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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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

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I. INTRODUCTION

1. The International Co-Prosecutor ("ICP") hereby appeals the failure of the Pre-Trial Chamber ("PTC") to forward Case 004 to the Trial Chamber ("TC") for trial as mandated by the ECCC legal framework. It now falls to this Chamber, as the court of final instance, to correct this error of law and ensure the proper administration of justice in the circumstances of this case.

2. The ICP respectfully submits that law, logic and justice require the Supreme Court Chamber ("SCC") to find this appeal admissible and exercise its inherent authority to order that the case be forwarded to the TC for trial. This appeal is warranted in the interests of justice for *all* parties and to ensure the legal clarity and certainty that every judicial system requires. Denying admission of the appeal would relegate the case to perpetual judicial limbo. It would also deprive victims, living and dead, of their right to a fair and impartial judicial determination of Yim Tith's responsibility for his alleged crimes.

3. The ICP respectfully submits that this Chamber should order the case to proceed to trial for several reasons. Of paramount importance, operation of the default position mandates that the case be sent forward for trial. The National PTC Judges' erroneous finding that the entire case file is illegal does not defeat implementation of the default position, as alleged errors in the preliminary investigation, if any, were cured by the subsequent actions of the parties, Co-Investigating Judges ("CIJs"), and PTC. Nor does the simultaneous issuance of two closing orders prevent implementation of that position. As such issuance was not illegal, it is no legal impediment to trial. The ECCC's legal framework not only allows, but envisions, that two conflicting closing orders would be issued based on its appointment of two equal, independent CIJs and the establishment of a permissive dispute resolution mechanism. Given these features and no specific prohibition against issuing two conflicting closing orders, the assumption that there must be a single closing order fails to fully appreciate the unique nature of the ECCC framework.

4. Also, even if, *arguendo*, the issuance of two conflicting closing orders *did* constitute a violation of the ECCC legal framework, it was a procedural error that does not invalidate the Closing Orders or defeat the entire legal process. If any remedy was required, that remedy was provided by the PTC's consideration of the merits of each closing order. The suitable remedy for such a procedural error must be considered in light of several factors, including whether the issuance caused any demonstrably unfair outcome, material

prejudice to Yim Tith, or abuse of process, as well as the seriousness of the charges, the social costs of preventing the case from proceeding to trial, the interests and rights of *all* parties, and the proportionality of the remedy to the alleged harm.

5. Just as this Chamber has previously exercised its authority to dismiss a case, it has the corresponding authority to order that Case 004 proceed to trial. To argue otherwise is to argue that the United Nations ("UN") and Royal Government of Cambodia ("RGC") created an impotent judicial structure in which the Chamber of last instance has no authority to correct errors of law committed by lower Chambers or to enforce lawful, corrective action. The ICP submits the UN and RGC did not create such a system and it should not be interpreted in such a way by the judges of this Court.[1]

II. RELEVANT PROCEDURAL HISTORY[2]

6. Following settlement of the Co-Prosecutors' Disagreement by the PTC on 18 August 2009,[3] the acting ICP submitted the Third Introductory Submission ("3IS") to the CIJs on 7 September 2009, requesting a judicial investigation into crimes within the ECCC's jurisdiction, naming Yim Tith, Ao An, and Im Chaem as suspects.[4] From 18 July 2011 to 20 November 2015, ICPs submitted four supplementary submissions on the scope of the judicial investigation in relation to Yim Tith.[5]

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[1] To assist the SCC, all authorities, pleadings and other documents referenced in this appeal, including those already on Case File 004, are filed as attachments (*per* Case 004/2-**E004/2/6** 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 Aug 2020, para. 21). The ICP submits that the SCC's access to all other case file material is an integral component of this Chamber's ability and responsibility to exercise its inherent jurisdiction and is required for the Chamber to comply with its mandate to make informed, reasoned decisions on issues before it. Nothing in law prohibits such access and the Chamber should, therefore, direct that Case File 004 be transferred to it for purposes of this appeal. Access would not violate confidentiality classifications, as the documents would remain confidential and are simply being considered by a Chamber of the same Court as the original classifying authority. To hold that the SCC cannot access these documents unless another Chamber allows it, would strip the SCC of its inherent authority and responsibility as a court of final instance. In other words, it would render the Chamber impotent to act in the interests of justice to ensure legal clarity and certainty.

[2] This is a short summary of the most relevant procedural history. For more details on the preliminary investigation, *see* Section V.D, *infra*, and regarding the investigative phase, *see e.g.* **D382** Closing Order, 28 Jun 2019 ("Indictment"), paras 1-22.

[3] **D1/1.3** Annex I: Public Redacted Version Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 Aug 2009 ("PTC Rule 71 Considerations").

[4] *See e.g.* **D382** Indictment, para. 1 (Yim Tith); Case 004/2-**D360** Closing Order (Indictment), 16 Aug 2018 ("Ao An Indictment"), para. 2; Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 Jun 2018 ("Case 004/1 PTC Considerations"), para. 2. The cases against Im Chaem and Ao An were severed on 5 Feb and 16 Dec 2016, respectively. *See* Case 004/1-**D308** Closing Order (Disposition), 22 Feb 2017 ("Im Chaem Closing Order"), para. 6; Case 004/2-**D360** Ao An Indictment, para. 8.

[5] *See e.g.* **D382** Indictment, para. 2.

7. On 24 February 2012, the reserve International Co-Investigating Judge ("ICIJ") Laurent Kasper-Ansermet[6] notified Yim Tith that he was a suspect in an ongoing judicial investigation.[7] On 9 December 2015, ICIJ Michael Bohlander[8] charged Yim Tith in person.[9]

8. On 1 March 2018, the CIJs together forwarded the case file to the Co-Prosecutors after declaring the judicial investigation had concluded.[10] The Co-Prosecutors then filed Final Submissions.[11]

9. From 22 February 2013 to 21 January 2019, the CIJs registered confidential disagreements.[12] On 28 June 2019, the CIJs issued separate and conflicting closing orders. Whereas the National Co-Investigating Judge ("NCIJ") dismissed all charges against Yim Tith because he was found not to be within the Court's personal jurisdiction,[13] the ICIJ indicted him for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code.[14]

10. Following the Parties' appeals of the closing orders in relation to Yim Tith,[15] on 20 September 2021 they were officially notified[16] of the PTC's Considerations of those appeals.[17] The PTC failed to reach the supermajority required to reverse either the Indictment or the Dismissal Order. The International PTC Judges found the former to be

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6 On 14 November 2011, the reserve ICIJ commenced his work. *See Press Release by the [ICIJ]*, 10 Oct 2011; *Press Release by the International Reserve Co-Investigating Judge*, 6 Dec 2011.

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

8 The ICIJ was appointed in August 2015. *See Appointment of New International Co-Investigating Judge and Reserve*, 24 Aug 2015.

9 *See e.g.* **D382** Indictment, para. 4 (stating also that the ICIJ subsequently amended the charges to include additional modes of responsibility on 29 March 2017).

10 **D378** Forwarding Order Pursuant to Internal Rule 66(4), 1 Mar 2018; **D358** Notice of Conclusion of Judicial Investigation Against Yim Tith, 13 Jun 2017, para. 7; **D368** Second Notice of Conclusion of Judicial Investigation Against Yim Tith, 5 Sep 2017, paras 27-28.

11 *See e.g.* **D382** Indictment, paras 15-16. *See also* para. 19 regarding Yim Tith filing his combined response to the Co-Prosecutors' Final Submissions.

12 *See e.g.* **D382** Indictment, paras 3, 7, 21 (22 Feb 2013, 5 Apr 2013, 21 Oct 2015, 16 Jan 2017, 21 Jan 2019); Case 004/2-**D360** Ao An Indictment, paras 1, 16 (22 Feb 2013, 5 Apr 2013, 22 Jan 2015, 16 Jan 2017, 12 Jul 2018); Case 004/1-**D308** Im Chaem Closing Order, para. 1 (22 Feb 2013, 5 Apr 2013, 20 May 2014).

13 **D381** Order Dismissing the Case Against Yim Tith, 28 Jun 2019 ("Dismissal Order"), para. 686.

14 **D382** Indictment, pp. 457-487.

15 *See* **D381/45 & D382/43** Considerations on Appeals Against Closing Orders, 17 Sep 2021 ("Considerations"), p. 8.

16 *See* Case 004 Email from Case-File-Officer-Notification of **D381/45 & D382/43** Considerations on Appeals Against Closing Orders, 17 Sep 2021, 5:05 p.m; Case 002-**F43** Decision on Nuon Chea and Khieu Samphan's Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 Apr 2019, para. 12 (the SCC "observes that the Trial Chamber notified the Trial Judgment at 8:37 p.m. […], placing it outside the official filing hours of the ECCC. […] [T]he Trial Judgment shall be deemed to have been filed during the next official filing day").

17 **D381/45 & D382/43** Considerations.

valid[18] and the latter to be "*ultra vires* and, thus, null and void".[19] The National PTC Judges found the Dismissal Order "just"[20] and remained silent on the Indictment.

III. APPLICABLE LAW

A. Admissibility of the Appeal

Inherent Jurisdiction

11. The ECCC Agreement states that:

> The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 [ICCPR], to which Cambodia is a party.[21]

12. IR 21(1) safeguards the rights and interests of all parties, providing in relevant part:

> The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
>
> a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...][22]

13. In Case 004/2, this Chamber exercised its inherent jurisdiction in the interests of justice and fairness, holding:

> [I]t is a general rule of law that it is undesirable for legal issues to remain unresolved. A final court, as the Supreme Court Chamber, has a duty to bring legal clarity and finality to such situations. Legal stalemates are indicative of failure of the judicial system to provide remedies. [...] The Supreme Court Chamber considers that it is its obligation as both the appellate Chamber and

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18 **D381/45 & D382/43** Considerations, Opinion of Judges Kang Jin Baik and Olivier Beauvallet ("International Judges' Opinion"), para. 167, p. 225 (disposition). They found the Indictment procedurally conformed with the law, *see* paras 172, 175-176.

19 **D381/45 & D382/43** Considerations, International Judges' Opinion, para. 517. *See also* paras 167, 173, 175-176, p. 225 (disposition). They found the Dismissal Order circumvented the compulsory disagreement procedure in an attempt to defeat the default position enshrined in the ECCC legal framework, *see* paras 173, 175, 510, 521.

20 **D381/45 & D382/43** Considerations, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy ("National Judges' Opinion"), para. 131.

21 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"), art. 12(2). *See also* 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. 33 new, which is a similarly worded provision and applies *mutatis mutandis* to the SCC, as set out in art. 37 new.

