



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Préliminaire

**D381/44**

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

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC61)

**THE PRE-TRIAL CHAMBER**

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

**Date:** 21 July 2021

**ឯកសារដើម**  
**ORIGINAL/ORIGINAL**  
ថ្ងៃ ខែ ឆ្នាំ (Date): 21-Jul-2021, 14:00  
CMS/CFO:.....

**PUBLIC**

**DECISION ON INTERNATIONAL CO-PROSECUTOR’S REQUEST TO FILE ADDITIONAL SUBMISSIONS ON HER APPEAL OF THE ORDER DISMISSING THE CASE AGAINST YIM TITH**

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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“the ECCC”) is seised of the “Request to File Additional Submissions on her Appeal of the Order Dismissing the Case against YIM Tith” filed by the International Co-Prosecutor on 26 August 2020 (“Request”).<sup>1</sup>

## I. PROCEDURAL HISTORY

1. On 18 September 2017, the Co-Investigating Judges informed the parties to Case 004/2 that they considered separate and opposing closing orders to be generally permitted under the applicable law.<sup>2</sup> The parties to Case 004 were notified of this Decision, which was later re-classified as public.<sup>3</sup>

2. On 28 June 2019, the International Co-Investigating Judge issued his Closing Order indicting YIM Tith (“Indictment”),<sup>4</sup> while the National Co-Investigating Judge issued his Order Dismissing the Case Against YIM Tith<sup>5</sup> (collectively, “Closing Orders”). The Pre-Trial Chamber is considering five pending Appeals from the parties against the two conflicting Closing Orders issued by the Office of the Co-Investigating Judges in Case 004.<sup>6</sup>

<sup>1</sup> Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), International Co-Prosecutor’s Request to File Additional Submissions on her Appeal of the Order Dismissing the Case against YIM Tith, 26 August 2020, D381/29 (“Request (D381/29)”).

<sup>2</sup> Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”), Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D355/1 (“Decision on Disclosure Concerning Disagreements (D355/1)”), paras 13-16.

<sup>3</sup> See Case 004, Closing Order, 28 June 2019, D382 (“Indictment (D382)”), para. 13.

<sup>4</sup> Indictment (D382). (In addition to the Indictment, the International Co-Investigating Judge formally terminated the judicial investigation into the facts excluded in the Rule 66bis Decision and issued a Partial Dismissal Order, dismissing certain charges against YIM Tith).

<sup>5</sup> Case 004, Order Dismissing the Case against YIM Tith, 28 June 2019, D381 (“Dismissal (D381)”).

<sup>6</sup> Case 004, National Co-Prosecutor’s Appeal against the International Co-Investigating Judge’s Closing Order (Indictment) in Case 004, 13 September 2019, D382/4/1 (“National Co-Prosecutor’s Appeal (D382/4/1)”); Case 004, YIM Tith’s Appeal of the Issuance of Two Closing Orders in Case 004, 2 December 2019, D381/18 & D382/21 (“YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21)”); Case 004, YIM Tith’s Appeal of the International Co-Investigating Judge’s Closing Order in Case 004, 2 December 2019, D382/22 (filed on 4 December 2019) (“YIM Tith’s Appeal (Indictment) (D382/22)”); Case 004, International Co-Prosecutor’s Appeal of the Order Dismissing the Case against YIM Tith (D381), 2 December 2019, D381/19 (filed on 5 December 2019) (“International Co-Prosecutor’s Appeal (D381/19)”); Case 004, Civil Party Co-Lawyers’ Appeal against the National Co-Investigating Judge’s Closing Order in Case 004, 1 December 2019, D381/20 (filed on 6 December 2019) (“Civil Parties’ Appeal (D381/20)”).



