

Annex 1: Civil Party Lawyers' Case 004 Appeal to the Closing Order (English) ~~D381/20~~

**BEFORE THE PRE-TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No.:** 004/07-09-2009-ECCC/OCIJ (PTC61) **Party Filing:** Co-Lawyers for Civil Parties

**Filed to:** Pre-Trial Chamber

**Original Language:** English

**Date of Document:** 1 December 2019

**CLASSIFICATION**

**Classification of the Document**

**Suggested by the Filing Party:** Public

**Classification by PTC:**

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

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**CIVIL PARTY CO-LAWYERS' APPEAL AGAINST THE NATIONAL CO-  
INVESTIGATING JUDGE'S CLOSING ORDER IN CASE 004**

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**Filed by:****Co-Lawyers for Civil Parties**

CHET Vanly

HONG Kimsuon

LOR Chunthy

SAM Sokong

SIN Soworn

Emmanuel JACOMY

Martine JACQUIN

Daniel MCLAUGHLIN

Nushin SARKARATI

**Before:****Pre-Trial Chamber**

Judge PRAK Kimsan

Judge Olivier BEAUVALLET

Judge NEY Thol

Judge BAIK Kang Jin

Judge HUOT Vuthy

**Distribution to:****Co-Investigating Judges**

YOU Bunleng

Michael BOHLANDER

**Co-Prosecutors**

CHEA Leang

Brenda HOLLIS

**Co-Lawyers for Yim Tith**

SO Mosseny

Suzana TOMANOVIĆ

**Co-Lawyers for Civil Parties**

KIM Mengkhy

TY Srinna

VEN Pov

Laure DESFORGE

Isabelle DURAND

Lyma NGUYEN

1. The Civil Party Co-Lawyers hereby respectfully submit their *Appeal Against the National Co-Investigating Judge's Closing Order in Case 004* to the Pre-Trial Chamber ("PTC").

### PROCEDURAL HISTORY

2. On 28 June 2019, the Co-Investigating Judges issued two separate and conflicting Closing Orders in Case 004. The International Co-Investigating Judge issued a Closing Order indicting Yim Tith for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code and committing him for trial ("ICIJ Closing Order").<sup>1</sup> The National Co-Investigating Judge issued a Closing Order dismissing all charges against Yim Tith, finding that he does not fall within the personal jurisdiction of the ECCC ("NCIJ Closing Order").<sup>2</sup>
3. On 10 September 2019, the International Co-Prosecutor filed her *Notice of Appeal Against the Order Dismissing the Case Against Yim Tith*.<sup>3</sup> On 19 September 2019, the Civil Parties filed their *Notice of Appeal Against the Order Dismissing the Case Against Yim Tith*.<sup>4</sup> On 30 October 2019, the Pre-Trial Chamber granted the parties 45 days from the notification of the corrected English translation of the NCIJ Closing Order on 16 October 2019 to file their appeals.<sup>5</sup> This appeal is timely filed and conforms to the page limits set out by the PTC.

### STANDARD OF REVIEW

4. The NCIJ Closing Order's conclusion on jurisdiction is reviewable by the PTC.<sup>6</sup> On appeal, errors of law are reviewed de novo and errors of fact are reviewed under a standard of reasonableness.<sup>7</sup>

### SUBMISSION

5. The NCIJ erred in law and fact in concluding that Yim Tith does not fall within the ECCC's jurisdiction, despite finding that he held positions senior to other individuals

<sup>1</sup> Case File No. 004, **D382**, Closing Order, 28 June 2019.

<sup>2</sup> Case File No. 004, **D381**, Order Dismissing the Case Against Yim Tith, 28 June 2019.

<sup>3</sup> Case File No. 004, **D381/4**, International Co-Prosecutor Notice of Appeal Against the Order Dismissing the Case Against Yim Tith (D381), 10 September 2019.

<sup>4</sup> Case File No. 004, **D381/11**, Notice of Appeal Against the Order Dismissing the Case Against Yim Tith, dated 19 September 2019, received 23 September 2019.

<sup>5</sup> Case File No. 004, **D381/16**, Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004, 30 October 2019.

<sup>6</sup> Case File No. 004/1, **D308/3/1/20**, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 29 June 2018, ¶ 20.

<sup>7</sup> Case File No. 002, **D427/1/30**, Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, ¶ 113.

over whom the ECCC has exercised jurisdiction.<sup>8</sup> The PTC should correct the NCIJ Closing Order and find that the ECCC can exercise jurisdiction over Yim Tith.

6. In the alternative, if the PTC is unable to reach a supermajority decision on the jurisdictional issue, it should advance Yim Tith's indictment to the Trial Chamber. A plain reading of the Agreement establishing the ECCC, interpreted in light of its object and purpose, makes clear that an investigation "shall proceed" unless a supermajority explicitly decides otherwise. Cambodian law, including the international treaty obligations it directly incorporates, likewise counsels for Yim Tith's indictment to advance to trial in these circumstances.