22 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)"), Rule 21(1).

the Court of final instance to provide legal remedies and make final determination in cases where statutes or laws are silent or unclear. It is the function of a court to provide legal certainty to the parties.[23]

14. The PTC has held that when an appeal is filed under IR 21:

> [T]he appellant must demonstrate that in the particular circumstances of the case at stake, the [...] Chamber's intervention is necessary to prevent an irremediable damage to the fairness of the proceedings or the appellant's fair trial rights.[24]

15. Other international criminal tribunals have also recognised a Chamber's power to exercise its inherent jurisdiction to decide a matter in the absence of a specific statutory provision. This has included circumstances in which no court had the power to pronounce on the matter due to "legal impediments or practical obstacles" and when it was necessary to remedy possible gaps in legal proceedings or ensure that justice was not only done but was also *seen* to be done.[25]

Exemptions from the Requirement to Exhaust Remedies

16. The European Court of Human Rights has found that although the European Convention on Human Rights provides that a matter may be referred to the Court only after all domestic remedies have been exhausted, when it comes to protecting human rights, the rule on exhaustion "must be applied with some degree of flexibility and without excessive

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[23] Case 004/2-**E004/2/1/1/2** Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 Aug 2020 ("SCC Immediate Appeal Decision"), para. 64; *see also* para. 65.

[24] **D205/1/1/2** Decision on Yim Tith's Appeal Against the Decision Denying His Request for Clarification, 13 Nov 2014, para. 7. *See also* **D381/45 & D382/43** Considerations, paras 55, 78; Case 002-**D345/5/11** Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Order on Ieng Sary's Motion Against the Application of Command Responsibility, 9 Jun 2010, para. 11.

[25] **STL:** *In the Matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, Appeals Chamber, 10 Nov 2010, paras 45 ("The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction."), 46, 48; **ICTY:** *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, Trial Chamber, 3 Jul 2003, paras 112, 114 (affirming that while not required to take further action, the Trial Chamber had an overarching interest and commitment to ensure that "justice is not only done but justice is seen to be done", ordering special steps to fully represent the accused's interests); *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, Trial Chamber, 27 May 2005, paras 9-12 (and the jurisprudence cited), 13 ("judges of this Tribunal exercise the inherent power to take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect for justice"); **ICTR:** *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, Appeals Chamber, 3 Nov 1999 ("*Barayagwiza* November 1999 Decision"), para. 76; *The Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments of the Indictment, Trial Chamber, 7 Dec 2004 ("*Karemera* Severance Decision"), para. 22.

formalism", as special circumstances may exempt an applicant from the obligation.[26] The Inter-American Court of Human Rights has held that in cases involving the possible violation of certain protected rights, the rule of prior exhaustion is not required when resorting to available remedies would be ineffective or illusory.[27] In the U.S., the Supreme Court and other federal courts have recognised exceptions to the "exhaustion doctrine"[28] to include situations in which the remedy would be inadequate because pursuing the remedy would be futile[29] or exhaustion would cause irreparable injury.[30]

B. Standard of Appellate Review

17. The PTC has found that "it is well-established in international jurisprudence that, on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct".[31] The SCC has held that this "standard of correctness" means it must decide whether the Chamber "established the content of the applicable legal norms based in the appropriate sources of law and by employing rules of interpretation pertinent to those sources of law".[32] It must also assess whether the result reached was "precise and unambiguous".[33] Only errors of law that invalidate the decision will justify reversal or

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26 *See e.g. Sejdovic v. Italy,* No. 56581/00, Judgment (Grand Chamber), 1 Mar 2006, paras 44-45, 55 (the Court dispensed with the obligation to seek a remedy, finding that the remedy "was bound to fail and there were objective obstacles to its use by the applicant", constituting "special circumstances"); *Akdivar and others v. Turkey*, No. 21893/93, Judgment (Grand Chamber), 16 Sep 1996, paras 66-67 (there is "no obligation to have recourse to remedies which are inadequate or ineffective", including an administrative practice that "is of such a nature as to make proceedings futile or ineffective"); *Vaney v. France*, No. 53946/00, Judgment, 30 Nov 2004, para. 53 (the exhaustion requirement was set aside as it would have locked the applicant into a "vicious circle" where the failure of one remedy would have forced him to pursue another one), followed by *Kaić and others v. Croatia*, No. 22014/04, Judgment, 17 Jul 2008, para. 32 and *Simaldone v. Italy*, No. 22644/03, Judgment, 31 Mar 2009, para. 44.

27 *Las Palmeras v. Colombia*, Judgment (Merits), 6 Dec 2001, paras 57-58 ("it is not enough that such recourses exist formally; they must be effective; [...] remedies that, due to the [...] particular circumstances of any given case, prove illusory cannot be considered effective"); *Velásquez-Rodríguez v. Honduras*, Judgment (Merits), 29 Jul 1988, paras 68 ("when it is shown that remedies are denied for trivial reasons or without an examination of the merits, [...] resort to those remedies becomes a senseless formality"), 80; *Velásquez-Rodríguez v. Honduras*, Judgment (Preliminary Objections), 26 Jun 1987, para. 93 ("The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective.").

28 A judicial doctrine that forbids a plaintiff from filing an action for judicial review before going through the appropriate administrative process. *See McKart v. U.S.*, 395 U.S. 185, 193 (1969).

29 *Mullins Coal Co. v. Clark,* 759 F.2d 1142, 1146 (4th Cir. 1985) ("A litigant need not exhaust administrative remedies where their pursuit would be a futile gesture.").

30 R. Power, "Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution", 1987 U. Ill. L. Rev. 547, 590-592 ("the injury must be both unusual and irreparable in the more common sense that it cannot be corrected through a later reversal of the interim action. Irreparable injury, then, turns on the particularity and finality of harm. While the magnitude of harm may be relevant, its permanence is far more important.").

31 *See e.g.* Case 002-**D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 Apr 2011 ("Ieng Sary CO Decision"), para. 113.

32 Case 001-**F28** Appeal Judgement, 3 Feb 2012 ("*Duch* AJ"), para. 14.

33 Case 001-**F28** *Duch* AJ, para. 14.

revision of the decision.[34]

C. The Permissive Nature of the ECCC Dispute Resolution Mechanism

18. Articles 5(4) and 7(1) of the ECCC Agreement state in relevant part:

> 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.[35]
>
> *In case* the co-investigating judges [...] 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.[36]

19. The ECCC Law provides in relevant part:

> The judges shall *attempt* to achieve unanimity in their decisions.[37]
>
> In the event of disagreement between the Co-Investigating Judges [...] [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.[38]

20. IR 72 provides in relevant part:

> 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 Judge *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 [...].[39]

D. The Impact of Procedural Errors on Criminal Proceedings

21. It is well settled in ECCC and international law that a procedural error does not automatically render the resulting action null and void.[40] Nor can it vitiate proceedings

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[34] Case 001-**F28** *Duch* AJ, para. 16.
[35] ECCC Agreement, art. 5(4), emphasis added.
[36] ECCC Agreement, art. 7(1), emphasis added.
[37] ECCC Law, art. 14 new (1), emphasis added.
[38] ECCC Law, art. 23 new, emphasis added.
[39] IRs 72(1)-(2), emphasis added.
[40] *See e.g.* IR 48 ("Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application."); Case 002-**D55/I/8** Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 Aug 2008, paras 33-42 (outside the narrow exceptions outlined in IRs 53(3) and 67(2), investigative or judicial actions will only be void for procedural defect where that defect has caused harm and it is determined that annulment is the appropriate remedy in

unless it is shown to cause a grossly unfair outcome that occasions a miscarriage of justice.[41] The SCC noted this practice in Case 002/01, stating:

> As regards errors of a procedural nature, and in particular those regarding the exercise of discretion, [...] the Supreme Court Chamber will consider whether [prejudice to the appellant] has arisen in view of the proceedings as a whole, occasioning a miscarriage of justice. 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'.[42]

22. In Case 004/2, this Chamber implicitly recognised that procedural errors are often non-fatal and curable. After recalling that when deciding appeals of the Case 004/2 closing orders, the PTC had explicitly found it had the power to issue a new or revised closing order that would serve as a basis for trial, the SCC stated:

> These explicit findings would lead a reasonable reader to conclude that the Pre-Trial Chamber was aware of its powers to go beyond declaring the illegality of the situation relating to issuance of two conflicting Closing Orders and to issue its own valid closing orders.[43]

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the circumstances of the case); Case 002-**D263/2/6** Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 Jun 2010, paras 24-26 (it is for the Chamber to determine the consequences, if any, of the procedural error on a case-by-case basis); Case 003-**D20/4/4** Considerations of the Pre-Trial Chamber Regarding the [ICP's] Appeal Against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, 2 Nov 2011), Opinion of Judges Lahuis and Downing, paras 9-11; IRMCT Rules of Procedure and Evidence, MICT/1/Rev. 7, 4 Dec 2020, Rule 5(A) ("Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a Party at the earliest opportunity, the Chamber shall grant relief, *if* it finds that the alleged non-compliance *is proved* and that it has *caused material prejudice* to that Party." (emphasis added)); *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence", Trial Chamber, 3 Oct 2003, para. 63 (discussing ten factors that militated toward the admission of evidence even if, for argument's sake, it had been illegally obtained; *see particularly* factor 7); *Prosecutor v. Brima et al.*, SCSL-04-16-PT, Brima - Decision on Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements, Trial Chamber (Judge Boutet), 2 Aug 2004, paras 19-24 (denying motion to exclude witness statements on the basis of failure by the Prosecution to disclose them in accordance with the applicable rules); *Prosecutor v. Furundžija*, IT-95-17/1, Decision on Motion of Defendant Anto Furundžija to Preclude Testimony of Certain Prosecution Witnesses, Trial Chamber (Judge Mumba), 29 Apr 1998 (denying motion to preclude the testimony of certain witnesses despite Prosecution's failure to comply with its disclosure obligations); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina v. Yugoslavia*), Preliminary Objections, Judgment, 11 Jul 1996, ICJ Reports 1996, para. 26.

[41] *See e.g. Prosecutor v. Fofana & Kondewa,* SCSL-04-14-A, Judgment, Appeals Chamber, 28 May 2008, paras 35 (only procedural errors that occasion a miscarriage of justice vitiate proceedings; those that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice), 443 (case law at the *ad hoc* Tribunals recognises that errors such as a defect in the indictment may be "cured" if the Prosecution can demonstrate that the accused's ability to prepare his defence was not materially impaired); *Bagosora & Nsengiyumva v. The Prosecutor*, ICTR-98-41-A, Judgement, Appeals Chamber, 14 Dec 2011, paras 214-217 (noting the Trial Chamber had considered a number of factors to determine that the defects in the indictments did not render the trial unfair, finding the defects had been cured and had not materially impaired Nsengiyumva's ability to prepare his defence).

[42] Case 002-**F36** Appeal Judgement, 23 Nov 2016 ("Case 002/01 AJ"), para. 100.

[43] Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, para. 61.

