

**BEFORE THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO  
YIM TITH'S REQUEST TO TERMINATE, SEAL AND ARCHIVE CASE 004**

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## I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby responds to Yim Tith’s request to terminate, seal and archive Case 004.<sup>1</sup> As detailed below, the Request is inadmissible, but even if admitted, it fails to establish that termination of Case 004 is appropriate in the circumstances of the case. The Request should therefore be dismissed. Moreover, far from achieving any degree of finality, a decision from the CIJs would be subject to appeal by the ICP, prompting yet another round of litigation.

## II. THE REQUEST IS INADMISSIBLE<sup>2</sup>

2. The Request is inadmissible for several reasons. First, it is premature; all legal avenues for acting in accordance with the ECCC legal framework are *not* exhausted. Second, the Co-Investigating Judges (“CIJs”) are no longer seised of Case 004 and have no authority to act. They are *functus officio* immediately after the issuance of a closing order, except for the administrative functions explicitly set forth in the ECCC framework, which do not apply to the Request. Moreover, the CIJs do not possess any inherent jurisdiction that would supplant the authority of the chambers currently seised of Case 004. In any event, the Office of the Co-Investigating Judges is not the correct forum for the Request, which seeks to have the CIJs annul the Indictment. Under the ECCC legal framework, the CIJs have no authority to nullify their own Closing Orders. Finally, the CIJs are disqualified from considering the merits of the Request based on their actual bias and appearance of bias, as they have predetermined the issue.

### A. All legal avenues for adhering to the ECCC legal framework are *not* exhausted

3. The Request is premature and premised on the knowingly false claim that all legal avenues for progressing the case to trial have been exhausted.<sup>3</sup> The Pre-Trial Chamber’s (“PTC”) Considerations were officially notified on 20 September 2021,<sup>4</sup> and at the time of this Request,

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<sup>1</sup> **D386** Yim Tith’s Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004, 18 Oct 2021 (“Request to Terminate”).

<sup>2</sup> The ICP also notes that Yim Tith’s Request is inadmissible because it is a deficient filing. The 21-page document exceeds the 15 pages allowed in Article 5.1 of the Practice Direction on the Filing of Documents Before the ECCC, ECCC/01/2007/Rev.8, amended 7 Mar 2012. The ICP further notes that some of the arguments relating to admissibility also demonstrate the Request’s lack of merit.

<sup>3</sup> **D386** Request to Terminate, EN 01679367 (Introduction), para. 46.

<sup>4</sup> **D381/45 & D382/43** Considerations on Appeals Against Closing Orders, 17 Sep 2021 (“Considerations”); 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. *See also* 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.

Yim Tith knew the ICP intended to seise the Supreme Court Chamber (“SCC”) with an appeal.<sup>5</sup> That appeal was filed on 20 October 2021<sup>6</sup> and the SCC has yet to render its decision.

4. Contrary to Yim Tith’s mistaken contention,<sup>7</sup> as a matter of law, the CIJs cannot terminate a case when there is ongoing litigation in another forum, namely the SCC. The CIJs also recognise this well-established legal principle.<sup>8</sup> Indeed, the CIJs have consistently confirmed that they will not intervene where there are other legal avenues “to progress this case either to trial or to a termination”.<sup>9</sup> In Case 004/2, the CIJs refrained from deciding on Ao An’s request to seal and archive the case when the ICP later seised the SCC with her appeal.<sup>10</sup> In Case 003, the CIJs requested the ICP to confirm her intention to seise the SCC with the case *and* instructed the Parties that only if the SCC would not be seised could they provide written submissions on the CIJs’ jurisdiction to terminate.<sup>11</sup> Yim Tith’s speculation on how the SCC will deal with Case 004<sup>12</sup> is irrelevant to the fact that other legal avenues are currently still being pursued.