**I. The NCIJ Closing Order Erred in Concluding that the ECCC May Not Exercise Jurisdiction Over Yim Tith.**

7. The NCIJ Closing Order dismissed the case against Yim Tith for lack of jurisdiction on the grounds that he was neither a senior leader nor one of those most responsible for the Khmer Rouge's crimes. Notwithstanding its finding that Yim Tith's position was senior to that of Kaing Guek Eav *alias* Duch (the Case 001 defendant over whom the ECCC clearly exercised jurisdiction), the NCIJ Closing Order concluded that Yim Tith could not be characterized as "one of those most responsible" given that he did not directly participate in the perpetration of crimes at the sites he controlled.<sup>9</sup> The NCIJ's conclusion was in error.
8. ECCC jurisprudence establishes a two-pronged test to determine those "most responsible for crimes committed during the Khmer Rouge regime" that examines both the severity of the alleged crimes and the level of responsibility of the accused.<sup>10</sup> The severity of the alleged crimes is determined by the number of victims, the geographic and temporal breadth of the crimes, and the number of particular incidents.<sup>11</sup> The accused's level of responsibility takes into account the degree of participation of the accused in the crimes, including in policy-making, the hierarchical position of the

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<sup>8</sup> See notes 13-18, *infra*.

<sup>9</sup> Case File No. 004, **D381**, Order Dismissing the Case Against Yim Tith, 28 June 2019, ¶¶ 682-683.

<sup>10</sup> Case File No. 001, **F28**, Appeal Judgement, 3 February 2012, ¶ 80; Case File No. 001, **E188**, Judgement, 26 July 2010, ¶ 22; Case File No. 004/1, **D308/3**, Closing Order (Reasons), 10 July 2017, ¶¶ 37-41.

<sup>11</sup> Case File No. 004/1, **D308/3**, Closing Order (Reasons), 10 July 2017, ¶ 317; Case File No. 001, **E188**, Judgement, 26 July 2010, ¶ 22.

accused, including the number of subordinates and superiors, and the individual's effective authority.<sup>12</sup>

9. The NCIJ Closing Order's own findings are sufficient to establish that Yim Tith is among those "most responsible for crimes committed during the Khmer Rouge regime" and thus within the court's jurisdiction. First, Yim Tith's crimes were sufficiently severe: the National Co-Investigating Judge acknowledged that 39 crime sites under investigation—including labor sites, prisons, execution sites, and forced marriage sites—were under Yim Tith's direct and/or indirect control.<sup>13</sup> Within 24 of these sites connected to Yim Tith, approximately 53,050 victims were killed or died.<sup>14</sup> Further, Yim Tith's crimes spanned a vast geographical region (the Southwest and Northwest Zones) and over an extended period of time (the NCIJ Closing Order details the various positions of authority held by Yim Tith between 1976 and 1979, namely secretary of Kiri Vong district, secretary of Sector 13 of the Southwest Zone, Northwest Zone Sector 1 Secretary, and Zone Committee member).<sup>15</sup> Second, Yim Tith's level of responsibility was sufficiently high: at all relevant times his hierarchical positions exceeded those of Duch,<sup>16</sup> the Case 001 defendant who was convicted for his role in directing one of the Khmer Rouge's security centers, where upwards of 12,273 died.<sup>17</sup> Indeed, the NCIJ Closing Order found that Yim Tith visited crime sites and perpetuated the Khmer Rouge's violent policies.<sup>18</sup>
10. Additional findings in the ICIJ Closing Order confirm that Yim Tith is among those "most responsible" for crimes committed during the Khmer Rouge regime.<sup>19</sup> The ICIJ Closing Order highlights Yim Tith's direct involvement in the genocide of the Khmer Krom, mass imprisonment, and forced marriages carried out by the Khmer Rouge.<sup>20</sup> It

<sup>12</sup> Case File No. 001, **E188**, Judgement, 26 July 2010, ¶ 22; Case File No. 004/1, **D308/3**, Closing Order (Reasons), 10 July 2017, ¶¶ 37-41.

<sup>13</sup> Case File No. 004, **D381**, Order Dismissing the Case Against Yim Tith, 28 June 2019, ¶¶ 673, 675.

<sup>14</sup> *Id.* at ¶¶ 589-90.

<sup>15</sup> *Id.* at ¶¶ 666-680.

<sup>16</sup> *Id.* at ¶ 682.

<sup>17</sup> Case File No. 001, **E188**, Judgement, 26 July 2010, ¶ 208. *See also* Case File No. 001, **D99**, Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2008, ¶ 44 ("Duch stated that in many cases, he was given instructions concerning the extraction and content of specific confessions.")

<sup>18</sup> Case File No. 004, **D381**, Order Dismissing the Case Against Yim Tith, 28 June 2019, ¶¶ 666-683.