23. Jurisprudence establishes that a Chamber's determination of what remedy is required, if any, for an alleged procedural error rests entirely on the facts of each case. The Chamber must balance the rights of the accused against other factors, including the gravity of the crimes and the public's interest in bringing to justice those responsible for serious violations of international law.[44]

24. The termination of proceedings is usually considered to be a "drastic remedy" that is disproportionate to the alleged harm suffered.[45] Courts have held that termination is warranted only in *exceptional circumstances* such as abuse of process where it would be "odious" or "repugnant" to the administration of justice to allow the proceedings to continue, or where the rights of the accused were breached to the extent that a fair trial was rendered impossible.[46] Showing that a violation warrants termination requires a

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[44] *See e.g. Ibrahim and others v. The United Kingdom*, Nos 50541/08, 50571/08, 505373/08 and 40351/09, Judgment (Grand Chamber), 13 Sep 2016, para. 252 ("general requirements of fairness [...] apply to all criminal proceedings, irrespective of the type of offence at issue [...] when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration"). *See also Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (the U.S. Supreme Court noted that suppressing evidence illegally obtained "generates 'substantial social costs'" and takes a "'costly toll' upon truth-seeking and law enforcement objectives"; there is therefore a "high obstacle" that must be met: such evidence should only be excluded "where its deterrence benefits outweigh its 'substantial social costs'"). *See further* the jurisprudence cited in fns 92 (re. the interest of the international community in prosecuting persons charged with serious violations of international humanitarian law), 93-94 (re. the need to balance the rights of *all* parties, including the victims and prosecution), *infra*.

[45] *See e.g. The Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", Appeals Chamber, 8 Oct 2010, paras 55 (holding that a stay of proceedings is a drastic and exceptional remedy), 60; *Prosecutor v. D. Nikolić*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber, 5 Jun 2003 ("*Nikolić* Legality Decision"), para. 30 (aside from exceptional cases, "the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate"), *followed by* Case 002-**D264/2/6** 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 (D264/1), 10 Aug 2010 ("IT Abuse of Process Decision"), fn. 52; *Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005 ("*Kajelijeli* AJ"), para. 206. *See also The Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Édouard Karemera's Motion Relating to His Right to be Tried Without Undue Delay, Trial Chamber, 23 Jun 2009 ("*Karemera* Undue Delay Decision"), paras 4, 6.

[46] *The Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2690-Red2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", Trial Chamber, 7 Mar 2011, paras 165-166, 203-205 (alleged failings on the part of the prosecution could be addressed as part of the ongoing trial process); *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-1883, Decision on Defence request for stay of proceedings with prejudice to the Prosecution, Trial Chamber, 28 Apr 2017, para. 20; *Karemera* Undue Delay Decision, para. 6; *The Prosecutor v. Kenyatta*, ICC-01/09-02/11-868-Red, Decision on Defence application for a permanent stay of the proceedings due to abuse of process, Trial Chamber, 5 Dec 2013, para. 14; *Prosecutor v. Kallon & Kamara,* SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 Mar 2004, para. 79. As explained by the PTC in Case 002-**D264/2/6** IT Abuse of Process Decision, para. 10: "The doctrine of abuse of process, originating within the common law system, is now accepted as part of international law and practice in order to ensure that *the most serious violations of conduct or procedures*, being entirely improper or illegal, are not permitted to negate the fair trial rights given to a charged person or accused before a court." (emphasis added).

particularly high threshold of proof: the ECCC and other international criminal tribunals have all made clear that the threshold is met *only* when the accused suffered a *serious* mistreatment (such as inhuman, cruel or degrading treatment, or torture) or other *egregious* violation of his rights.[47]

E. The "Default Position" Underlying the ECCC's Legal Framework

25. Article 7(4) of the ECCC Agreement and article 23 new of the ECCC Law state, in relevant part:

> A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. [...] If there is no majority, as required for a decision, the investigation or prosecution shall proceed.[48]

26. IR 72(d) provides, in relevant part:

> A decision of the [Pre-Trial] 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 [CIJ] shall stand, or that the order or investigative act proposed to be done by one [CIJ] shall be executed.

27. IR 77(13) states:

> A decision of the [Pre-Trial] 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 indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

28. IR 77(14) provides:

> All decisions under this Rule, including any dissenting opinions, shall be reasoned

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[47] *See e.g.* Case 002-**D264/2/6** IT Abuse of Process Decision, paras 24, 27; *Prosecutor v. Šešelj,* IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, Trial Chamber, 10 Feb 2010, para. 22; *Prosecutor v. D. Nikolić,* IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Trial Chamber, 9 Oct 2002, para. 114 (noting that on the facts of the case, the treatment of the accused was not of such an egregious nature that it caused a legal impediment to the exercise of jurisdiction over him), *upheld by Nikolić* Legality Decision, paras 2, 28, 33; *The Prosecutor v. Lubanga Dyilo,* ICC-01/ 04- 01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 Dec 2006, para. 31; *Barayagwiza* November 1999 Decision, para. 75.

[48] *See also* ECCC Agreement, arts 5(4), 6(4); ECCC Law, art. 20 new.

and signed by their authors. Such decisions shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the other parties by the Greffier of the [Pre-Trial] Chamber. The Co-Investigating Judges shall immediately proceed in accordance with the decision of the [Pre-Trial] Chamber.

29. IR 79(1) states:

> The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.

30. In Case 004/2, this Chamber stated:

> [W]here unanimity is unattainable at any stages of the investigation and prosecution in the Pre-Trial process, there is a default position in favour of continuing the investigation or prosecution, whether with the Co-Investigating Judges or the Co-Prosecutors.[49]

IV. ADMISSIBILITY

31. The ICP submits that this appeal is admissible pursuant to articles 12(2) of the ECCC Agreement, 33 new and 37 new of the ECCC Law, and Rule 21(1), which mandate that the ECCC conduct its proceedings with respect for the rights and interests of *all* parties and the due process of law, and in accordance with the fundamental principles of legal certainty, good and fair administration of justice, and the duty of judges to resolve the issues before them.[50] As set out below, the circumstances of this case make intervention at this stage of the proceedings necessary in order to avoid irremediable damage to both the fairness of the proceedings and the fundamental fair trial rights of the parties.[51]

32. As this Chamber made clear in Case 004/2, when deciding the appeals of the CIJs' Closing Orders, the PTC was obliged to deliver a final ruling that set out the effect of all its findings, including the operation of the default position.[52] Unfortunately, the PTC failed to do so. Like the CIJs, the PTC Judges were unable to reach consensus on the issues before them. Returning to the PTC to request a final ruling would be futile. After receiving such requests in Case 003,[53] the PTC unanimously declared that it was "under no obligation to render a unanimous decision" and it had already provided finality by notifying the CIJs of

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[49] Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, para. 62.

[50] *See* III.A. Inherent Jurisdiction section, *supra,* for details regarding the applicable law that, *inter alia*, holds that IR 21 provides a basis for appeal.

[51] *See also* para. 14, *supra*.

[52] Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, paras 60-61, 68.

[53] Case 003-**D271/1** International Co-Prosecutor's Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 21 Jun 2021, paras 1-3, 10-12, 14, 17, 34; Case 003-**D272** Meas Muth's Request to Terminate, Seal, and Archive Case File 003, 17 Jun 2021, paras 60, 72-73.

the operative part of its Considerations.[54] The PTC also made clear to future litigants that it would reject an appeal or motion when it challenged an issue that was "essentially the same (in fact and in law) as a question already considered by the Chamber [...] over which judges may be expected to maintain similar views".[55]

33. Extensive litigation in Case 003 has further demonstrated that at this stage of the Case 004 proceedings, only SCC intervention can provide the parties the necessary legal certainty and clarity.[56] The CIJs have not jointly or unilaterally transferred the Case 004 Indictment and case file to the TC for trial and, in Case 003, made clear that they would not do so without a clear instruction from the PTC.[57] As it did in Case 004/2, the TC also continued to refuse to accept that it was seised of Case 003 in the absence of the administrative transference of the case file.[58] There is no reason to believe that these entrenched positions will change under the circumstances of Case 004.

34. Given the failure of the PTC to forward the case for trial and the TC to exercise its jurisdiction over the case, it is now for the SCC to exercise its inherent jurisdiction to safeguard the interests of justice, maintain the integrity of the proceedings, and provide clarity and certainty to the situation by rescuing this case from the judicial limbo in which it now resides. Without SCC intervention, the proceedings will remain there, causing irremediable damage to, and breaching the fair trial rights of, *all* the parties, particularly the thousands of victims who have waited four decades for a fair and impartial judicial

[54] 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"), paras 68, 72 ("the Applicants' demands have already been met in the Considerations in Case 003. Indeed, the [CIJs] Judges were notified of the operative part of the Pre-Trial Chamber's Considerations and are responsible for processing the case in accordance with Internal Rules 77(13) and (14). By having notified its Considerations, the Pre-Trial Chamber effectively fulfilled its duty. It is now the Co-Investigating Judges' responsibility to comply with the Considerations immediately.").

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

[56] *See* III.A Exemptions from the Requirement to Exhaust Remedies section, *supra*.

[57] 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"), paras 25, 35-39. The CIJs also advised the parties to exhaust other paths to progress the case, offering to act as a "jurisdiction of last resort" that would, if necessary, bring the case to conclusion by terminating it (*see* paras 41-42). *See also* Case 003-**D273** Order to File Submissions on Residual Jurisdiction to Terminate Case 003, 16 Sep 2021, paras 5, 7, EN 01676518 (disposition).

[58] Case 004/2-**D359/36.2 & D360/45.2** Attachment 2 (Email entitled "Information" from TC Greffier Suy-Hong Lim), 21 Jan 2020 (stating that the PTC's Considerations had not been notified to the TC and neither the Case File nor the Indictment had yet been forwarded); Case 004/2-**D363/1.2.4** Statement Of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving Ao An, 3 Apr 2020 (providing the Judges' diverging views); Case 003-**D271/1.1.41** Email from TC Greffier Suy-Hong Lim entitled "Re: Request for extension of time to file Rule 80 list of witnesses and experts", 27 Apr 2021, 7:26 p.m. (the TC stated it would "not accept any communications from the parties" as it had not been notified of the PTC's Considerations and had not received the case file); Case 003-**D270/7** CIJs' Refusal Decision, paras 6-7. *See also* Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, paras 50, 71(i).

determination of accountability. Such an outcome would be a denial of justice that is adverse to the mandate of this Court and the principles upon which this appeal is brought.

35. For all the foregoing reasons, the ICP submits that this appeal is admissible.

V. MERITS

A. The Opposing Closing Orders Were Not Issued Illegally – The Case Proceeds to Trial

36. The case must proceed to trial based on the operation of the default position, as discussed below.[59] The issuance of conflicting closing orders due to irreconcilable differences does not negate this outcome. Such issuance is not prohibited within the unique ECCC legal framework. This is demonstrated by the equal and independent status of the CIJs and the permissive nature of the disagreement resolution mechanism adopted.[60] Indeed, such an outcome is implicitly envisioned by the ECCC Agreement, ECCC Law ("founding documents"), and the Internal Rules.

37. Each CIJ is equal and mandated to act independently.[61] The PTC's holding that only one closing order should have been issued[62] contravenes this independence. It requires, *a posteriori*, that one of the CIJs should have violated this duty of independence by acquiescing to his counterpart's diametrically opposed position. In the alternative, it places form over substance by requiring that the irreconcilable differences that necessitated two documents should be set forth in only one.