#### B. The CIJs are not seised of Case 004

5. Yim Tith also ignores<sup>13</sup> the fact that it is the PTC, not the CIJs, that “has final jurisdiction in the pre-trial investigation phase”.<sup>14</sup> The CIJs are “*functus officio* after having signed the

<sup>5</sup> **D386** Request to Terminate, paras 2-4.

<sup>6</sup> See Case 004/23-09-2021-ECCC/SC (06)-2 International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 20 Oct 2021 (“ICP Appeal”), EN 01679603. It was notified to the Parties the following day. See Case 004/23-09-2021-ECCC/SC (06) Email from Case-File-Officer-Notification of ICP Appeal, 21 Oct 2021, 11:46 a.m.

<sup>7</sup> **D386** Request to Terminate, paras 10, 41, 45.

<sup>8</sup> See Case 003-**D270/7** Decision on International Co-Prosecutor’s Request to Forward Case File 003 to the Trial Chamber, 20 May 2021 (“Decision on Forwarding Case”), para. 40.

<sup>9</sup> Case 003-**D270/7** Decision on Forwarding Case, para. 42 (“should no other path be found to progress this case *either* to trial or to a termination [...] and *no* other judicial body in this Court be willing to take it upon itself to do either, we would, as an *ultima ratio* and *after all* other jurisdictions have run their course, be open to [...] whether we have an exceptional residual jurisdiction of *last resort* to terminate the case ourselves” (emphasis added)). See also para. 40.

<sup>10</sup> Case 004/2-**D364** Memorandum from the Co-Investigating Judges entitled “Defence Request of 17 March 2020 to seal and archive Case File 004/2 – D363 (“Request””, 29 May 2020.

<sup>11</sup> Case 003-**D273** Order to File Submissions on Residual Jurisdiction to Terminate Case 003, 16 Sep 2021 (“Order for Termination Submissions”), disposition. See also paras 5, 7.

<sup>12</sup> **D386** Request to Terminate, paras 13 (stating the SCC will not be rendering any decision that will lead to the case proceeding to trial), 18 (implicitly suggesting that because the CIJs had to seal and archive the case file after the SCC did not in Case 004/2, the same will occur in Case 004).

<sup>13</sup> **D386** Request to Terminate, paras 47 (“CIJs have exclusive jurisdiction and authority to bring Case 004 to an end”), 40 (“CIJs must exercise their residual jurisdiction”), EN 01679369 (“Part I: The CIJs’ Exclusive Jurisdiction Over Case 004”). See also paras 8-9.

<sup>14</sup> Case 003-**D271/5 & D272/3** Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for Meas Muth Concerning the Proceedings in Case 003, 8 Sep 2021 (“Consolidated PTC Decision”), para. 69 (citing, *inter alia*, Case 001-**D99/3/42** Decision on the Appeal Against Closing Order Indicting Kaing Guek Eav *alias* “Duch”, 9 Dec 2008, para. 41; Case 004/2-**D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 Dec 2019 (“Case 004/2 Considerations”), para. 41; Case 004/2-**D360/3** Decision on Ao An’s Urgent Request for Redaction and Interim Measures, 5 Sep 2018, paras 5, 13). See also Case 003-**D266/27 & D267/35** Considerations on Appeals Against Closing Orders, 7 Apr 2021 (“Case 003

disposition of a closing order”,<sup>15</sup> and multiple appeals were filed against the Closing Orders in Case 004. The CIJs can therefore only administratively “process[] the case in accordance with Rules 77(13) and (14)”,<sup>16</sup> and do not have the authority to issue substantive decisions and orders related to the pre-trial stage.<sup>17</sup> A refusal to adhere to the express ECCC legal mandate to forward the Indictment and case file, jointly or unilaterally, to the Trial Chamber (“TC”)<sup>18</sup> does not legally sanction dismissing the Indictment or terminating the case.

