals Chamber, 1 Apr 2011, para. 238; *Šešelj*, IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, Trial Chamber, 10 Feb 2010 (“*Šešelj* Abuse of Process Decision”), para. 30; *Ayyash et al.*, STL-11-01/T/TC, Judgment, Trial Chamber, 18 Aug 2020, para. 966.

⁴⁵ See e.g. **D382** Closing Order, 28 Jun 2019 (“Indictment”), paras 151, 992-1040, pp. 475-487, detailing the alleged crimes that occurred at more than 20 sites throughout the Southwest and Northwest Zones, Yim Tith’s various positions of leadership throughout the DK regime, and the multiple modes of liability including membership in three distinct Joint Criminal Enterprises; **D384** Order on Admissibility of Civil Party Applications, 28 Jun 2019, para. 2 (noting that 2,014 people had applied to become civil parties in Case 004). The ICP further notes that, prior to the severance of Case 004, Yim Tith was one of three charged persons. The Introductory and Supplementary Submissions seized the CIJs with, *inter alia*, purges targeting internal enemies in the Central and Northwest Zones, persecution and genocide of the Cham (in the Central Zone) and the Khmer Krom (in the Northwest and Southwest Zones), and forced marriages in various locations. See e.g. **D378/2.3** Annex B – Procedural History, 4 Jun 2018, paras 1-3 (re. scope of the *saisine*), 12 (re. severance), 16 (re. quantity of evidence). See also **D361** Yim Tith’s Request for Adequate Preparation Time, 16 Jun 2017, paras 16-29.

⁴⁶ See e.g. Case 002-**D314/1/8** Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 Jun 2010, para. 70; Case 003-**D120/3/1/8** International Judges’ Motion to Strike Considerations, para. 36. See also *Boddaert v. Belgium*, No. 12919/87, Judgment, 12 Oct 1992, para. 39 (“Article 6 [...] commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice.”) applied in *Coëme v. Belgium*, Judgment, para. 140.

⁴⁷ See e.g. General Comment No. 32, para. 35; *Abdoella v. The Netherlands*, No. 12728/87, Judgment, 25 Nov 1992, para. 24 (“detention is a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met”); **D381/45 & D382/43** Considerations, para. 520.

⁴⁸ See e.g. *Rwamakuba*, ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, Trial Chamber, 3 Jun 2005, para. 19 (“the reasonableness of the length of the proceedings has to be assessed on a case by case basis, in light of several factors, including: the gravity of the charges against the Accused”); *Šešelj* Abuse of Process Decision, paras 29-30; **D382** Indictment, pp. 475-487 (charging Yim Tith with genocide; numerous crimes against humanity including murder, torture, enslavement, and other inhumane acts; war crimes; and violations of the 1956 Cambodian Penal Code).

⁴⁹ ECCC Law, arts 1, 2 new; ECCC Agreement, art. 1.

and, (iv) most importantly, the PTC unanimously held that the delays resulting from the CIJs' failure to strictly adhere to the ECCC's legal framework had not "so seriously erode[d] the fairness of the proceedings that it would be oppressive to continue", nor had the overall duration of Case 004 sufficiently demonstrated that a fair trial by the TC was either impossible or irremediably vitiating.⁵⁰ In short, there was no undue delay and no prejudice caused by the issuance of conflicting closing orders.⁵¹ Informed analysis of these factors weighs conclusively in favour of advancing Case 004 to trial, not terminating it.

V. ONLY THE SCC CAN BRING LEGAL CERTAINTY


15. It is only the SCC that can bring clarity to the case by resolving the judicial uncertainty arising out of the PTC's Considerations.⁵² Any decision the CIJs would make would be subject to appeal before the PTC, and possibly the SCC, prompting even more litigation. As the court of final instance, the SCC can prevent "a potential for endless litigation".⁵³

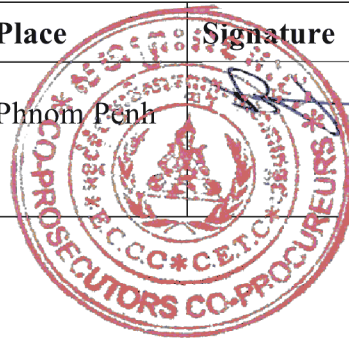
VI. RELIEF REQUESTED

16. For all the foregoing reasons, the ICP requests that the SCC:

- (i) Dismiss Yim Tith's Response, and
- (ii) Grant the relief requested in the ICP's Appeal.⁵⁴

Respectfully submitted,

Date	Name	Place	Signature
8 November 2021	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh	



⁵⁰ **D381/45 & D382/43** Considerations, paras 73-79 (quote at para. 78 citing **D382/22** Yim Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004, 2 Dec 2019, para. 51).

⁵¹ ICP Appeal, paras 48, 50-51, 73.

⁵² See ICP Appeal, para. 13. *Contra* Response, paras 26 (suggesting that the CIJs are a non-futile option), 21 (stating that PTC "decisions" are not appealable to the SCC).

⁵³ Case 003-**D271/5 & D272/3** Consolidated PTC Decision, para. 77.

⁵⁴ ICP Appeal, para. 74.