38. The founding documents anticipate disagreements yet do not make their settlement mandatory.[63] Rule 72 clearly stipulates that the resolution mechanism is permissive in nature: either CIJ, or both, *may* record the exact nature of their disagreement in a register, and within 30 days, *may* bring the said disagreement before the PTC.[64] The CIJs' prior actions in this case cannot be negated by the more recent contradictory interpretation of the PTC that makes an optional provision mandatory.[65]

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59 *See* Section V.C, *infra*.
60 *See* Section III.C, *supra*.
61 ECCC Agreement, arts 3(3), 5(3); ECCC Law, arts 10 new, 25.
62 **D381/45 & D382/43** Considerations, paras 95, 97, 108, 111-112.
63 *See* Section III.C, *supra*, detailing the permissive (as opposed to mandatory) language regarding resolution of the CIJs' differences. *See also* Case 004/2-**D355/1** Decision on Ao An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 Sep 2017, paras 13-18 (joint decision issued by the CIJs informing the parties in Cases 004/2, 003 and 004 of their views about issuing split COs); **D382** Indictment, para. 13.
64 As detailed in para. 20, *supra*.
65 *See* **D381/45 & D382/43** Considerations, paras 102-107, fn. 225.

39. Far from prohibiting the issuance of two closing orders where there are irreconcilable differences, the founding documents implicitly envision this scenario and provide the solution: the fundamental and determinative default position mandates that the investigation shall proceed.[66] In this context, the RGC and the UN implicitly anticipated the current situation.

40. The likelihood of the issuance of two closing orders where, as here, there are irreconcilable differences, has already been recognised by this Chamber. In Case 004/2, the SCC found that the numerous disagreements between the CIJs spanning more than a decade made the issuance of conflicting closing orders "almost inevitable".[67] Case 004 is no different.[68]

41. Thus, the ICP submits that the language of the Rules that refer to one closing order must be interpreted in light of the founding documents and other Rules, as discussed above, which anticipate disagreements that could result in the issuance of two conflicting closing orders. For example, Rule 67(1), which requires the CIJs to conclude the investigation by issuing a closing order, must be interpreted in this context and in conjunction with Rule 1(2), which provides that a reference to the CIJs includes both acting jointly and each acting individually. Meaning implicitly that each could issue a closing order.

42. An analysis of inquisitorial systems at both the national and international levels highlights the unique nature of this Court's legal framework which allows the issuance of two contrary closing orders. At the *national level*, there is no system in which two or more independent investigating judges of equal status work together on a case without a clear decision-making process to avoid procedural stalemates. In most civil law countries which use investigating judges,[69] including Cambodia,[70] the judges routinely work alone and, as

[66] *See* paras 18-19, *supra*, detailing the provisions and the use of the mandatory language of "shall proceed". The same scenario holds true if a disagreement is brought to the PTC for resolution. In the case of an indictment, the investigation/case goes forward unless a supermajority dismisses it (*see* the provisions detailed in Section III.E, *supra,* and further discussion in Section V.D, *infra*).

[67] Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, para. 59 and *reiterated* at para. 62.

[68] As set out in II. Relevant Procedural History, fn. 12, *supra*.

[69] About half of all civil law countries do not have the function of independent investigating judges in their legal framework. These include Andorra, Austria, Bosnia and Herzegovina, Brazil, Burundi, China (PRC), Chile, Colombia, Costa Rica, Croatia, Denmark, Democratic Republic of Congo, Finland, Guatemala, Honduras, Iceland, Italy, Japan, Kosovo, Latvia, Mexico, Nicaragua, Norway, Paraguay, Peru, Republic of North Macedonia, Republic of Korea, Russia, Romania, Serbia, Sweden, Switzerland, Taiwan (ROC), Turkey, Uruguay, and Venezuela.

[70] The Cambodian Code of Criminal Procedure ("CCCP") does not envisage the assignment of more than one investigating judge per case file (Code of Criminal Procedure of the Kingdom of Cambodia, 7 Jun 2007). In case of a conflict of jurisdiction between investigating judges of different courts of first instance, art. 123 provides that the President of the Investigation Chamber settles the conflict. However, a case file may be withdrawn from an investigating judge and assigned to another for the good administration of justice (art.

a result, the law is silent about the possibility of designating more than one judge per case.[71] In countries where two or more investigating judges are assigned to work together on a complex case, one of the judges coordinates and ultimately decides the main issues, while the other provides assistance. Alternatively, the decision is made by the majority, or the judge who coordinates/presides has the deciding vote.

43. For example, in some tribunals in France, investigating judges are grouped within investigative pools where two or more investigating judges may be co-seised with the most serious or complex cases (including terrorism and international crimes). In such circumstances, one investigating judge is designated to be in charge of the investigation, coordinating and making decisions alone, such as the drafting and issuance of the closing order, while the other judge(s) simply assist him/her.[72] Algeria, Central African Republic, Guinea, and Gabon all have similar systems.[73] In Ivory Coast, orders (including closing

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53), and one investigating judge may also issue a rogatory letter authorising another judge to investigate on his/her behalf. This rogatory letter specifies the nature of investigative work to be done (arts 173-174).

[71] *See e.g.* Criminal Procedure Codes of **Argentina**, 2 Aug 2019, arts 180, 188, 194, 196; **Belgium**, Titre préliminaire (as at 20 Dec 2019), art. 12bis; Livre premier (as at 20 Jul 2021), arts 55-56, 61, 62bis, 127; Livre II, Titre V (as at 19 Feb 2016), art. 540; **Benin**, 18 Mar 2013, arts 43, 86, 89; **Bolivia**, 25 Mar 1999, art. 54; **Burkina Faso**, 29 May 2019, arts 243-1, 243-3, 243-4, 261-2; **Chad**, as at 31 Aug 1994, arts 231-232; **Dominican Republic**, 2 Jul 2002, arts 63, 73, 379; **Estonia**, as at 7 May 2020, arts 21, 24; **Germany**, as at 11 Jul 2019, ss 162, 165, 169; **Greece**, 1 Jul 2019, arts 31(2), 246-247; **Guyana**, as at Mar 1998, arts 51, 65, 72; **Haiti**, 1935, arts 35, 48, 51; **Montenegro**, as at 1 Sep 2011, arts 276, 293; **Morocco**, as at 27 Oct 2011, arts 44, 52-55; **The Netherlands**, as at 1 Jul 2021, arts 59a, 63, 105, 110, 170, 172, 177, 182, 238; **Portugal**, as at 16 Aug 2021, arts 17, 142, 268, 288; **Republic of the Congo**, 13 Jan 1963, arts 581-582; **Slovenia**, as at 19 Jun 2020, arts 25, 171; **Spain**, as at 19 Jul 2021, arts 22-23, 303; **Tunisia**, as at 9 Jun 2017, art. 49.

[72] **France:** Code of Criminal Procedure, as at 16 Oct 2021 ("FCCP"), arts 52-1 (*unofficial translation*: "[...] In some judicial tribunals, the investigating judges are grouped within investigation pools. The investigating judges who are part of investigating pools are [...] exclusively competent for the investigations for which there is a co-seisin in furtherance of articles 83-1 and 83-2"), 83-1 (*unofficial translation*: "When the gravity or the complexity of the case justifies it, the investigation can be subject to a co-seisin [...]. The president of the tribunal where an investigation pool exists, [...] assigns, as the opening of the investigation, one or several investigating judges to be assistants to the judge in charge of the investigation."], 83-2 (*unofficial translation*: "In case of co-seisin, the investigating judge in charge of the investigation coordinates its conduct. He/she has alone the authority to seise the *judge responsible for the release and detention*, to order a statutory release and to issue the notice of the end of the investigation provided for in Article 175, and the closing order. However, this notice and this order may be cosigned by the co-seised judge or judges" (emphasis added)). *See also* B. Bouloc et al., *Procédure pénale*, 27th edition, 2020, Dalloz, paras 595(a), 596(c); L. Belfanti, "Juge d'instruction – Le statut du juge d'instruction", Répertoire de droit pénal et de procédure pénale, Dalloz, Oct 2015, paras 316, 706; C. Guéry and P. Chambon, *Droit et pratique de l'instruction préparatoire*, 10th edition, 2017, Dalloz Action, "Chapitre 112 – Désignation du juge d'instruction", para. 112.29.

[73] **Algeria:** Code of Criminal Procedure, 2007, art. 70 (*unofficial translation*: "[...] Where the seriousness or complexity of the case so warrants, the public prosecutor may appoint, in addition to the investigating judge in charge of the investigation, one or more investigating judges, whom he or she shall designate [...]. The judge in charge of the investigation shall coordinate the progress of the investigation and shall have sole authority to rule on judicial supervision and pre-trial detention and to issue the settlement order." (emphasis added)). **Central African Republic:** Code of Criminal Procedure, as at 15 Jan 2010, arts 53 (*unofficial translation*: "Where the seriousness or complexity of the case so warrants, the President of the Court of Appeal [...] may appoint one or more investigating judges from his or her area of jurisdiction to assist the

orders) are decided by the co-investigating judges assigned; in the event of a tie, the coordinating investigating judge has the deciding vote.[74]

44. At the *international level*, the Special Criminal Court in the Central African Republic (another hybrid tribunal based on the civil law system) applies a clearly articulated mandatory disagreement mechanism, in sharp contrast to that of the ECCC. When disagreements arise between the equal national and international CIJs on the substance of the case, the *Chambre d'Accusation Spéciale* (the Special Indictment Chamber, on par with the PTC) composed of two international judges and one national judge, is *automatically* seised of the dispute, which is resolved by a majority decision issued within five days. The Special Indictment Chamber's decision is binding for both investigating judges.[75] This structure explicitly precludes any conflicting substantive orders by the co-investigating judges.

B. The Opposing Closing Orders Are Not Null and Void Even if Their Simultaneous Issuance was Illegal – The Case Proceeds to Trial

45. The opposing Closing Orders do not preclude the case from proceeding to trial even assuming, *arguendo*, their simultaneous issuance was illegal. As noted above, it is well established across the international criminal tribunals, including the ECCC and particularly this Chamber, that if a procedural error occurred, this does not automatically render the resulting Closing Orders null and void.[76] Rather, it fell within the PTC's

investigating judge [...]. The judge in charge of the investigation shall coordinate the conduct of the investigation. However, the measures of detention, release, judicial supervision, and the settlement order shall be decided collectively. The coordinating judge alone shall be authorised to sign the relevant documents." (emphasis added)), 34(b). In **Guinea**, for complex cases, the law mentions that a pool of investigating judges can be established, but one judge still seems to be responsible for each investigation (New Code of Criminal Procedure, as at Feb 2016, arts 62, 153). In **Gabon**, the possibility of assigning two or more investigating judges for complex cases exists, but no provision explicitly states how the decisions are made (Code of Criminal Procedure, 5 Jul 2019, art. 92). In all logic, it should be specified in the order assigning the co-judges.

[74] Code of Criminal Procedure, as at 13 Mar 2019, art. 102 *(unofficial translation*: "Where there are several investigating judges in a court, the president of the court shall designate the judge responsible for each investigation. He may also designate two or more investigating judges to act in a complex or serious case involving several charges. In this case, he shall appoint one of the investigating judges to coordinate the investigation. Each act of investigation is signed by the investigating judge who performs it. However, the orders are made collectively. *In the event of a tie, the coordinating investigating judge has the casting (deciding) vote.*" (emphasis added)).