### C. The CIJs have no inherent jurisdiction

6. Nor, as Yim Tith asserts, do the CIJs have inherent jurisdiction to hear the Request pursuant to IR 21 or otherwise.<sup>19</sup> As established above,<sup>20</sup> the CIJs are *not* seized of Case 004 and cannot usurp the authority of the other ECCC Chambers with rightful carriage of this case. Accordingly, Yim Tith’s reliance on the SCC’s finding that inherent jurisdiction exists when matters arise that are “incidental” to procedures of which a chamber is already seized is misplaced; the CIJs have no such primary jurisdiction.<sup>21</sup> Similarly irrelevant is the CIJs’ 2017

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Considerations”), Opinion of Judges Olivier Beauvallet and Kang Jin Baik (“International Judges’ Opinion”), paras 132, 133 (“Article 12(2) of the Practice Direction on Classification and Management of Case-Related Information, ‘[t]he last judicial office seized of a case shall undertake a review of the security classification of records in the case file[]’ [...] being either the Pre-Trial Chamber or the Supreme Court Chamber”).

<sup>15</sup> Case 004/1-D308/3/1/20 Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 Jun 2018, para. 33. *See also* Case 003-D271/5 & D272/3 Consolidated PTC Decision, fn. 186 *citing, inter alia*, Case 003-D266/27 & D267/35 Case 003 Considerations, International Judges’ Opinion, para. 132. The CIJs’ argument that they cannot be *functus officio* because in Case 004/2 Pre-Trial Judges issued instructions to the Court’s Records and Archives Unit on how to process the case overlooks that those instructions occurred in January *before* the Office of the Co-Investigating Judges was properly constituted by the re-instatement of the International CIJ on 22 Apr 2020. *See* Case 003-D270/7 Decision on Forwarding Case, para. 38; Case 004/2-D359/36 & D360/45 Interoffice Memorandum from Judges Olivier Beauvallet and Kang Jin Baik entitled “Transfer of Case File 004/2”, 12 Mar 2020, paras 27-28, 31; ECCC Statement, *International Co-Investigating Judge Reinstated*, 24 Apr 2020. *See also* Case 003-D271/5 & D272/3 Consolidated PTC Decision, para. 72.

<sup>16</sup> Case 003-D271/5 & D272/3 Consolidated PTC Decision, para. 72; Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 Jan 2015 (“Internal Rule(s)”, “Rule(s)”, or “IR(s)”). *See also* Case 003-D266/27 & D267/35 Case 003 Considerations, p. 40 (Disposition); D381/45 & D382/43 Considerations, p. 49 (Disposition).

<sup>17</sup> Case 003-D271/5 & D272/3 Consolidated PTC Decision, para. 69.

<sup>18</sup> *See* Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 Jun 2003 (“ECCC Agreement”), arts 5(4), 7(4); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended on 27 Oct 2004 (“ECCC Law”), art. 23 new; IR 1(2). *See also* Case 003-D271/5 & D272/3 Consolidated PTC Decision, para. 67 (“as a matter of principle, one Co-Investigating Judge can validly act alone”), including fn. 181.

<sup>19</sup> D386 Request to Terminate, paras 9-12. *See also* paras 7, 34, 38, 40 (referring to the CIJs’ supposed ‘residual jurisdiction’), 47 and EN 01679369 (referring to the CIJs’ supposed ‘exclusive jurisdiction’).

<sup>20</sup> *See* paras 3-5, *supra*.

<sup>21</sup> *See* D386 Request to Terminate, para. 10 *citing* Case 002-E284/2/1/2 Decision on Co-Prosecutor’s Request for Clarification, 26 Jun 2013, para. 12 (note the incorrect document number cited by Yim Tith) and Case 002-E463/1/3 Decision on Khieu Samphan’s Urgent Appeal Against the Summary of Judgment Pronounced on 16 November 2018, 13 Feb 2019, para. 17.

statement that they have inherent power to terminate a case “when the ‘situation and outlook going forward [...] become incompatible with the basic principles of fair trial’”.<sup>22</sup> Albeit erroneous in any circumstance, in 2017, the investigation was still ongoing and, unlike now, the CIJs were still seised of Case 004. In any event, all the ECCC Chambers have been very clear that admissibility pursuant to IR 21 is exceptional and may only be used when particular facts and circumstances so require.<sup>23</sup> Since any fair trial issues that Yim Tith may wish to raise can be heard by the chambers currently seised of Case 004, there are no exceptional reasons warranting the CIJs’ intervention.