<sup>19</sup> Case File No. 004, **D382**, Closing Order, 28 June 2019, ¶¶ 992-999. The ICIJ Closing Order did not adopt a final position as to whether Yim Tith also qualified as a "senior leader", though it noted that "[a]s far as his official rank is concerned, he rose very quickly from the position of a deputy district secretary in the Southwest Zone to that of a deputy zone secretary and, towards the end of DK, possibly even full zone secretary in the Northwest Zone. . . . His authority under CPK law thus stretched very far, both geographically and hierarchically." *Id.* at ¶ 993.

<sup>20</sup> Case File No. 004, **D382**, Closing Order, 28 June 2019, ¶¶ 996-98.

also identifies Yim Tith as a major authority in the Southwest and Northwest Zones—the “*de facto* second-in-command of Ta Mok”<sup>21</sup>—placing Yim Tith squarely within the jurisdiction of the ECCC.

11. The Civil Parties respectfully request that the PTC correct the NCIJ Closing Order’s erroneous conclusion that Yim Tith was not among those “most responsible” and instead hold that he is subject to the jurisdiction of the ECCC.
12. In the alternative, should the PTC fail to reach a supermajority decision resolving the split Closing Orders, the ECCC’s legal framework dictates that the ICIJ Closing Order’s indictment of Yim Tith must proceed to the Trial Chamber.

## **II. In the Absence of a Supermajority Decision by the PTC Resolving the Split Between the Closing Orders, the Indictment of Yim Tith Should Proceed to Trial**

### **1. The ECCC Agreement Must Be Interpreted in Accordance with Principles of Treaty Interpretation Under International Law as Codified in the Vienna Convention on the Law of Treaties**

13. Under the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties, (“VCLT”)—generally applicable to all treaties and specifically incorporated by Article 2(2) of the ECCC Agreement—a treaty must be interpreted based on its plain meaning taken in the context of its object and purpose.<sup>22</sup> Article 31(1) of VCLT requires that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to [its] terms [] in their context and in the light of its object and purpose.”<sup>23</sup> A supplementary means of interpretation is available under Article 32, such that the preparatory work of the treaty and its context can be referenced to confirm the meaning of terms where an interpretation under Article 31 results in an “ambiguous or obscure” meaning or a “manifestly absurd or unreasonable” result.<sup>24</sup> In addition, State practice, including any subsequent agreement between the parties or any subsequent practice in the treaty’s application, is an authentic method of treaty interpretation and, where present, could be determinative.<sup>25</sup>

<sup>21</sup> Case File No. 004, **D382**, Closing Order, 28 June 2019, ¶¶ 994-95.

<sup>22</sup> Vienna Convention on the Law of Treaties, art. 31, 23 May 1969, 1155 U.N.T.S. 331 (hereinafter VCLT).

<sup>23</sup> *Id.* art. 31(1).

<sup>24</sup> *Id.* art. 32.

<sup>25</sup> *Id.* arts. 31(3)(a), 31(3)(b).

A. The Plain Meaning of the ECCC Agreement Indicates That the Indictment Against Yim Tith Should Proceed to Trial

14. The ECCC Agreement envisions that disagreements may arise between the Co-Prosecutors, the Co-Investigating Judges and the judges of the PTC at various stages in the lifecycle of a case; for each of these scenarios, the text of the ECCC Agreement lays out procedures that clearly favor the continuation of an investigation or prosecution in the absence of a supermajority decision to the contrary.
15. Article 7 of the ECCC Agreement details the procedural rule that governs disagreements within the PTC. According to the plain language of Article 7: “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**.” (emphasis added). Unless there is a supermajority decision dismissing the ICIJ Closing Order, the plain meaning of Article 7 thus requires that Yim Tith’s indictment proceed to the next phase of the proceedings, namely trial.
16. Other provisions of the ECCC Agreement similarly reflect the principle that an investigation or prosecution should continue absent a supermajority decision to the contrary. For example, Article 5(4) states that if “the [C]o-[I]nvestigating [J]udges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests . . . that the difference . . . be settled in accordance with Article 7.” The same language is used in Article 6(4) to set out the dispute resolution process in the case of disagreements between the Co-Prosecutors.
17. Likewise, the text of the ECCC Law, which forms an integral part of the ECCC Agreement, calls for the continuation of an investigation or prosecution unless a supermajority decision holds otherwise. Article 23 *new* of the ECCC Law states that resolution of a disagreement between Co-Investigating Judges requires a “decision of the Pre-Trial Chamber” with “the affirmative vote of at least four judges,” and that “[i]f there is no majority as required for a decision, the investigation shall proceed.” According to Article 20 *new*, the resolution of a disagreement between the Co-Prosecutors similarly requires a supermajority of four votes in the PTC, in the absence of which “the prosecution shall proceed.”
18. Here, in keeping with the procedures detailed in the ECCC Agreement, the International Co-Prosecutor filed Introductory and Supplemental Submissions alleging that Yim Tith

is subject to the jurisdiction of the ECCC.<sup>26</sup> The Co-Investigating Judges carried out an investigation on the basis of these Submissions, which resulted in their issuing divergent findings on, among others, whether Yim Tith is subject to the jurisdiction of the ECCC. The plain language of the ECCC Agreement, which is repeated in the ECCC Law, makes clear that the ICIJ Closing Order indicting Yim Tith should continue to the Trial Chamber absent a supermajority decision to the contrary by the PTC. Any other outcome would contravene the plain language of the ECCC Agreement, which Cambodia and the United Nations formally agreed to.