3. On 19 December 2019, with respect to Case 004/2, the Pre-Trial Chamber issued its “Considerations on Appeals against Closing Orders” (“Considerations”).<sup>7</sup>

4. On 12 March 2020, the International Judges of the Pre-Trial Chamber disseminated to the parties, copying the Pre-Trial Chamber, the Greffier of the Trial Chamber and the Acting Director and Deputy Director of the Office of Administration, an interoffice memorandum of the International Judges along with the appended Annexes delineating the events within the Chamber since the issuance of the Considerations in Case 004/2, clarifying that the Pre-Trial Chamber has taken all the required administrative actions to transfer the Indictment and the 004/2 Case File to the Trial Chamber.<sup>8</sup> On 16 March 2020, the President of the Pre-Trial Chamber issued an interoffice memorandum asserting that only the unanimously decided portion of the Case 004/2 Considerations shall have applicable effect.<sup>9</sup>

5. On 10 August 2020, the Supreme Court Chamber issued its “Decision on International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2” (“SCC Decision”), dismissing on the merits the Immediate Appeal, which was filed on 4 May 2020,<sup>10</sup> and terminating Case 004/2.<sup>11</sup> On 14 August 2020, the Office of the Co-Investigating Judges issued its “Order Sealing and Archiving Case File 004/2”, holding that based on the SCC Decision, all that remained for the Office of the Co-Investigating Judges was to seal and archive the Case File.<sup>12</sup>

6. On 26 August 2020, the International Co-Prosecutor filed the instant Request to make additional submissions on her Appeal of the Dismissal, in light of the SCC Decision,<sup>13</sup> which she alleges directly impacts the Pre-Trial Chamber’s deliberations

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<sup>7</sup> Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 & D360/33 (“Case 004/2 Considerations (D359/24 & D360/33)”).

<sup>8</sup> Case 004/2, Interoffice Memorandum of the International Judges Olivier BEAUVALLET and Kang Jin BAIK, 12 March 2020, D359/36 & D360/45.

<sup>9</sup> Case 004/2, Interoffice Memorandum issued by Judge PRAK Kimsan, President of the Pre-Trial Chamber, 16 March 2020, D359/37 & D360/46.

<sup>10</sup> Case 004/2, International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020, E004/2/1.

<sup>11</sup> Case 004/2, Decision on International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2 (“Case 004/2 Supreme Court Chamber’s Decision on Immediate Appeal (E004/2/1/1/2)”).

<sup>12</sup> Case 004/2, Order Sealing and Archiving Case File 004/2, 14 August 2020, D363/3.

<sup>13</sup> Case 004/2 Supreme Court Chamber’s Decision on Immediate Appeal (E004/2/1/1/2).



in Case 004.<sup>14</sup> On 7 September 2020, the Co-Lawyers for YIM Tith (“the Co-Lawyers”) filed their Response, submitting that the Request should be summarily dismissed as inadmissible.<sup>15</sup> On 1 March 2021, the Pre-Trial Chamber invited the parties to Case 004, via email, to file submissions on whether the Chamber should conduct an oral hearing on the Appeals against the Closing Orders in Case 004.<sup>16</sup> Between 3 March 2021 and 5 March 2021, the various parties filed their submissions.<sup>17</sup> On 18 March 2021, the Pre-Trial Chamber, pursuant to Internal Rule 77(3)(b), decided to proceed without an oral hearing and to determine the Appeals against the Closing Orders in Case 004 on the basis of the written submissions only.<sup>18</sup>

## II. SUBMISSIONS

7. The International Co-Prosecutor requests that, in accordance with Internal Rule 21(1), to ensure the proper administration of justice, judicial economy and to safeguard the interests of the Charged Person, Victims and the rights of all Case 004 Parties,<sup>19</sup> the Pre-Trial Chamber: (i) find the Request admissible;<sup>20</sup> (ii) ensure that the issue raised is resolved in a way that brings the required legal certainty, clarity and finality;<sup>21</sup> (iii) return the Case to the Office of the Co-Investigating Judges with the instructions to either issue one Closing Order or to formally refer the disagreement to the Pre-Trial Chamber for final resolution;<sup>22</sup> or, (iv) issue its own Closing Order indicting YIM Tith, forwarding the Case File to the Trial Chamber.<sup>23</sup>

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<sup>14</sup> Request (D381/29).