#### D. The CIJs have no legal authority to dismiss the Indictment

7. The Request is also inadmissible because the CIJs do not have jurisdiction to entertain the specific request in any event.<sup>24</sup> Yim Tith assumes that the Indictment is already null and void.<sup>25</sup> It is not. As Case 004 currently stands – *i.e.* after the PTC Considerations which did not overturn the Indictment by supermajority<sup>26</sup> and before the SCC decides upon the appeal currently before it – the Indictment *remains valid*. The Request attempts to have the CIJs use an SCC decision in one case (Case 004/2) to *render* the Indictment null and void in another case (Case 004).<sup>27</sup>

<sup>22</sup> **D386** Request to Terminate, paras 11, 45 (quote at para. 11), *citing* **D355/9** Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith, 11 Aug 2017, para. 16 (quote in **D355** Request for Submission on the Budgetary Situation of the ECCC and Its Impact on Cases 003, 004, and 004/2, 5 May 2017, para. 1). As set out in para. 24, *infra*, the ICP submits that a chamber’s ability to terminate proceedings except on the merits of a case is very limited and that the extremely high threshold has not been met on the facts of Case 004.

<sup>23</sup> *See e.g.* SCC: Case 002-E154/1/1/4 Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 Apr 2012, paras 14-15; PTC: Case 002-A410/2/6 Decision on Appeal Against the Response of the Co-Investigating Judges on the Motion of Confidentiality, Equality and Fairness, 29 Jun 2011, para. 10; OCIJ: **D185/1** Decision on Ta An’s Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 22 Apr 2014 (“Ao An Annulment Decision”), para. 29 (“recourse to [IR] 21 as an admissibility avenue for motions not admissible pursuant to other [IRs] has been deemed exceptional and may only be used when particular facts and circumstances so require”), fn. 37 (“While the use of [IR] 21 as a procedural avenue to request various forms of relief has been discussed in the ambit of appellate proceedings, the [ICIJ] finds that the limitations set by the PTC and the [SCC] are appropriately applicable also to motions submitted on first instance.”).

<sup>24</sup> The ECCC Chambers have recognised that requests brought before judges who do not have the jurisdiction to entertain them are inadmissible. *See e.g.* Case 002-C22/I/41 Decision on Admissibility of Civil Party General Observations, 24 Jun 2008, para. 5 (“The Pre-Trial Chamber does not have jurisdiction to consider objections to amendments to the ECCC Practice Directions and in this respect the Observations are also inadmissible.”); **D185/1** Ao An Annulment Decision, para. 33 (“the relief requested by the Defence is both inadmissible [...] and unavailable pursuant to [IR] 76 since the power to annul investigative acts does not rest with the CIJs but with the PTC.”); Case 003-C2/4 Considerations of the Pre-Trial Chamber on Meas Muth’s Urgent Request for a Stay of Execution of Arrest Warrant, 23 Sep 2015, Opinions of Judges Olivier Beauvallet and Steven J. Bwana, para. 17 (“the Request for a Stay [...] does not fall within the jurisdiction. It is [...] inadmissible”).

<sup>25</sup> *See e.g.* **D386** Request to Terminate, p. 1 (“[the Closing Orders] are null and void (emphasis added)”), paras 13 (“The Closing Orders in Case 004 are null and void and without legal effect, meaning that there is no valid indictment in Case 004. (emphasis added)”), 14, 16.