[75] Central African Republic, Loi Organique No. 15.003 Portant Création, Organisation et Fonctionnement de la Cour Pénale Spéciale, 3 Jun 2015, arts 11 (*unofficial translation*: "The Investigation Chamber is composed of three cabinets. Each cabinet includes one national judge and one international judge."), 12, 41, 42 (*unofficial translation*: "In the event of disagreement between the investigation judges of the same cabinet, the points of divergence are recorded in a report and transmitted [...] to the Special Indictment Chamber [...]. The decision of the Special Indictment Chamber [...] is binding on the co-investigating judges.").

[76] *See* Section III.D, *supra*.

jurisdiction, as the appellate Chamber at the pre-trial stage, to cure any defect through examination of the merits of each Closing Order.[77] Indeed, only by considering the merits of each Closing Order could a lawful, logical, and just resolution of this case be achieved. The error the PTC committed, therefore, was not in considering the merits of each Closing Order; the error was in failing to send the case to trial as required.

46. Should this Chamber disagree and move to its own consideration of an appropriate remedy, this assessment must consider a number of factors including, first and foremost, whether the issuance of two opposing closing orders occasioned a miscarriage of justice or, put another way, caused a grossly unfair outcome in the proceedings.[78] Other factors that must be considered include the gravity of the crimes charged, the social costs of preventing the case from proceeding, the interests and rights of all the parties, and the proportionality of any remedy to the alleged harm.[79] As detailed below, such an assessment can only conclude that Case 004 must proceed to trial.

The CIJs' procedural error did not cause any gross unfairness, material prejudice or abuse of process

47. It is settled law that not all pre-trial procedural errors prevent a case from proceeding.[80] As noted above, the SCC has recognised this explicitly and implicitly, holding in the Case 002/01 Appeal Judgment that only procedural errors that result in a "grossly unfair outcome in judicial proceedings" would require drastic intervention,[81] and in Case 004/2, that the PTC could have cured the irregular issuance of two closing orders by issuing its own valid closing order that would serve as a basis for trial.[82] The PTC examined the merits of each Closing Order, thereby engaging in the same assessment it would have conducted if the CIJs had submitted their disagreement to the PTC for resolution pursuant to IR 72. There is, therefore, no grossly unfair outcome that would require the drastic remedy of terminating the proceedings.

48. In addition, there is nothing in the ECCC Agreement or ECCC Law that specifically prohibits the issuance of two conflicting closing orders.[83] Thus, the contested issue for the

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[77] Case 004/2-**D359/24 &D360/33** Considerations on Appeals Against Closing Orders, 19 Dec 2019 ("Case 004/2 PTC Considerations"), paras 52, 89. *See also* paras 21-22, *supra*.
[78] *See* Section III.D, *supra*.
[79] *See* Section III.D, *supra*.
[80] *See* Section III.D, *supra*.
[81] Case 002-**F36** Case 002/01 AJ, para. 100.
[82] *See* Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, para. 61 (set out in para. 22, *supra*).
[83] *See* Section V.A, *supra*.

SCC's analysis hinges on the interpretation of the ECCC Internal Rules. Where, as here, the issuance of two conflicting closing orders constitutes a possible violation of those Rules,[84] international jurisprudence makes clear that a case is only prevented from moving forward if there is a showing of an error that caused material prejudice.[85] There is no such showing here. Nor can there be. Determining responsibility for serious crimes such as genocide and crimes against humanity in a fair and impartial trial that respects the rights of all parties would not materially prejudice Yim Tith. Nor can it be argued that being denied the windfall benefit of avoiding a judicial determination of criminal liability constitutes material prejudice. Such an argument is contrary to law, logic and justice.

49. The circumstances of the case also show that the CIJs' issuance of two conflicting closing orders has not caused any egregious violation of Yim Tith's fair trial rights which would constitute an abuse of process warranting termination of the proceedings.[86] Nor is there any other basis to conclude any abuse of process warranting such relief. The proceedings have been conducted without undue delay in light of the legal and factual complexity of the case (including, *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).[87] Moreover, Yim Tith is not now and has never been in ECCC custody, having lived freely for the entirety of the investigation with no meaningful restrictions on his personal freedom.[88] Indeed, a survey of other international criminal tribunals shows that judicial proceedings with lengths of a similar range to Case 004 have not been found unduly delayed despite the fact that the other accused were in custody.[89] In short, there are no violations caused by the CIJs' procedural error that would meet the very high threshold necessary to justify termination.[90]

Preventing the case from moving forward would be disproportionate to the alleged harm

50. On the facts of this case, the issuance of two opposing closing orders requires no remedial action. Assuming a remedy is required, the determination of what that remedy would be

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84 As discussed in Section V.A, *supra*, the ICP submits that the issuance does not violate the Rules.

85 *See e.g.* the authorities cited in fns 40 and 41, *supra*.

86 *See* para. 24, *supra*.

87 For a full discussion of these factors and the jurisprudence upon which they are based, *see* Case 003-**D272/1** International Co-Prosecutor's Response to Meas Muth's Request to Terminate, Seal and Archive Case File 003, 8 Jul 2021 ("ICP's Abuse of Process Response"), paras 4-16. *See also* **D381/45 & D382/43** Considerations, para. 78.

88 *See* **D381/45 & D382/43** Considerations, para. 520 noting that the ICIJ had considered provisional detention pending trial unnecessary.

89 Case 003-**D272/1** ICP's Abuse of Process Response, para. 16.

90 *See* Section III.D, *supra,* particularly para. 24.

requires the Chamber to consider the gravity of the crimes and the high social costs incurred if such crimes were not adjudicated.[91] It must also maintain the correct balance between the rights of the accused and the essential interests of the Cambodian and international communities in prosecuting persons charged with the most serious international crimes, thereby ensuring that victims of crimes have a meaningful voice.[92] The rights of the parties must also be considered, including the victims and the prosecution as prescribed by IR 21(1).[93] Such interests have been recognised in French and Cambodian law, and by this Court and other international tribunals.[94] Sending Case 004 to trial strikes

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[91] *See* Section III.D, *supra,* particularly para. 23; Case 002-**D264/2/6** IT Abuse of Process Decision, para. 28; *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

[92] Case 002-**D264/2/6** IT Abuse of Process Decision, para. 28. This is particularly clear in abuse of process claims that have been raised at the ICTY, ICTR and ICC. *See e.g. Nikolić* Legality Decision, paras 24 ("in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such [...], courts seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction"), 25-26, 30 ("The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."); *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, Appeals Chamber, 12 Oct 2009, paras 49, 52-53 (recalling that "one of the fundamental aims of international criminal courts and tribunals is to end impunity and to ensure that serious violations of international humanitarian law are prosecuted and punished" and the facts that gave rise to the Appellant's expectations of impunity, even if proved, would not trigger the abuse of process justifying a stay of the proceedings); *Kajelijeli* AJ, para. 206; *Karemera* Undue Delay Decision, paras 8, 11. Following this approach would give significant weight to the main purpose of the ECCC, which is to bring to trial the senior leaders and those who were most responsible for the crimes committed during the DK regime against the Cambodian people (*see* ECCC Agreement, art. 1; ECCC Law, arts 1, 2 new).

[93] IR 21(1). *See also* **D384/5.1.1** Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Resolution 40/34 of 29 Nov 1985, Principle 4 ("Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered.").

[94] **France:** FCCP, article préliminaire; Conseil Constitutionnel, No. 95-360, 2 Feb 1995, para. 5; Pradel, *Manuel de Procédure Pénale*, 14th edition, 1 Jul 2008, p. 141; **Cambodia:** CCCP, art. 4; **ECCC:** Case 002-**D411/3/6** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 Jun 2011, para. 67 ("the Pre-Trial Chamber reads the Internal Rules in a manner that takes into account the nature, the extent, the modes of participation and founding elements of the alleged crimes *and the needs of the affected* community as expressed in ECCC's foundation instruments" (emphasis added)); Case 002-**E50/2/1/4** Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release, 3 Jun 2011, para. 39 (noting that the "interpretative direction of Rule 21(1) does not [...] mean that Internal Rules are to be construed so as to automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules"); Case 002-**E50/3/1/4** Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 Jun 2011, para. 30; Case 002-**F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 Dec 2014, para. 12; **ICTY:** *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, Appeals Chamber, 16 Feb 1999, para. 25; **ICTR:** *The Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, Trial Chamber, 16 Nov 2006, para. 18; *Karemera* Severance Decision, para. 26; **ICC**: *Situation in the Democratic Republic of the Congo*, ICC-01/04-135tEN, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber, 31 Mar 2006, para. 38; *Situation in Uganda*, ICC-02/04-112, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber, 19 Dec 2007, para. 27.

the correct balance; such important interests cannot be outweighed by a pre-trial procedural error that does not deprive Yim Tith of any of his lawful rights.

51. For all these reasons, in the circumstances of this case, termination would be disproportionate to the nature of the non-fatal pre-trial procedural error. Furthermore, if any remedial action is required, the PTC has taken that action by considering the merits of each closing order. The legal framework of this Court established by the ECCC Agreement, ECCC Law, and Internal Rules require that the case be sent to trial in accordance with the fundamental and determinative default position.

C. The Indictment Was Not Overturned by a Supermajority – The Case Proceeds to Trial

52. The PTC was obliged to transfer Case 004 to the TC for trial, as the Indictment was not overturned by a supermajority of the PTC (and no supermajority upheld the validity of the Dismissal Order). As set out above, articles 5(4) and 7(4) of the ECCC Agreement, article 23 new of the ECCC Law, and IRs 77(13)(b) and 79(1)[95] required the PTC to seise the TC with the Indictment in keeping with what the PTC unanimously held to be the "fundamental and determinative" default position that the investigation shall proceed.[96] The PTC's International Judges rightly described this core principle as the "principle of continuation of the investigation and prosecution",[97] that removes any uncertainty when an indictment is not reversed.[98] The default position was accepted by both the RGC and the UN[99] and has been regularly applied by the ECCC Chambers, including by the National

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[95] *See* Applicable Law, paras 18, 25, 27 and 29, *supra* (para. 18: ECCC Agreement, art. 5(4); para. 25: ECCC Agreement, art. 7(4), ECCC Law, art. 23 new; para. 27: IR 77(13)(b); para. 29: IR 79(1)).

[96] **D381/45 & D382/43** Considerations, paras 100, 104, fn. 223; SCC statement in para. 30, *supra*.

[97] **D381/45 & D382/43** Considerations, International Judges' Opinion, paras 169, 174, 533, 538; Case 003-**D266/27 & D267/35** Considerations on Appeals Against Closing Orders, 7 Apr 2021 ("Case 003 PTC Considerations"), Opinion of Judges Kang Jin Baik and Olivier Beauvallet, paras 256, 261; Case 004/2-**D359/24 & D360/33** Case 004/2 PTC Considerations, Opinion of Judges Baik and Beauvallet ("International Judges' Opinion"), para. 320.