B. The Failure to Proceed to Trial Would Lead to an Absurd Result,  
Invalidating the Yim Tith Indictment in Contravention of the Object and  
Purpose of the ECCC Agreement

19. The VCLT requires that the text of the ECCC Agreement be interpreted in light of its “object and purpose,”<sup>27</sup> which both further confirm that the Yim Tith indictment should proceed to trial absent a supermajority decision to the contrary.
20. First, the ECCC Agreement makes clear that a principal object and purpose of the ECCC is bringing suspects to trial. Article 1 of the ECCC Agreement states that “[t]he purpose of the . . . Agreement is to regulate the cooperation [between the U.N. and Cambodia] in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes” committed during the Khmer Rouge period.<sup>28</sup> Article 11 of the ECCC Agreement, which prohibits the Cambodian government from requesting “an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement,” further underscores the importance that the drafters of the ECCC Agreement placed on effective prosecutions.<sup>29</sup>

<sup>26</sup> Case File No. 004, **D1**, Co-Prosecutors’ Third Introductory Submission, dated 20 November 2008, received 28 November 2008; Case File No. 004, **D65**, Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, dated 18 July 2011, filed 25 November 2016.

<sup>27</sup> VCLT, *supra* note 22, arts. 31-32.

<sup>28</sup> 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, art. 1, 6 June 2003, [hereinafter ECCC Agreement].

<sup>29</sup> *See id.* art. 11; *see also id.* Preamble (“**WHEREAS** the Cambodian authorities have requested assistance from the United Nations **in bringing to trial** senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979; **WHEREAS** prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations (hereinafter, “the Secretary-General”) and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia **for the prosecution of crimes** committed during the period of Democratic Kampuchea[.]”) (emphasis added).



The ECCC Law similarly highlights that a principal object and purpose of the work of the ECCC is bringing suspects to trial.<sup>30</sup> Procedurally stalling the Yim Tith indictment at the pre-trial stage absent a definitive decision to dismiss the indictment clearly contravenes this object and purpose.

21. Second, the ECCC Agreement identifies access to justice for victims as another primary object and purpose of the ECCC. The preamble to the ECCC Agreement affirms the ECCC's commitment to providing redress to victims and to the community at large, emphasizing that a purpose of the ECCC is to seek accountability for the crimes committed during the Khmer Rouge period, and that the tribunal should be guided by the "pursuit of justice and national reconciliation, stability, peace and security."<sup>31</sup> In particular, the preamble quotes a United Nations ("U.N.") General Assembly resolution recalling that "the serious violations of Cambodian and international humanitarian law during the period of Democratic Kampuchea . . . continue to be matters of vitally important concern to the international community as a whole" and recognizing "the legitimate concern of the Government and the people of Cambodia in pursuit of justice and national reconciliation, stability, peace and security."<sup>32</sup>
22. In the absence of a supermajority decision to the contrary, advancing the Yim Tith indictment to trial would thus be consonant with the text of the ECCC Agreement, as well as its twin goals of bringing suspects to trial and providing justice to victims. Nor would doing so infringe on the rights of the accused as set out in Article 14 and 15 of the 1966 International Covenant on Civil and Political Rights ("ICCPR"), namely the rights to equality before the law, to a fair trial, to the presumption of innocence, to a fair and public hearing by an impartial tribunal, and to freedom from ex post facto application of the law.<sup>33</sup> Allowing the case to move forward in the absence of a supermajority would not implicate any of the above fair trial rights: such a decision goes purely to the jurisdiction of the court and does not intimate the suspect's innocence

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<sup>30</sup> See, e.g., Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, arts. 1 and 40 *new* [hereinafter ECCC Law].

<sup>31</sup> See ECCC Agreement, Preamble.

<sup>32</sup> *Id.*

<sup>33</sup> See ECCC Law, art. 33 *new* (Requiring the Extraordinary Chambers to "ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level."); International Covenant on Civil and Political Rights, arts. 14, 15, 19 December 1966, 999 U.N.T.S. 171.

or guilt, or otherwise engage the merits of the case in any way. Notably, as per the ECCC framework, Yim Tith could only be convicted of the crimes in the ICIJ Closing Order by a supermajority decision of the Trial Chamber (or ultimately of the Supreme Court Chamber). In contrast, the failure to advance an otherwise valid indictment to the Trial Chamber would entirely extinguish the victims' rights to seek justice.