<sup>26</sup> *See* **D381/45 & D382/43** Considerations.

<sup>27</sup> *See* Case 004/2-E004/2/1/1/2 Decision on International Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 10 Aug 2020 (“SCC Immediate Appeal Decision”). *Contra*

Not only must this Request fail on its merits,<sup>28</sup> but to give effect to the Request would require the CIJs to have authority to nullify a valid Indictment. No such power exists. Aside from the fact that the CIJs are *functus officio* under the ECCC legal framework, there is no provision allowing the CIJs to annul their own Closing Orders.<sup>29</sup>

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

8. Yim Tith deliberately makes his Request to the CIJs because they have predetermined the outcome of the case.<sup>30</sup> In Case 003, the CIJs openly declared in two decisions that termination of the case is the only option they will consider.<sup>31</sup> They also suggested in a judicial order that any application the ICP might make to the SCC should be one for termination.<sup>32</sup>

9. However, applying the legal test for bias that has been consistently applied at the ECCC and taking into account the presumption of impartiality and high threshold of proof,<sup>33</sup> the CIJs are disqualified from considering the merits of the Request based on their actual bias and appearance of bias. Although the CIJs' predeterminations were made in Case 003, both cases concern the failure to send the case to trial as mandated by the ECCC legal framework, including on the basis of the default position,<sup>34</sup> and the CIJs made explicitly clear that their

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**D386** Request to Terminate, paras 13, 17, 48; Case 003-**D270/7** Decision on Forwarding Case, para. 36.

<sup>28</sup> See Section III.B.2, *infra*. As explained further below, SCC decisions from one ECCC case cannot simply be transplanted into another, especially where, as here, cogent reasons exist for departing from the SCC's Case 004/2 holding that two closing orders issued illegally are null and void.

<sup>29</sup> The power to annul a closing order at the pre-trial stage resides with the PTC following appeals under IRs 67(5), 73, 74, and 77. (Closing Orders are not amenable to the IR 76 procedure. See IR 76(2) and (4); Case 003-**D158/1** Decision on Meas Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order & to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 Apr 2016, paras 17-18.).

<sup>30</sup> See e.g. **D386** Request to Terminate, paras 7, 12, 29, 34-35, 38.

<sup>31</sup> See Case 003-**D270/7** Decision on Forwarding Case, paras 19, 36-37, 42; Case 003-**D273** Order for Termination Submissions, paras 5-6. See also Case 003-**D271/5** & **D272/3** Consolidated PTC Decision, para. 74(2) (the CIJs "have already ruled on 'the fate of the case' in the event it were to come back to them").

<sup>32</sup> Case 003-**D273** Order for Termination Submissions, para. 7.

<sup>33</sup> *Furundžija*, IT-95-17/1-A, Judgement, Appeals Chamber, 21 Jul 2000, paras 189 ("a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. [...] [T]he following [...] should direct it in interpreting and applying the impartiality requirement of the Statute: A. A Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if [...] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias"), 190 ("reasonable observer" is "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold"); Case 002-**C11/29** Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 Feb 2008, paras 19-21; Case 002/31-10-2019-ECCC/SC (03)-**11** Decision on Khieu Samphan's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 Jul 2020, paras 63-64. See also Case 002-**F36** Appeal Judgement, 23 Nov 2016 ("Case 002/01 AJ"), para. 112.

<sup>34</sup> See Section III.B.3, *infra*. See also the dispositions at Case 003-**D266/27** & **D267/35** Case 003 Considerations, p. 40, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, p. 42, International Judges' Opinion, p. 145;

position applied equally to all the remaining cases, including Case 004.<sup>35</sup> Indeed, Yim Tith notes that the CIJs' "inclination to terminate the case" in Case 003 makes it "imperative for the CIJs" to do the same in Case 004.<sup>36</sup>

### III. EVEN IF THE CIJS HAVE AUTHORITY, THE REQUEST LACKS MERIT

#### A. The equal treatment principle does not justify the termination of Case 004

10. Yim Tith requests the termination of his case based, in part, on his right to equal treatment with Ao An.<sup>37</sup> His argument lacks merit, however, as he fails to acknowledge the inapplicability of the principle when treatment of others is based on an error of law.