[98] **D381/45 & D382/43** Considerations, International Judges' Opinion, para. 174 ("the argument of a possible *lacuna* in the ECCC legal framework in relation to the legal repercussions of issuing conflicting closing orders finds no application in the present case [...] the alleged uncertainty is removed through a fair reading of the relevant legal texts [...] which uphold the principle of continuation of judicial investigation and prosecution. 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").

[99] On the same day that the UN first provided the Article 7(4) wording to the RGC, Hans Corell, Under-Secretary-General for Legal Affairs and Legal Counsel of the UN, recorded a conversation with Deputy Prime Minister Sok An, the RGC's chief negotiator, rejecting his call to have a supermajority requirement to approve the continuation of an investigation or prosecution. Hans Corell explained that the disagreement mechanism as drafted meant "you would need super majority to stop the investigation or prosecution" (*See* **D324.30** Note from Hans Corell to the Secretary-General, Subject: Urgent call from Cambodia — Options to settle differences between investigating judges/prosecutors, annexed to Letter from UN Secretary-General to Prime Minister H.E. Hun Sen, 19 Apr 2000, EN 01326090). Hans Corell confirmed this position in March

Judges of the PTC.[100] It must be interpreted in light of the object and purpose of the treaty between the UN and RGC to "[bring] to trial senior leaders of Democratic Kampuchea and those who were most responsible" for the DK crimes.[101]

53. In this context, it is clear that the "investigation or prosecution shall proceed" means simply "the case shall proceed" and includes the phase of seising the TC with an indictment.[102] Indeed, the default position must be respected throughout the ECCC proceedings, including after the completion of the appeals process before the PTC, whether one considers the transfer of the Indictment and case file to the TC to be part of the investigation or part of the prosecution.[103] Creating a system in which early disagreements were to be resolved in favour of proceeding but later disagreements on the same issue were to be resolved in favour of terminating proceedings would have been pointless, costly and time-consuming, with little prospect of going to trial.

54. The default position governed by IR 77(13)(b), which specifically relates to indictments, prevails as *lex specialis* over the general terms of IR 77(13)(a) regarding orders other than

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2003 after the ECCC Agreement containing that same wording was agreed (**D324.36** Statement by Under-Secretary-General Hans Corell upon leaving Phnom Penh on 17 March 2003, 17 Mar 2003, EN 01326112). *See also* D. Scheffer, "The Extraordinary Chambers in the Courts of Cambodia", in M. Cherif Bassiouni (ed), International Criminal Law, Third Edition, Vol. III, 2008, pp. 231, 246 (stating that under the supermajority rule, "[t]he only way the prosecution or investigation is halted is if the [PTC] decides by supermajority vote that it should end").

100 *See e.g.* **SCC:** Case 001-**F28** *Duch* AJ, para. 65 ("If, for example, 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.'"); **PTC: D1/1.3** PTC Rule 71 Considerations, paras 16, 17, 26, 45 (unanimous), Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy ("National Judges' Opinion"), paras 18-19 (where the PTC's National Judges disagreed with the way the preliminary investigations were started and carried out by the ICP in Cases 003 and 004 but, together with the International Judges, unanimously accepted the primacy of the principle of continuation of the investigation and prosecution); **D1/1.1** Annex II: Excerpt of the Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 Aug 2009, Conclusion; **A122/6.1/3** Decision on Im Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 Aug 2014 ("Im Chaem Summons Decision"), para. 14; **D369** Decision on Ao An's Request for Clarification, 5 Sep 2017, para. 25 (which reiterated A122/6.1/3); **D212/1/2/2** Decision on Yim Tith's Appeal Against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 Dec 2014 ("PTC Summons Validity Decision"), para. 7.

101 ECCC Agreement, art. 1, as reflected in ECCC Law, art. 1.

102 In Case 002, the PTC unanimously held in a decision that pre-dated the SCC's holding in Case 001 that the phrase "the investigation shall proceed" incorporates the phase where an indictment seises the Trial Chamber. *See* Case 002-**D427/1/30** Ieng Sary CO Decision, para. 274 ("The [CIJs] are under no obligation to seise the [PTC] when they do not agree on an issue before them, the default position being that the 'investigation shall proceed' which is coherent with the approach taken by the [CIJs] in the current case.").

103 **D381/45 & D382/43** Considerations, paras 103-104; Case 003-**D266/27 & D267/35** Case 003 PTC Considerations, para. 98 (unanimous) ("a principle as fundamental and determinative as the default position cannot be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions"); Case 004/2-**D359/24 & D360/33** Case 004/2 PTC Considerations, para. 112 (unanimous).

indictments.[104] Had the drafters of the IRs intended that a dismissal order would end the case absent a supermajority overturning it, they would have expressly stated so in IR 77(13)(b). Thus, the principle of continuation of the case requires that the TC be seised of the Indictment and the case must be tried.[105]

55. Failing to respect the principle of continuation constitutes an error of law by the PTC Judges that caused "a manifestly unreasonable legal result, violating both international law and Cambodian law",[106] including the overriding principles that proceedings must comply with legality, fairness and effectiveness.

56. Although the PTC unanimously recalled the value of the default position to provide an effective way out of any possible procedural impasses caused by disagreements,[107] it failed to apply it to Case 004 by transferring the case file to the TC. In particular, against all logic and consistency, the National Judges failed to acknowledge that the Dismissal Order was not upheld by a supermajority and therefore the default decision required the case to proceed.[108] Even in a situation where a dismissal order would stand in parallel to an indictment, the case would proceed to trial on the basis of that indictment, as this is precisely what the parties to the ECCC Agreement intended with this default position: proceedings should only be halted by a PTC supermajority.[109]

57. Finally, in Cambodian procedure, the causes of extinction of criminal action, beyond a dismissal or acquittal on the merits, are explicitly limited by article 7 of the Cambodian

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[104] The Latin expression *lex specialis* refers to a doctrine relating to the interpretation of laws according to which a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*). It is a widely recognised interpretation mechanism, used internationally, including at the ECCC. *See e.g.* Case 001-**F28** *Duch* AJ, paras 298, 348. *See also* Report of the International Law Commission, UN Doc. A/CN.4/L.682 (UNGA, 58th session), 13 Apr 2006, para. 61; Report of the International Law Commission, UN Doc. A/59/10, 2004 (UNGA, 56th session), para. 305; *Dispute Between Argentina and Chile Concerning the Beagle Channel*, Report and Decision of the Court of Arbitration, 18 Feb 1977, UNRIAA, Vol. XXI, paras 36, 38-39; *Brannigan and McBride v. United Kingdom*, Nos 14553/89 & 14554/89, Judgment, 25 May 1993, para. 76; *Nikolova v. Bulgaria*, No. 31195/96, Judgment, 25 Mar 1999, para. 69; C-96/00 Rudolf Gabriel, Judgment, 11 Jul 2002, 2002 ECR-I-06367, paras 35-36, 59.

[105] *See* Case 001-**F28** *Duch* AJ para. 65, *citing* ECCC Law, art. 23 new, ECCC Agreement, art. 7(4), IR 72(4)(d). Whilst this finding arises out of a discussion of the scenario where one or both of the CIJs has referred the question of a conflicting indictment and dismissal order to the PTC under IR 72, the substantive outcome is equally applicable to the current situation where the PTC had been seised of appeals by the parties, since the manner in which the PTC had been seised of the same question – whether either judge erred in issuing his Dismissal Order or Indictment - is irrelevant.

[106] **D381/45 & D382/43** Considerations, para. 104.

[107] **D381/45 & D382/43** Considerations, paras 103-104.

[108] **D381/45 & D382/43** Considerations, paras 103-104.

[109] ECCC Agreement, art. 7(4). By its terms, this provision deals with the formal dispute resolution mechanism outlined in Article 23 new of the ECCC Law and IR 72, and so it does not address the precise procedural situation in the present case. But it *does* address this situation *substantively*: two CIJs disagree as to whether proceedings should continue.

Code of Criminal Procedure to the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata.*[110] None of these apply to Case 004, and the SCC and TC have both held that the ECCC has no authority to order termination for any other reason.[111]

D. Case File 004 is Not Illegal

58. The National PTC Judges' belated finding that the entire Case File 004 is illegal[112] is erroneous. There were no defects in the preliminary investigation. Even if there were, they occurred 13 years ago and were cured by subsequent actions of the parties, CIJs and PTC.

There was no procedural defect in the preliminary investigation

59. Contrary to the National PTC Judges' finding, the ICP did not initiate the Rule 50(1) preliminary investigation in Case 004 "unilaterally and in secret".[113] The National PTC Judges have presented a distorted perspective on the preliminary investigation that relies solely upon selected submissions from the NCP during the Co-Prosecutors' Rule 71(1)(2) Disagreement in 2008-2009, instead of giving the informed perspective provided by the full complement of available information.[114]

60. In fact, the NCP was integral to the preliminary investigation in all the ECCC cases, including the selection of candidates for prosecution. As the ICP explained in his submissions to the PTC during the Disagreement, the 3IS resulted from a preliminary investigation carried out by the Office of the Co-Prosecutors principally on the basis of an in-house analysis of documents collected from the Documentation Center of Cambodia ("DC-Cam") prior to 18 July 2007, *i.e.* before the filing of the First Introductory

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[110] CCCP, art. 7.

[111] Case 002-**E138/1/10/1/5/7** Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, 14 Dec 2012, para. 38; Case 002-**E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 Sep 2011, paras 16-17 (finding that ECCC proceedings may only be terminated under IR 89(1)(b) on one of the limited grounds set out in art. 7 of the CCCP).

[112] **D381/45 & D382/43** Considerations, National Judges' Opinion, para. 130 ("The [ICP] initiated the preliminary investigation in Case 004 [...] unilaterally and in secret, in violation of the ECCC Agreement and the ECCC Law, thereby resulting in the illegality of the entire Case File.").

[113] **D381/45 & D382/43** Considerations, National Judges' Opinion, paras 117, 130 (quote at para. 130).

[114] At para. 130, the National PTC Judges purport to quote from **D1/1.3** PTC Rule 71 Considerations (as reproduced in part in Case 004/2-**D359/24 & D360/33** Case 004/2 PTC Considerations, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy ("National Judges' Opinion"), para. 260), yet this quotation is selective, omitting many of the NCP's submissions and almost the entirety of the ICP's Submissions, as recorded in **D1/1.3**.

Submission ("1IS")[115] which covered what became Cases 001 and 002.[116] By July 2007, the Co-Prosecutors had *together* (i) identified 15 potential suspects, including Ao An, Yim Tith and Im Chaem; (ii) commenced preliminary investigations and reviewed draft introductory submissions for all those suspects; and (iii) decided which six[117] to prioritise *and* which nine would then be investigated further.[118] After the Co-Prosecutors issued the 1IS, the investigations into those remaining suspects resumed as planned. In October 2008, relying principally on the DC-Cam documents, the ICP drafted additional submissions for six of the nine suspects, including Ao An, Yim Tith and Im Chaem.[119] Nothing in this process was withheld from the NCP.[120] Indeed, the NCP does not dispute that the Case 004 crime base was the subject of a joint preliminary investigation.[121]

61. The ICP also notes that the NCP raised the issue of the allegedly secretive preliminary investigations very late in the Disagreement process. Even based on her own assertions, the NCP would have first known of the preliminary investigation in a meeting held on 18 November 2008 to discuss the filing of, *inter alia*, the 3IS.[122] At the very least, she received detailed particulars on 3 December 2008, when the ICP's Statement on the Disagreement

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115 Cases 001 & 002-**D3** Introductory Submission, 18 Jul 2007 ("1IS").