<sup>15</sup> Case 004, YIM Tith’s Response to the International Co-Prosecutor’s Request to File Additional Submissions on Her Appeal of the Order Dismissing the Case against YIM Tith, 7 September 2020, D381/31 (“Response (D381/31)”). *See also* Case 004, Request to File YIM Tith’s Response to the International Co-Prosecutor’s Request to File Additional Submissions on Her Appeal of the Order Dismissing the Case against YIM Tith in One Language, 7 September 2020, D381/30.

<sup>16</sup> Case 004, Pre-Trial Chamber Instructions to the Parties, Email dated 1 March 2021.

<sup>17</sup> Case 004, International Co-Prosecutor’s Submissions regarding an Oral Hearing on the Appeals against the Closing Orders in Case 004 (YIM Tith), 3 March 2021, D381/36 & D382/35; Case 004, National Co-Prosecutor’s Submissions regarding an Oral Hearing on the Appeals against the Closing Orders, Email dated 4 March 2021, D381/40 & D382/39; Case 004, YIM Tith’s Submissions to the Pre-Trial Chamber on the Necessity for an Oral Hearing in Case 004, 4 March 2021, D381/38 & D382/37; Case 004, Civil Party Co-Lawyers’ Views on Oral Hearings on Appeals to the Closing Orders in Case 004, 5 March 2020, D381/39 & D382/38.

<sup>18</sup> Case 004, Decision on Oral Hearing in Case 004, 18 March 2021, D381/41 & D382/40.

<sup>19</sup> Request (D381/29), para. 1.

<sup>20</sup> Request (D381/29), paras 9-10, 18.

<sup>21</sup> Request (D381/29), paras 11-12.

<sup>22</sup> Request (D381/29), paras 13-18.

<sup>23</sup> Request (D381/29), paras 13-18.



8. The International Co-Prosecutor submits that the Request is admissible.<sup>24</sup> The SCC Decision, issued after the close of the written submissions before this Chamber, constitutes new, directly relevant jurisprudence from the ECCC's court of final instance and could not have been foreseen by the parties.<sup>25</sup> The SCC Decision is persuasive authority potentially leaving Case 004 in "judicial limbo".<sup>26</sup> Fundamental fairness requires that the Case 004 parties be allowed to file additional submissions.<sup>27</sup> This would comport with the ECCC mandate to conduct proceedings aligned with justice and fairness<sup>28</sup> and to avoid another judicial dilemma, undermining the proper administration of justice.<sup>29</sup>

9. The International Co-Prosecutor further submits that, after the SCC Decision, the Pre-Trial Chamber is left with no valid Closing Order in this Case, leaving an "unacceptable legal limbo which affords no judicial finality".<sup>30</sup> It is ultimately for the Pre-Trial Chamber to ensure the issue is resolved in a way that brings legal certainty, clarity and finality.<sup>31</sup>

10. The International Co-Prosecutor contends that the two judicial avenues remain for the Pre-Trial Chamber in this Case: (i) to remit the Case to the Office of the Co-Investigating Judges with appropriate instructions that they either issue one Closing Order or formally refer the disagreement to the Pre-Trial Chamber for resolution; or (ii) to issue its own Closing Order.<sup>32</sup> In either instance, whether the Pre-Trial Chamber cannot resolve the Co-Investigating Judges' dispute by supermajority or the Chamber issues its own Closing Order, the ECCC legal framework provides the governing default position, which means that the Case File shall be forwarded to Trial Chamber.<sup>33</sup>

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<sup>24</sup> Request (D381/29), paras 9-10.

<sup>25</sup> Request (D381/29), paras 9-10.

<sup>26</sup> Request (D381/29), para. 9.

<sup>27</sup> Request (D381/29), para. 9.

<sup>28</sup> Request (D381/29), para. 10 referring to *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 10 August 2001, NS/RKM/1004/006, as amended 27 October 2004, Art. 33new; *Internal Rules of the Extraordinary Chambers in the Court of Cambodia* (Rev. 9), as revised 16 January 2015 ("Internal Rules"), 21(1).

<sup>29</sup> Request (D381/29), para. 10 referring to, *inter alia*, Case 004/2 Considerations (D359/24 & D360/33), para. 122.