C. Supplementary Means of Interpretation Under Article 32 of the VCLT  
Further Support Having Yim Tith's Indictment Proceed to Trial

a. The Negotiating History of the ECCC

23. The preparatory work of the ECCC, which is a supplementary means of interpretation under Article 32 of the VCLT, reflects that the ECCC was founded with the help of the international community to prosecute the perpetrators of Khmer Rouge-era crimes, along with providing redress for their victims. The history of the Khmer Rouge underscores the importance to victims and the Cambodian community of a public condemnation of the atrocities in a court of law. From 17 April 1975 to 7 January 1979, at least 1.7 million people died from execution, torture, starvation, and forced labor, occurring within the overall four-year collectivization plan that included other human rights violations such as family separation, forced marriages, and child exploitation.<sup>34</sup> In addition to the millions of victims who remained in Cambodia, following the country's fall to the Khmer Rouge regime, approximately 600,000 Cambodians fled the country,<sup>35</sup> many having suffered severe trauma without judicial recourse. Cambodian refugees from the Khmer Rouge period resettled in numerous countries throughout the world, among them: the United States (152,748), Vietnam (150,000), France (38,598), Canada (21,489), Australia (17,605), Malaysia (10,000), New Zealand (5,995), and Switzerland (1,717).<sup>36</sup>
24. Acknowledging a mounting need for accountability and justice, then co-Prime Ministers of Cambodia wrote to U.N. Secretary-General Kofi Annan in 1997 for

<sup>34</sup> *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, (n.d.), <https://www.eccc.gov.kh/en/introduction-eccc>; see also DOCUMENTATION CENTER OF CAMBODIA, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979), p. 41-47, 2007 (DC-Cam).

<sup>35</sup> Stéphanie Nann, *Les Cambodgiens en France, entre l'image et la réalité*, MIGRATIONS SOCIÉTÉ 19, p. 152, 2007.

<sup>36</sup> The numbers in parentheses indicate the total number of Khmer Rouge-era refugees resettled in each country. Jonathan H.X. Lee, *Introduction: Cambodia, Lao, and Hmong Diaspora in the United States*, in Yuk Wah Chan et al. eds., *THE AGE OF ASIAN MIGRATION: CONTINUITY, DIVERSITY, AND SUSCEPTIBILITY*, VOLUME 1, p. 245, 2014 (Cambridge Scholars Publishing).

assistance, “[hoping] that the United Nations and the international community [could] assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion.”<sup>37</sup> With the civil war having recently ended, the co-Prime Ministers recognized that “Cambodia [did] not have the resources or expertise to conduct this very important procedure” of “bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.”<sup>38</sup>

25. Over the following years, Cambodia and the international community collaborated to set up a new tribunal mechanism. The King of Cambodia echoed the co-Prime Ministers by voicing support for an internationally-assisted tribunal, as the crimes in Cambodia “concerns the conscience of the world community.”<sup>39</sup> The U.N. Group of Experts on Cambodia likewise found widespread support among the population: “accountability first and foremost [was] a statement to the millions of Cambodian victims and their relatives and friends that their cries have at last been heard, providing the survivors with a sense of justice and some closure on the past.”<sup>40</sup> The Group of Experts reported that “from [their] consultations with Cambodians in and out of Government, [they] heard an unambiguous demand for trials. All spoke of the importance of justice for peace, stability and national reconciliation.”<sup>41</sup> None of the Cambodians consulted in the report “suggested that peace and trials were irreconcilable.”<sup>42</sup>
26. For its part, the U.N. supported and encouraged a jurisdictional framework designed to be comprehensive. Writing to the General Assembly and Security Council, Secretary-General Annan expressed that “the trial of a single Khmer Rouge military leader which would leave the entire political leadership unpunished would not serve the cause of justice and accountability.”<sup>43</sup> In its research of the jurisdictional standard ultimately adopted—senior leaders and those “most responsible”—the Group of Experts determined that “the number of persons to be tried might well be in the range of some

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<sup>37</sup> Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, 24 June 1997, U.N. Doc. A/51/930.

<sup>38</sup> *Id.*

<sup>39</sup> U.N. Secretary-General, *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, Annex ¶ 93, 16 March 1999, U.N. Doc. A/53/850-S/1999/231.

<sup>40</sup> *Id.* at Annex ¶2.

<sup>41</sup> *Id.* at Annex ¶94.

<sup>42</sup> *Id.* at Annex ¶100.

<sup>43</sup> *Id.* at p. 3.