116 **D1/1.3** PTC Rule 71 Considerations, para. 43 (unanimous), National Judges' Opinion, para. 5, *citing* International Co-Prosecutor's Response to Directions of the Pre-Trial Chamber to Provide Further Particulars, 22 May 2009 ("ICP Response to Directions"), para. 50, International Co-Prosecutor's Reply to the National Co-Prosecutor's Response to the Directions of the Pre-Trial Chamber to Provide Further Particulars, 27 May 2009 ("ICP Reply to Directions"), para. 16.

117 These were the five suspects named in the 1IS (*see* Cases 001 and 002-**D3** 1IS, para. 8): Kaing Guek Eav *alias* Duch, Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, together with a sixth suspect, Vann Rith, to whom the NCP ultimately objected.

118 Redacted version: **D1/1.3** PTC Rule 71 Considerations, National Judges' Opinion, paras 6-8, *citing* ICP Response to Directions, paras 51-53; Unredacted extracts of **D1/1.3**: Case 004/2-**D359/24 & D360/33** Case 004/2 PTC Considerations, National Judges' Opinion, para. 260, *citing*, at sub-paras 5-7, unredacted extracts of **D1/1.3** PTC Rule 71 Considerations, National Judges' Opinion, paras 6-8.

119 Redacted version: **D1/1.3** PTC Rule 71 Considerations, Opinion of Judges Lahuis and Downing, para. 16; National Judges' Opinion, paras 9-10, *citing* ICP Response to Directions, paras 50, 54-55, ICP Reply to Directions, para. 16; Unredacted extracts of **D1/1.3**: Case 004/2-**D359/24 & D360/33** Case 004/2 PTC Considerations, National Judges' Opinion, para. 260, *citing*, at sub-paras 8-9, unredacted extracts of **D1/1.3** PTC Rule 71 Considerations, National Judges' Opinion, paras 9-10.

120 In this context, the ICP also notes that, like all sections of the ECCC, the Office of the Co-Prosecutors has computer drives accessible to the whole office - the ICP, the NCP and their entire staff – on which all work products relating to the preliminary investigations were stored.

121 **D1/1.3** PTC Rule 71 Considerations, paras 29-30 (unanimous), *citing* National Co-Prosecutor's Response to the International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement Pursuant to Rule 71(2), 29 Dec 2008 ("NCP Response"), paras 52, 54, National Co-Prosecutor's Response to the Pre-Trial Chamber's Directions to Provide Further Particulars, Dated 24 April 2009, and National Co-Prosecutor's Additional Observations, 22 May 2009 ("NCP Response to Directions"), paras 48, 84-85, 86(D), and National Co-Prosecutor's Reply to the International Co-Prosecutor's Response to the Pre-Trial Chamber's Directions to Provide Further Particulars, 29 May 2009 ("NCP Reply to Directions"), paras 8, 13-14, 17-18.

122 **D1/1.3** PTC Rule 71 Considerations, para. 18 (unanimous), *citing* NCP Response, para. 1.

was notified.[123] Yet, the NCP first mentioned the alleged issue on 22 May 2009,[124] after failing to do so in her three previous filings during the Disagreement procedure.[125]

62. Even assuming the preliminary investigation was unilateral, it was permissible under the Rules as long as the disagreement had crystallised before the 3IS was signed. Whilst the Co-Prosecutors must "cooperate with a view to arriving at a common approach"[126] and "work together",[127] as a textual matter, this does not impose a mandatory requirement on the Co-Prosecutors to act together in the execution of all prosecutorial actions. If it did, the Disagreement Mechanism laid out by the founding documents and Rules, which envisages precisely this situation, would be redundant, and one Co-Prosecutor could block a preliminary investigation simply by refusing to participate. IR 50, governing preliminary investigations by the Co-Prosecutors, must therefore be read in light of IRs 1(2)[128] and 71.

The preliminary investigation was not carried out in violation of the personal jurisdiction provisions in the ECCC Agreement and ECCC Law

63. The National PTC Judges' assertion that "the clear purpose of the Agreement between the [RGC] and the [UN] is [to bring to trial] from four (4) to five (5) persons, all of whom are covered in Cases 001 and 002"[129] is not borne out by the evidence of the negotiations for the ECCC Agreement or the October 2004 National Assembly debate on amending the ECCC Law to comply with the ECCC Agreement.[130]

64. First, the National PTC Judges misinterpret the 2004 National Assembly debate. H.E. Keo Remy's statement that "[i]t is unfair if we try only 3 or 4 people,"[131] is *not* evidence that Deputy Prime Minister Sok An, the RGC's chief negotiator in the talks with the UN, limited the number of people in the same manner.[132] Rather, H.E. Sok An responded expressly and unambiguously to lawmakers (including H.E. Keo Remy) that there was (i) no set number of people who might fall within the ECCC's jurisdiction and (ii) no list of

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123 **D1/1.3** PTC Rule 71 Considerations, paras 1, 19 (unanimous).
124 **D1/1.3** PTC Rule 71 Considerations, paras 9, 38 (unanimous), *citing, inter alia,* NCP Response to Directions, para. 19, NCP Reply to Directions, paras 20, 22-25.
125 **D1/1.3** PTC Rule 71 Considerations, paras 2, 5, 7 (unanimous) referencing the NCP's filings of 29 Dec 2008, Feb/Mar 2009, 7 Apr 2009.
126 ECCC Agreement, art. 6(4).
127 ECCC Law, art. 16.
128 IR 1(2), which provides in relevant part that "a reference in these IRs to the Co-Prosecutors includes both of them acting jointly and each of them acting individually, whether directly or through delegation".
129 **D381/45 & D382/43** Considerations, National Judges' Opinion, para. 123. *See further* paras 125, 128, 129.
130 Transcript: The First Session of the Third Term of Cambodian National Assembly, translated by Documentation Center of Cambodia, 4-5 Oct 2004 ("2004 National Assembly Transcript").
131 2004 National Assembly Transcript, p. 14.
132 *Contra* **D381/45 & D382/43** Considerations, National Judges' Opinion, para. 125.

named targets to investigate, correctly noting that it was the task of this Court to determine who would be indicted.[133] Prime Minister Hun Sen also recognised that it was for this Court's officials to determine independently which individuals fall within the ECCC's jurisdiction.[134]

65. The UN shared the same understanding. In 1999, the Group of Experts, whom the Secretary-General had assigned to explore options for justice in Cambodia, emphasised that fair and impartial justice requires independent decisions on whom to indict. They expressly refused to offer a numerical limit on prosecutions, but suggested it might reach around 20 to 30 individuals, including undefined categories of senior leaders and those at lower levels implicated in the most serious atrocities.[135] These recommendations formed the basis for the UN's negotiating position at the time. Moreover, David Scheffer, the former U.S. Ambassador-at-Large for War Crimes Issues, who was deeply involved in the negotiations,[136] has been clear that the UN's position was that "the prosecutor must retain the discretion of whom to indict".[137] He recalled the UN's interest in prosecuting senior DK leaders as well as other top CPK functionaries,[138] and confirmed that he "[knew] of no

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133 2004 National Assembly Transcript, pp. 30-31 (H.E. Sok An: "If we ask the question 'who shall be indicted?,' neither the [UN] nor the Task Force of the [RGC] 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*. Considering *senior leaders*, we refer to no more than 10 people, but we don't clearly state that they are the members of the Standing Committee. This is the task of the Co-Prosecutors to decide who are the senior leaders. [...] 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. <u>There is no specific amount of people in the second group to be indicted</u>" (underlined emphasis added)). *See also* pp. 16 (comparing the ECCC's person jurisdiction to the Special Court for Sierra Leone, which indicted 9 people), 33 ("I also have already stated that the rights to decide [who shall be indicted or prosecuted] are the rights of co-prosecutors and the Extraordinary Chambers.").

134 **D324.22** Letter dated 24 March 1999 from the Prime Minister of Cambodia to the Secretary-General, UN Doc. A/53/875 & S/1999/324 (Annex), 24 Mar 1999, paras 2-3 ("The [RGC] does not have any power to impose anything on the competent tribunal. [...] The issue of whether to try Ta Mok alone or any other Khmer Rouge leaders depends entirely on the competence of the tribunal. The [RGC] will not exert any influence on or interfere, in any form, in the normal proceedings of the judiciary, which will enjoy complete independence from the executive and legislative powers."). *See also* **D324.23** Statement made on 18 April 1999 by the Cabinet of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, UN Doc. S/1999/443 (Annex), 19 Apr 1999, para. 2 (Prime Minister Hun Sen affirming to U.S. Senator Kerry that the indictment and prosecution of other Khmer Rouge leaders are the sole competence of the court without orders from RGC); Kyodo News International, *Hun Sen regrets stating number of K. Rouge leaders to be tried*, 7 Jan 2000.

135 **D324.15** Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850 & S/1999/231 (Annex), 16 Mar 1999, paras 97, 109-110.

136 Case 001-**C5/13** Brief of Professor David Scheffer, International Law Expert, as *Amicus Curiae* in support of the Co-Investigating Judges, 3 Oct 2007, pp. 2-3.

137 D. Scheffer, *The Negotiating History of the ECCC's Personal Jurisdiction*, Cambodia Tribunal Monitor, 22 May 2011 ("Scheffer article"), p. 3.

138 Scheffer article, pp. 2-8.

concession by UN negotiators to interpret the personal jurisdiction language so as to limit the suspect pool to only five specific individuals."[139]

66. In sum, the ECCC negotiating history shows that the intent of both the RGC and the UN at the time of the ECCC Agreement was that "senior leaders" and "those who were most responsible" were open categories whose membership would only be determined by the ECCC Co-Prosecutors and Judges acting impartially and independently.[140] Indeed, this Chamber has confirmed that the decision as to whom to indict is exclusively a policy decision within the independent *discretion* of the Co-Prosecutors and CIJs.[141] It is clear neither party intended the interpretation adopted by the National PTC Judges, and the ICP did not violate the ECCC's founding documents by issuing the 3IS.

Any procedural defect was cured by the progression of proceedings

67. In any event, any procedural error was cured by the forwarding of the 3IS to the CIJs and by the actions of the parties, CIJs, and PTC during the judicial investigation.

68. In August 2009, having considered the Co-Prosecutors' Disagreement but unable to reach the requisite majority, the PTC unanimously agreed that the default position in IR 71(4)(c) mandated that the introductory submissions "shall" be forwarded to the CIJs pursuant to IR 53(1).[142] There was no supermajority decision on the NCP's arguments now adopted by the National PTC Judges.[143] Indeed, in the recent Case 004 Considerations, the PTC *unanimously* recognised that it had "directed" the ICP to forward the 3IS to the CIJs in 2009, and summarily dismissed Yim Tith's allegation that the 3IS was invalid.[144]

69. Even if, *arguendo*, the forwarding of the 3IS was not sufficient to cure the defect - despite the PTC's unanimous finding that it was - it has been cured by the failure of the parties or CIJs to seek annulment of the 3IS under IR 76[145] on the alleged basis that it arose from a

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139 Scheffer article, p. 10 (referring to Nuon Chea, Ieng Sary, Khieu Samphan, Ieng Thirith and Duch).