<sup>30</sup> Request (D381/29), para. 11.

<sup>31</sup> Request (D381/29), para. 12.

<sup>32</sup> Request (D381/29), paras 13-16.

<sup>33</sup> Request (D381/29), paras 13-16.



11. The International Co-Prosecutor submits that the persuasive jurisprudence of the Supreme Court Chamber, which held that personal jurisdiction is determined solely by whether the Suspect or Charged Person was a Khmer Rouge official, should be followed and, accordingly, personal jurisdiction is not in issue since it has never been contested that YIM Tith was a Khmer Rouge official.<sup>34</sup> The International Co-Prosecutor concludes that an abuse of discretion, not jurisdictional analysis, must be applied to resolve the issue of whether the Charged Person was among those most responsible.<sup>35</sup>

12. In the Response, the Co-Lawyers submit that the Chamber should summarily dismiss the Request as inadmissible because (i) it lacks any legal foundation; (ii) there is no change of circumstance that would require additional submissions; and (iii) the Request misconstrues the ‘direct impact’ of the SCC Decision on the Appeals in Case 004.<sup>36</sup>

13. First, the Co-Lawyers argue that there is no indication that additional submissions would serve the interests of Internal Rule 21(1) and that they would only lengthen the inevitable conclusion of Case 004: the dismissal of all charges.<sup>37</sup> The Co-Lawyers submit that the ECCC legal framework does not provide for the reopening of the Pre-Trial Chamber Appeals<sup>38</sup> nor provide the Chamber authority to consider additional written submissions beyond replies.<sup>39</sup>

14. Second, the Co-Lawyers contend that no change in circumstance has arisen requiring the Chamber to hear from the International Co-Prosecutor anew and, nevertheless, adequate opportunity to address the arguments has been provided.<sup>40</sup> The SCC Decision confirms arguments already made by the Co-Lawyers as early as 2 December 2019 in YIM Tith’s Appeal (Two Closing Orders)<sup>41</sup> and the International Co-Prosecutor responded to these arguments at that time.<sup>42</sup> The Co-Lawyers maintain

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<sup>34</sup> Request (D381/29), para. 17 *referring to* Case 001/18-07-2007-ECCC/SC (“Case 001”), Appeal Judgement, 3 February 2012, F28 (“Case 001 Appeal Judgement (F28)”), para. 79.

<sup>35</sup> Request (D381/29), para. 17 *quoting* Case 001 Appeal Judgement (F28), paras 62-64, 74, 79.

<sup>36</sup> Response (D381/31), para. 15.

<sup>37</sup> Response (D381/31), paras 16-18.

<sup>38</sup> Response (D381/31), paras 16-17.

<sup>39</sup> Response (D381/31), paras 17-18.

<sup>40</sup> Response (D381/31), paras 19-24.

<sup>41</sup> Response (D381/31), paras 20-21 *referring to* YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21).

<sup>42</sup> Response (D381/31), paras 20, 23.



that these issues were raised on appeal before the Chamber well before the Supreme Court Chamber pronounced on them and no circumstances raised would require the Pre-Trial Chamber to hear from the International Co-Prosecutor again.<sup>43</sup>

15. The Co-Lawyers recall that they had highlighted in the instant proceedings the ramifications of the Chamber declaring that the Co-Investigating Judges issuance of the two conflicting Closing Orders was illegal.<sup>44</sup> Thus, the International Co-Prosecutor was on notice of the need to respond to the Defence position that there must be a single decision and that the ECCC legal framework makes no allowance for the issuance of opposing Closing Orders.<sup>45</sup>

16. Third, the Co-Lawyers assert that the International Co-Prosecutor misconstrues the strong persuasive authority of the SCC Decision, mistaking it for a procedural event in the appeal proceedings in Case 004.<sup>46</sup> The Supreme Court Chamber does not exercise appellate jurisdiction over Case 004<sup>47</sup> nor over the procedures in the judicial investigation before the Pre-Trial Chamber.<sup>48</sup> Particularly, the Supreme Court Chamber cannot issue decisions or orders that are binding on this Chamber and the common law principle of *stare decisis* is inapplicable.<sup>49</sup> The Co-Lawyers further argue that while the Pre-Trial Chamber has in the past used the Supreme Court Chamber jurisprudence as persuasive authority, by referring to, adopting, and endorsing it,<sup>50</sup> the SCC Decision does not provide any reason to change the appeals procedure.<sup>51</sup>