11. The concept of equal treatment was developed as a key element of human rights protection and to safeguard the rule of law.<sup>38</sup> It ensures that parties to civil and/or criminal proceedings are subject to substantive and procedural equality.<sup>39</sup> At the ECCC, the basis of this principle is

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**D381/45 & D382/43** Considerations, p. 49, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, p. 56, Opinion of Judges Kang Jin Baik and Olivier Beauvallet ("International Judges' Opinion"), p. 225. *See also* Case 003-**D271/5 & D272/3** Consolidated PTC Decision, paras 72, 76.

<sup>35</sup> *See* **D270/7** Decision on Forwarding Case, para. 19 ("Had we been given such notice of the PTC's allegedly joint views [on the lawfulness of split Closing Orders] in a timelier manner, all remaining cases could have been dealt with as soon as possible by joint decision – which [...] could only have meant the *immediate termination of all cases remaining* after the dismissal in case 004/1. (Emphasis added)"). No reasonable observer could believe that the CIJs will adopt a different position hereafter. *See e.g. Rudnichenko v. Ukraine*, No. 2775/07, Judgment, 11 Jul 2013, paras 116 (a judge "had earlier examined the merits of the case of the applicant's co-defendant, B., in the framework of which she had expressed her view on the involvement and roles of both B. and the applicant [...]. Both aforementioned cases concerned the same event and implied the evaluation of the same evidence."), 118; *Buscemi v. Italy*, No. 29569/95, Judgment, 16 Sep 1999, paras 68 (a judge "used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it"), 69; *Olujić v. Croatia*, No. 22330/05, Judgment, 5 Feb 2009, paras 59, 65, 68; *Lavents v. Latvia*, No. 58442/00, Judgment, 28 Nov 2002, paras 119 (a pre-formed view that a full acquittal was not a possibility at all was a real stance on the undecided case and a clear preference for a finding of guilt), 121.

<sup>36</sup> **D386** Request to Terminate, paras 29, 40.

<sup>37</sup> **D386** Request to Terminate, paras 13, 17, 42-45.

<sup>38</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 Aug 2007 ("General Comment No. 32"), paras 2-4, 7.

<sup>39</sup> Substantively, equal treatment protects an individual against discrimination based on legally protected characteristics. *See* General Comment No. 32, paras 8-9. These characteristics include rights prohibiting arbitrary discrimination based on, *inter alia*, race, colour, sex, language, religious belief, political tendency, national or social origin, birth, or other status. *See also* Constitution of the Kingdom of Cambodia, adopted 21 Sep 1993, amended 4 Mar 1999, art. 31 ("Every Khmer citizen shall be equal before the law, enjoying the same rights, freedoms and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status."); Universal Declaration of Human Rights, 10 Dec 1948, General Assembly, UN Doc. A/Res/3/217A, art. 7; International Covenant on Civil and Political Rights, 16 Dec 1966 ("ICCPR"), 999 UNTS 171, art. 14(1); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, updated Sep 2009, art. 21(1); Statute of the International Criminal Tribunal for Rwanda, 8 Nov 1994, amended 31 Jan 2010, art. 20(1); Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Freetown, 16 Jan 2002, 2178 UNTS 137, art. 17(1); Statute of the Special Tribunal for Lebanon, 30 May 2007, Security Council, UN Doc. S/Res/1757 (Attachment), art. 16(1). Procedurally, it ensures the enjoyment of the same procedural rights and guarantees, including equal access and equality of arms. *See* General Comment No. 32, paras 8-9, 12-14. *See also* S. Negri, "The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure", International

found in IR 21(1)(b): “[p]ersons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules”.<sup>40</sup> However, equal treatment guarantees “[do] not make *all* differences of treatment discriminatory”.<sup>41</sup>