140 *See also* ECCC Agreement, art. 3(3); ECCC Law, art. 10 new; The Constitution of the Kingdom of Cambodia, adopted 21 Sep 1993 and amended 4 Mar 1999, arts 51, 128-130 (former arts 109-111); Charter of the Association of Southeast Asian Nations, 20 Nov 2007, preamble, art. 1(7).

141 Case 001-**F28** *Duch* AJ, paras 63, 74-75, 77-79, 80-81.

142 **D1/1.3** PTC Rule 71 Considerations, paras 15, 17, 26, 44-45, 53, Disposition (unanimous).

143 **D1/1.3** PTC Rule 71 Considerations, para. 44.

144 **D381/45 & D382/43** Considerations, paras 2, 69. The ICP also notes that twelve days later, as the basis for dismissing all Case 004 civil party applicants, the National PTC Judges held that the NCIJ's dismissal of the case against Yim Tith on the basis of personal jurisdiction was justified, making no mention of the preliminary investigation or case file being illegal. *See* **D384/7** Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 29 Sep 2021, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, paras 42-43. *See also* para. 2 (unanimous).

145 The ICP notes the PTC's unanimous finding that introductory and supplementary submissions are amenable to the IR 76 annulment process. *See* Case 003-**D120/3/1/8** Considerations on Meas Muth's Appeal Against

unilateral preliminary investigation,[146] thereby waiving any claims to annulment.[147] It is notable that at the end of the judicial investigation, when seeking dismissal of the cases against Im Chaem, Ao An, and Yim Tith in her Final Submissions, the NCP never followed through on the claim that the preliminary investigation had been unilateral and secretive.[148]

70. The CIJs positively confirmed the validity of the 3IS, and of Case 004, by conducting investigations into the facts alleged. They concluded those investigations together,[149] and issued closing orders in Case 004/1 (unanimously), Case 004/2 and now Case 004, before dismissing the remainder of Case 004.[150] When jointly dismissing the case against Im Chaem, the CIJs did not find that the preliminary investigation was conducted

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 ("PTC Supplementary Submission Considerations"), paras 31, 34, 36, *citing* CCCP, arts 253 and 280 (which describe the annulment of *parts of the proceedings*, not investigative actions in the narrow sense). *See also* **D257/1/8** Considerations on Ao An's Application to Seise the Pre-Trial Chamber With a View to Annulment of Investigative Action Concerning Forced Marriage, 17 May 2016, Opinion on Merit of the Application by Judges Baik and Beauvallet, para. 6. In any event, consistent with French law from the *Cour de Cassation*, an introductory submission may only be annulled on two grounds: (i) if it is found that the ICP did not "have reason to believe that crimes within the jurisdiction of the ECCC have been committed" (IR 53(1)), or (ii) if, in accordance with IR 53(3), the formalities in IR 53(1)(a)-(e) had not been complied with (*see* Case 003-**D120/3/1/8** PTC Supplementary Submission Considerations, Opinion of Judges Beauvallet and Baik Regarding the Merit of the Appeal, paras 14-19; Cass. Crim., No. 91-82.706, 27 Jun 1991; Cass. Crim., No. 98-82.622, 4 Aug 1998; Cass. Crim., No. 01-84.779, 30 Oct 2001; Cass. Crim., No. 20-82.267, 11 May 2021). There are no other procedural requirements specified in the IRs or Cambodian law for filing an introductory submission.

146 *See e.g.* Case 004/2-**D360** Ao An Indictment, para. 42 ("The alleged flaw in the 3IS was never mentioned as a reason for annulment").

147 IR 76(6) ("A party whose interests have been affected by an invalid investigative action may waive the right to request annulment, and thus regularise the proceedings."). *See also* CCCP, art. 254. Waiver, acquiescence and estoppel are all general principles of law. *See* Case 001-**F28** *Duch* AJ, para. 31, fn. 78; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, 12 Oct 1984, ICJ Reports 1984, paras 79, 130 (Applying "principles and rules of international law", the Court observed that "the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity"); *Argentine-Chile Frontier Case*, Report of the Court of Arbitration, 24 Nov 1966, [1966] UNRIAA, Vol. XVI, p. 164; *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), Award, 18 Mar 2015, Case no. 2011-03, Permanent Court of Arbitration, para. 435; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, 15 Jun 1962, ICJ Reports 1962, pp. 29-31 (holding that Thailand was precluded by its conduct from asserting that it did not accept the mapping of Preah Vihear Temple as within Cambodian territory). *See also* Separate Opinion of Vice-President Alfaro, pp. 39, 43 ("The principle [...] has been referred to by the terms of 'estoppel', 'preclusion', 'forclusion', 'acquiescence'. [...] I have no hesitation in asserting that this principle [...] is one of the general principles of law recognized by civilized nations").

148 Case 004/1-**D304/1** Final Submission Concerning Im Chaem Pursuant to Internal Rule 66, 27 Oct 2016, paras 2-11 (procedural history), 17, 27, 32, 35-37 (submissions); Case 004/2-**D351/4** Final Submission Concerning Ao An Pursuant to Internal Rule 66, 18 Aug 2017, paras 2-12 (procedural history), 28, 37-39 (submissions); **D378/1** Final Submission Concerning Yim Tith Pursuant to Internal Rule 66, 31 May 2018, paras 2-11 (procedural history), 24, 29, 33-35 (submissions). *See also* Case 004/2-**D360** Ao An Indictment, para. 42.

149 With regard to e.g. Case 004 against Yim Tith, *see* fn. 10, *supra*.

150 *See* fn. 4, *supra*; **D385** Order Terminating the Remainder of the Investigation in Case 004, 28 Jun 2019.

unilaterally.[151] Only when Ao An and Yim Tith alleged in their responses to the Co-Prosecutors' Final Submissions that the unilateral preliminary investigation rendered the 3IS invalid did the CIJs address the claim. Although the NCIJ found the 3IS arose from a unilateral preliminary investigation that violated ECCC legal procedures, this did *not* prevent him from evaluating and relying on the evidence in the case files to conclude that Ao An and Yim Tith did not fall within the ECCC's personal jurisdiction.[152] Nor did he initiate the annulment process. The ICIJ *dismissed* the argument, noting that no judge or party had alleged the 3IS was flawed since 2009, when it was allowed to proceed.[153]

71. During the Case 004 investigation, the National PTC Judges frequently upheld its validity. For example, they joined unanimous PTC decisions permitting the execution of a summons requiring Im Chaem to appear at the ECCC for charging,[154] and allowing evidence to be placed onto Case File 004.[155] They implicitly recognised that the facts underpinning Case 004 arose from an investigation conducted by both Co-Prosecutors,[156] and stated that "investigative procedures [were] *not* defective".[157] Not once during the entire judicial investigation did they allege the preliminary investigation was unlawful. Indeed, in Case 004/2, the PTC Judges all addressed the propriety of two closings orders and their respective merits in that case.[158] Had their view been that the preliminary investigation, 3IS and the resulting investigation were invalid, they would not have done so. Likewise,

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151 *See* Case 004/1-**D308** Im Chaem Closing Order; Case 004/1-**D308/3** Closing Order (Reasons), 10 Jul 2017 ("Im Chaem Closing Order (Reasons)").

152 *See* Case 004/2-**D359** Order Dismissing the Case Against Ao An, 16 Aug 2018, paras 14-15, 554; **D381** Dismissal Order, paras 44-45, 685-686.

153 Case 004/2-**D360** Ao An Indictment, paras 41-42 and *reiterated* in **D382** Indictment, para. 24 ("the Defence make a number of preliminary submissions that I consider to be settled matters").

154 **A122/6.1/3** Im Chaem Summons Decision, paras 7, 14. *See also* **D212/1/2/2** PTC Summons Validity Decision, para. 7.

155 *E.g.* **D347/2/1/4** Decision on Yim Tith's Appeal of the Decision on Request to Place Materials on Case File 004, 25 Oct 2017 (from Cases 002 and 003); **D360/1/1/6** Decision on Yim Tith's Application to Annul the Placement of Case 002 Oral Testimonies Onto Case File 004, 26 Oct 2017.

156 *See* para. 3 of their appended opinions in: **D5/2/4/3** Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, 14 Feb 2012; **D5/1/4/2** Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Seng Chan Theary, 28 Feb 2012.

157 **D263/1/5** Considerations on Ao An's Application for Annulment of Investigative Action Related to Wat Ta Meak, 15 Dec 2016, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy Regarding the Merit of Application, paras 41-42 (stating investigation acts were void in the absence of personal jurisdiction) (emphasis added). *See also* **D345/1/6** Considerations on Yim Tith's Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 11 Aug 2017, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, paras 17-18; **D344/1/6** Considerations on Yim Tith's Application to Annul the Investigation into Forced Marriage in Sangkae District (Sector 1), 25 Jul 2017, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, paras 15-17.

158 Case 004/2-**D359/24 & D360/33** Case 004/2 PTC Considerations, paras 88-124 (unanimous), 170-302 (National Judges' Opinion), paras 304-682 (International Judges' Opinion).

in Case 004/1, the CIJs issued a joint decision on the merits of the investigation and the PTC issued its considerations on the appeal of those merits without finding the 3IS or the Case 004 investigation invalid.[159]

VI. CONCLUSION AND RELIEF REQUESTED

72. ECCC law mandates that Case 004 be sent to trial on the basis of the default position, which was triggered when the Indictment was not overturned by at least a supermajority. The National PTC Judges' erroneous finding that Case File 004 is illegal does not defeat implementation of the default position, as any alleged errors were cured by subsequent proceedings. The PTC's failure to take the final step to properly conclude the pre-trial phase by sending Case 004 to trial constitutes an error of law that requires SCC intervention.

73. The PTC's finding that the issuance of two closing orders was illegal does not prevent the case from proceeding to trial. The finding itself erroneously disregards the ECCC's unique legal framework that not only allows but envisions the issuance of two closing orders where there are irreconcilable differences between CIJs with equal status. Even if the PTC's finding is accepted, the CIJs' illegal issuance constitutes a procedural error that the PTC cured, and which has caused no gross unfairness, no material prejudice, and no abuse of process that would warrant the termination of Case 004 by the SCC. Such a remedy would be entirely disproportionate to the alleged error and would disregard the interests of the victims and the entire global community to have such serious crimes publicly adjudicated before a fair and impartial trier of fact.

74. For the foregoing reasons, the International Co-Prosecutor requests that the Supreme Court Chamber order that Case 004 be forwarded to the Trial Chamber for trial.

Respectfully submitted,

Date	Name	Place	Signature
20 October 2021	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh	

[159] Case 004/1-**D308/3** Im Chaem Closing Order (Reasons); Case 004/1-**D308/3/1/20** Case 004/1 PTC Considerations.