20 to 30.”<sup>44</sup> The Group likewise advocated for what has become a foundational element of the ECCC: dedicated public attendance in the proceedings, because the “trials of the Khmer Rouge leaders must observe the maxim that justice not only be done, but be seen to be done.”<sup>45</sup> As such, the negotiating history of the ECCC invariably reflects widespread calls for healing, acknowledgement, and reconciliation through trials in pursuit of international justice.

b. Subsequent Practice Following the Creation of the ECCC

27. The adoption of the ECCC Internal Rules after the creation of the ECCC, which are now in their ninth version, can be relied upon as an expression of subsequent practice within the meaning of the VCLT. These Internal Rules reflect a continued commitment to allowing investigations and prosecutions to move forward absent a supermajority decision to the contrary, as well as an acknowledgment that the ECCC provisions should be interpreted to provide meaningful participation for the victims.
28. First, various procedural provisions within the Internal Rules reflect overarching principles that favor the advancement of tribunal proceedings as a default presumption. As in the ECCC Law, Internal Rule 72(2) establishes that in the event of disagreement either Co-Investigating Judge may submit the matter for review by the PTC.<sup>46</sup> If the PTC subsequently fails to achieve the majority to reach a decision, “the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand.”<sup>47</sup> For other pre-trial appeals, Rule 77 likewise requires an affirmative vote to halt the *status quo* continuation of any challenged proceeding. By default, in the absence of the required majority, any “order or investigative action other than an indictment . . . shall stand.”<sup>48</sup> Similarly, in the absence of a supermajority decision to the contrary, Rule 77 provides “[a]s 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.”<sup>49</sup>
29. Second, Internal Rule 21 sets out the fundamental principles of the ECCC, including that the core ECCC documents must always be interpreted to safeguard the interests

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<sup>44</sup> *Id.* at Annex ¶ 110.

<sup>45</sup> *Id.* at Annex ¶ 134.

<sup>46</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 72(2), 16 January 2015.

<sup>47</sup> *Id.* at Rule 72(4)(d).

<sup>48</sup> *Id.* at Rule 77(13)(a).

<sup>49</sup> *Id.* at Rule 77(13)(b).

of the victims and to ensure that their rights are respected throughout the proceedings.<sup>50</sup> As the PTC recognized in Case 002, “the [ECCC] Agreement provides that one of the fundamental principles for the establishment of [the] ECCC is ‘national reconciliation.’”<sup>51</sup> This guides the Judges and Chambers of [the] ECCC to not only seek the truth about what happened in Cambodia, but also to pay special attention and assure a meaningful participation for the victims of the crimes committed as part of its pursuit for national reconciliation.<sup>52</sup> Likewise, Internal Rule 29 similarly enshrines the need for the ECCC to consider the rights and needs of victims, mandating that the ECCC “ensure the protection of [v]ictims who participate in the proceedings,” and that the officers of the Court “take account of the needs of victims” when fulfilling their duties.<sup>53</sup> In pursuit of these aims, the ECCC provides a unique mechanism for victim participation—the Civil Party action—whose “purpose before the ECCC is to . . . [s]eek collective and moral reparations.”<sup>54</sup> This language, taken together, guides the ECCC to pay special attention to and assure the meaningful participation of victims and their right to seek justice as part of the broader national pursuit of truth and reconciliation. These articulated aspirations would ring hollow however, if an otherwise valid indictment does not proceed to trial because of procedural deadlock before the PTC.

## **2. Cambodian Law, Including the International Law It Incorporates Via Its Constitution, Supports Permitting an Existing Indictment to Proceed to Trial**

### **A. Cambodian Law Favors Justice for Victims and the Continuation of Proceedings in the Absence of a Contrary Ruling by a Superior Authority.**

30. Cambodian domestic law, on which the governing rules of the ECCC draw heavily, favors justice for victims and the continuation of proceedings in the absence of a contrary ruling. In the opening remarks to the Criminal Procedure Code, Minister of Justice Ang Vong Vathana states that they believe the Code will become an “important instrument” for promoting “access to justice in the Kingdom of Cambodia.”<sup>55</sup> Indeed,

<sup>50</sup> *Id.* at Rule 21; Case File No. 002, **D404/2/4**, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, ¶ 61.

<sup>51</sup> Case File No. 002, **D404/2/4**, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, ¶ 61.

<sup>52</sup> *Id.*

<sup>53</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 29(2), 16 January 2015.

<sup>54</sup> *Id.* Rule 23(1)(b) *new*.

<sup>55</sup> Criminal Procedure Code of Kingdom of Cambodia, Remarks of His Excellency Ang Vong Vathana, 2007.

this reference to access to justice is the last line of these opening remarks, thereby framing the entirety of the Code's content.

31. The content of the Code itself also supports allowing Yim Tith's case to move forward, especially in its articulation of a presumption of continuation. For example, Article 255 of the Cambodian Criminal Procedure Code directs that, "[i]f the Investigation Chamber receives a request for nullification, the investigating judge can continue his/her investigation, unless it is decided otherwise by the president of the Investigation Chamber."<sup>56</sup> Likewise, Article 275 asserts that, "[i]n case there is an appeal against any warrant other than a settlement warrant, the investigating judge can continue his/her investigation unless there is a decision made otherwise to the contrary by the president of the Investigation Chamber."<sup>57</sup> These Articles embody the same idea that is evident in the ECCC Law and the Internal Rules—in the absence of a superior authority affirmatively halting proceedings, the presumption is in favor of continuation.