12. Fundamentally, the application of the equal treatment principle does not allow the CIJs to nullify their own Closing Orders or terminate Yim Tith’s case. Aside from the CIJs’ lack of authority to do so,<sup>42</sup> the Case 004/2 SCC Decision<sup>43</sup> was based on an error of law arising from the PTC’s erroneous decision that the issuance of two conflicting Closing Orders was illegal.<sup>44</sup>

13. Yim Tith has provided *no* authority to support his assertion that the CIJs must follow the Case 004/2 SCC Decision. His reliance on the European Court of Human Rights’ (“ECtHR”) holding that “legal certainty [...] requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question” is misplaced.<sup>45</sup> The cited jurisprudence concerns the issue of *res judicata* in a particular case,<sup>46</sup> *not* equal treatment between different parties to different cases. In fact, the ECtHR has been very clear that “the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law.”<sup>47</sup> Nor does it support the premise that equal treatment requires or supports perpetuating legal errors.

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Criminal Law Review 5, no. 4 (2005), pp. 523, 544-545, 571.

<sup>40</sup> IR 21(1)(b).

<sup>41</sup> *S.W.M Broeks v. The Netherlands*, Communication No. 172/1984, UN Doc. Supp. No. 40 (A/42/40), 9 Apr 1987, at p. 139, para. 13 (emphasis added). *See also* General Comment No. 32, paras 13-14 (departures can be justified on “objective and reasonable grounds”).

<sup>42</sup> *See* paras 5-7, *supra*.

<sup>43</sup> Case 004/2-E004/2/1/1/2 SCC Immediate Appeal Decision.

<sup>44</sup> ICP Appeal, paras 18-20, 36-44. *See further* Section III.B, *infra*, showing the Closing Orders were not issued illegally and even if, *arguendo*, their simultaneous issuance was not permitted under the ECCC framework, that fact does not render both Closing Orders null and void, nor does it allow the termination of Case 004 where gross unfairness or material prejudice are not demonstrated, and where the costs to the interests of justice of not proceeding to trial outweigh any speculative prejudice.

<sup>45</sup> **D386** Request to Terminate, para. 17, fn. 38 (*citing* *Brumărescu v. Romania*, No. 28342/95, Judgment, 28 Oct 1999 (“*Brumărescu*”), para. 61, *Kehaya and Others v. Bulgaria*, Nos 47797/99 and 68698/01, Judgment, 12 Jan 2006 (“*Kehaya and Others*”), para. 61, *Ryabykh v. Russia*, No. 52854/99, Judgment, 24 Jul 2003 (“*Ryabykh*”), para. 51).

<sup>46</sup> *Brumărescu*, paras 14-25, 56-65 (After a final order was executed, the Procurator-General asked for it to be quashed which the Supreme Court of Justice did. The ECtHR said this violated *res judicata* as the judicial decision had been executed.); *Kehaya and Others*, paras 12-26, 71-77 (The Supreme Court upheld the return of the land to the applicants. A State forest authority filed to have the applicant’s possession declared unlawful, leading the Supreme Court to order the applicants to vacate the land. The ECtHR said the Supreme Court deprived legal effect to the earlier judgment which had been executed. As a result, the state violated the principle of legal certainty, and there was no public interest to justify a re-examination of the dispute to deprive property without compensation.); *Ryabykh*, paras 7-30, 51-58 (When the State filed for review of a final reward after enforcement proceedings commenced, it returned the case to court four times. The ECtHR noted this case had proceeded through the full judicial process and there should be no fresh examination. The State violated the principle of legal certainty as they interfered with the principle of finality of judgments.)