17. In conclusion, the Co-Lawyers submit that the only legal avenues available to the Chamber are: (i) dismissing the Closing Orders and the Case against YIM Tith; (ii) dismissing the Closing Orders and returning the Case to the Office of the Co-Investigating Judges, noting that any persistent disagreement must be resolved in favor of YIM Tith; or (iii) dismissing the Closing Orders, with the Chamber itself

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<sup>43</sup> Response (D381/31), paras 22-24.

<sup>44</sup> Response (D381/31), para. 24.

<sup>45</sup> Response (D381/31), para. 24.

<sup>46</sup> Response (D381/31), para. 25.

<sup>47</sup> Response (D381/31), para. 25.

<sup>48</sup> Response (D381/31), paras 25-26.

<sup>49</sup> Response (D381/31), para. 26.

<sup>50</sup> Response (D381/31), para. 27.

<sup>51</sup> Response (D381/31), para. 27.



assessing Case 004 and issuing its own Closing Order either indicting or dismissing the Case against YIM Tith.<sup>52</sup>

### III. DISCUSSION

18. The Pre-Trial Chamber is seised with the five Appeals against the two conflicting Closing Orders in Case 004.<sup>53</sup> The proceedings, including the filing of the submissions, are now closed.

19. The Pre-Trial Chamber considers that the issuance of a decision by the Supreme Court Chamber in a different proceeding bears no direct impact on the pending Case, particularly in light of the Pre-Trial Chamber's position as the sole and ultimate jurisdiction for pre-trial matters.<sup>54</sup>

20. The Pre-Trial Chamber notes that the principles of justice and fairness have been strictly respected in this Case as the Appeals have been extensively briefed by written submissions, including YIM Tith's Appeal of the Issuance of the Two Closing Orders in Case 004 and the International Co-Prosecutor's Response thereto.<sup>55</sup>

21. The Pre-Trial Chamber finds that the Request is in fact calling for the Chamber's final disposition in the current proceedings, which will be issued in due course. There is no reason for the Pre-Trial Chamber to rule at this time on a matter falling within the scope of ongoing Appeals.

22. Therefore, the Pre-Trial Chamber finds that the Request is inadmissible.

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<sup>52</sup> Response (D381/31), para. 29.

<sup>53</sup> National Co-Prosecutor's Appeal (D382/4/1); YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21); YIM Tith's Appeal (Indictment) (D382/22); International Co-Prosecutor's Appeal (D381/19); Civil Parties' Appeal (D381/20).

<sup>54</sup> *See, e.g.*, Internal Rules 73, 76(4), 77(13), 72(4)(d). *See also* Case 004/2 Considerations (D359/24 & D360/33), para. 49; *see also* Case 003/07-09-2009-ECCC/OCIJ, Decision on International Co-Prosecutor's Request to File Additional Submissions on her Appeal of the Order Dismissing the Case against MEAS Muth, 3 November 2020, D266/25, para. 31.

<sup>55</sup> YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21); Case 004, International Co-Prosecutor's Response to YIM Tith's Appeal against the Issuance of Two Closing Orders in Case 004, 17 February 2020, D381/25 & D382/28 ("The International Co-Prosecutor's Response (D381/25 & D382/28)"); *see also* Case 004, YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Appeal of the Issuance of Two Closing Orders in Case 004, 16 March 2020, D381/27 & D382/30.





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

**DENIES** the Request as inadmissible.

In accordance with Internal Rule 77(13), this decision is not subject to appeal.

**Phnom Penh, 21 July 2021**

**President**

**Pre-Trial Chamber**



**PRAK Kimsan**

**Olivier BEAUVALLET**

**NEY Thol**

**Kang Jin BAIK**

**HUOT Vuthy**