B. International Obligations, including the Duty to Prosecute and Victims' Right to a Remedy, are Part of Cambodian Law and Support Moving the Indictment Forward

32. Cambodian law incorporates international law. Therefore, the duty to prosecute and the right to a remedy for victims established in international treaty and custom are a duty and a right under Cambodian law. Insofar as the ECCC is a Cambodian institution, it is constrained by these obligations.<sup>58</sup>
33. International law is binding in Cambodia. Article 31 of the Cambodian Constitution incorporates the obligation to respect human rights as stipulated in international law sources into domestic law.<sup>59</sup> In 2007, the Cambodian Constitutional Council affirmed that international law recognized by Cambodia is, indeed, law in force in that country and shall be taken into account by the country's judges.<sup>60</sup> Even if considered a

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<sup>56</sup> *Id.* at art. 255.

<sup>57</sup> *Id.* at art. 275.

<sup>58</sup> Separately, the Vienna Convention on the Law of Treaties reiterates the need to take into account "any relevant rules of international law applicable in the relations between the parties." VCLT, *supra* note 22, art. 31(3)(c).

<sup>59</sup> The Constitution of the Kingdom of Cambodia, art. 31, 21 September 1993, as amended through 2008.

<sup>60</sup> Decision No. 092/003/2007 CC.D, Constitutional Council, 10 July 2007 (Cambodia) ("The term 'Laws' as above referred to means the national laws, including the Constitution which is the supreme law, all the laws that remain in force, and the international laws already recognized by the Kingdom of Cambodia, in particular the Convention on the Children's Rights.").

complementary source of law here, international law comports with and reinforces the relevant norms and procedural rules established in Cambodian domestic law.<sup>61</sup>

34. Sources of international law to which Cambodia is bound—treaties, state practice, and international jurisprudence—oblige States to prosecute crimes of a certain gravity. Multilateral treaties to which Cambodia is a party contain within them either an explicit or implied duty to prosecute perpetrators of grave offenses.<sup>62</sup> Soft law sources and international courts have reiterated the prohibition against impunity for severe human rights violations. The Universal Declaration of Human Rights proclaims, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>63</sup> A 2006

<sup>61</sup> BORA MEAS, *The 1993 Cambodian Constitution and International Law: A Normative Perspective*, in Peng Hor et al. eds., *CAMBODIAN CONSTITUTIONAL LAW*, p. 81, 2016 (Konrad-Adenauer-Stiftung, Phnom Penh). (suggesting that the proper place of international law within Cambodian law is complementary to domestic law, at times superseding the latter, while at other times taking precedence, depending on the norm in question).

<sup>62</sup> See generally Thoris Ingadottir, *The ICJ Armed Activity Case — Reflections on States’ Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions*, p. 591-95, 2010, 78 *NORDIC J. INT’L L.* 581 (describing the international obligation to prosecute grave breaches); see also Rome Statute of the International Criminal Court, Preamble, 17 July 1998, 2187 U.N.T.S. 90 (Cambodia ratified on 11 April 2002) (“affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation[.]”); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 49, 12 August 1949, 75 U.N.T.S. 31 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [listed in Article 50], and shall bring such persons, regardless of their nationality, before its own courts.”) (Cambodia accession on 8 June 1959); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 50, 12 August 1949, 75 U.N.T.S. 85 (Cambodia accession on 8 June 1959) (same for breaches in its Article 51); Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 129, 12 August 1949, 75 U.N.T.S. 135 (same for breaches listed in its Article 130) (Cambodia accession on 8 June 1959); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 146, 12 August 1949, 75 U.N.T.S. 287 (same for breaches listed in its Article 147) (Cambodia accession on 8 June 1959); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5, 7.1, 10 December 1984, 1465 U.N.T.S. 85 (Article 5: “Each State Party shall take measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: [listing territorial or national links to the offender, the offense, or the victim]; (Article 7.1: “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”) (Cambodia accession on 15 October 1992); Convention on the Prevention and Punishment of the Crime of Genocide, arts. IV, VI, 9 December 1948, 78 U.N.T.S. 277 (Article IV: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”) (Article VI: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction[.]”) (Cambodia accession on 14 October 1950); International Covenant on Civil and Political Rights, art. 2(3)(a), 19 December 1966, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”) (Cambodia accession on 26 May 1992).

<sup>63</sup> Universal Declaration of Human Rights, art. 8, 10 December 1948, G.A. Res. 217 (III), U.N. Doc. A/810 at 71.

U.N. General Assembly resolution establishing guidelines for protecting the right to a remedy affirms the duty to prosecute three separate times.<sup>64</sup> The duty has been asserted by States before the International Court of Justice (ICJ),<sup>65</sup> and the ICJ has encouraged States to cooperate with criminal tribunals and to subject perpetrators to domestic proceedings.<sup>66</sup>

35. All of the international sources discussed above denote that Cambodia is bound under domestic law by both treaty and custom to prosecute those accused of gross human rights abuses. Advancing the ICIJ Closing Order's indictment of Yim Tith to the Trial Chamber would, therefore, not only be consistent with a reading of the ECCC Agreement in light of international law but would also satisfy Cambodia's concrete obligation to prosecute under its own law.
36. In addition to establishing Cambodia's duty to prosecute serious human rights offenders, international law establishes victims' right to a remedy. This right includes participation in the prosecution of those responsible for their harm and the ability to claim reparations. When a case is frozen in procedural limbo, these remedies are both placed beyond reach.
37. Treaty and customary law entitle victims to an effective remedy. This right was the subject of a U.N. General Assembly resolution relying on provisions found in the Universal Declaration of Human Rights (article 8); the International Covenant on Civil and Political Rights (article 2); the International Convention on the Elimination of All

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<sup>64</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶¶ 3(b), 4, 22(f), 21 March 2006, G.A. Res. 60/147, UN Doc. A/RES/60/147.

<sup>65</sup> See, e.g., *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, ¶ 8, 24 May 1980, 1980 I.C.J. Rep. 3, (presenting the U.S. claim that Iran should "submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates[.]"); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, ¶ 25, 19 December 2005, 2005 I.C.J. Rep. 168 (presenting the Congo claim that Uganda violated principles of international law by "failing to punish persons under its jurisdiction or control having engaged in [human rights abuses.]"); *Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, Judgment, ¶ 71, 20 July 2012, 2012 I.C.J. Rep. 422 ("Belgium requested the Court to adjudge and declare that Senegal is obliged to bring criminal proceedings [against an alleged torturer] . . . and, failing that, to extradite him to Belgium.").

<sup>66</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, Judgment, ¶ 280, 19 December 2005, 2005 I.C.J. Rep. 168 (finding that Uganda "by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ¶ 471(6), 26 February 2007, 2007 I.C.J. Rep. 43 (finding Serbia responsible under the Genocide Convention for not cooperating with the International Criminal Tribunal for the former Yugoslavia); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ¶ 122, 20 July 2012, 2012 I.C.J. Rep. 422 (finding the Republic of Senegal had breached its obligation "by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed[.]").



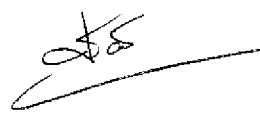

Forms of Racial Discrimination (article 6); the Convention against Torture (article 14); and the Rome Statute (articles 68 and 75), among others.<sup>67</sup> That resolution asserts that victims of serious crimes have the rights to “[e]qual and effective access to justice; [a]dequate, effective and prompt reparation for harm suffered; [and a]ccess to relevant information concerning violations and reparation mechanisms.”<sup>68</sup>

38. The ECCC echoes these entitlements within its own procedural mechanisms, such as the participation of Civil Parties through Internal Rule 23. These objectives, which comprise the international legal right to a remedy, are only satisfied in practice if otherwise valid indictments are permitted to proceed to the trial phase, where judges can make findings of law and fact to determine the responsibility of the accused for the crimes alleged, as well as any corresponding collective and moral reparations awarded to the Civil Parties.

### CONCLUSION

39. Yim Tith’s case should proceed to the Trial Chamber, either because the PTC affirmatively finds the National Co-Investigating Judge erred in his Closing Order, or because the ECCC mandates the default advancement of its proceedings in the absence of express resolution by the PTC. This standard is borne out by the plain meaning of the ECCC Agreement and its accompanying Law, the object and purpose of the tribunal in adjudicating mass atrocities of the Khmer Rouge, and domestic and international law principles emphasizing victims’ rights and the duty to prosecute.

Respectfully submitted,

Date	Name	Place	Signature
1 December 2019	CHET Vanly	Phnom Penh, Cambodia	
1 December 2019	HONG Kimsuon	Phnom Penh, Cambodia	

<sup>67</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble, 21 March 2006, G.A. Res. 60/147, UN Doc. A/RES/60/147.

<sup>68</sup> *Id.* at ¶11.

1 December 2019	LOR Chuntly	Phnom Penh, Cambodia	
1 December 2019	SAM Sokong	Phnom Penh, Cambodia	
1 December 2019	SIN Soworn	Phnom Penh, Cambodia	
1 December 2019	Emmanuel JACOMY	Singapore	
1 December 2019	Martine JACQUIN	Phnom Penh, Cambodia	
1 December 2019	Daniel MCLAUGHLIN	San Francisco, United States	
1 December 2019	Nushin SARKARATI	San Francisco, United States	