<sup>47</sup> *Stanković and Trajković v. Serbia*, Nos 37194/08 and 37260/08, Judgment, 22 Dec 2015, para. 40(vi) (confirming that “[c]ase-law development is not, in itself, contrary to the proper administration of justice, since



14. In the same way, at the ECCC, as with other international courts and tribunals,<sup>48</sup> there exists *no* absolute obligation to retain the reasoning and conclusions of earlier cases. The right to equal treatment is not absolute, nor is it a straitjacket for the courts. Although typically it is legally sound for a court to follow its previous decisions in pursuit of legal certainty, this is only on the presumption that those decisions are correct.<sup>49</sup> The PTC has rightly stated that “[t]he principle of equal treatment before the law cannot be construed to imply that an error in one case should be repeated in a future case, even if the error in question is beneficial to the Charged Person.”<sup>50</sup> Even where two cases are similar, if there are “cogent reasons” to depart from a previous decision, the court must do so in the interests of justice.<sup>51</sup>

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

<sup>48</sup> *See e.g.* Statute of the International Court of Justice, 18 Apr 1946, 33 UNTS 993, arts 38(1)(d), 59; Rome Statute of the International Criminal Court, 17 Jul 1998 (“Rome Statute”), 2187 UNTS 90, art. 21(2). *See further South West Africa*, Second Phase, Judgment, 18 Jul 1966, ICJ Reports 1966, Separate Opinion of Judge Van Wyk, p. 67; *Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment, 24 Jul 1964, ICJ Reports 1964, Separate Opinion of Judge Tanaka, p. 65. Regarding the ICTY, ICTR and ECtHR, *see* fn. 51, *infra*.

<sup>49</sup> As para. 26 of General Comment No. 32 ascribes, art. 14 of the ICCPR guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal. The CIJs have noted (*see e.g.* Case 004/1-**D308/3** Closing Order (Reasons), 10 Jul 2017 (“Im Chaem Closing Order Reasons”), para. 10; Case 003-**D87/2/1.7/1** Decision on Meas Muth’s Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 Apr 2016, para. 13) that the ECCC operates in a civil law system where the principle of *stare decisis* does not apply. Indeed, the CIJs have previously refused to follow the PTC’s rulings, the appellate chamber at the pre-trial stage (*see e.g.* Case 004/2-**D360** Closing Order (Indictment), 16 Aug 2018, paras 35-38).

<sup>50</sup> Case 002-**D390/1/2/4** Decision on Ieng Sary’s Appeal Against Co-Investigating Judges’ Decision Refusing to Accept the Filing of Ieng Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 Sep 2010, para. 15.

<sup>51</sup> *See e.g.* *Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 Mar 2000, paras 107-108 (“in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*”); *Semanza*, ICTR-97-23-A, Decision, Appeals Chamber, 31 May 2000, para. 92; *Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 Nov 2006, para. 117; *Kordić & Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 Dec 2004, para. 1040; *Šainović et al.*, IT-05-87-A, Judgment, Appeals Chamber, 23 Jan 2014, para. 1650 (“Consequently, the Appeals Chamber [...] unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.”); *Cossey v. The United Kingdom*, No. 10843/84, Judgment, 27 Sep 1990, para. 35 (the Court noted that although not strictly bound, it

15. The ICP also notes Yim Tith's inconsistent and opportunistic position on the applicability of the equal treatment principle. When requesting the CIJs to *depart from* the SCC's Case 001 jurisprudence on personal jurisdiction, he specifically asked the CIJs to treat him differently to Duch.<sup>52</sup> He argued that the ECCC is not subject to the doctrine of *stare decisis*, and that there is no principled reason to adopt a posture of practical judicial deference to the SCC, where "cogent reasons" exist for the Chamber to express its own view.<sup>53</sup> In direct conflict with his position now, Yim Tith sought to convince the CIJs then that following the SCC's opinion would violate the principle of legal certainty.<sup>54</sup>

16. *Not following* a prior decision given *per incuriam* ensures the predictability, transparency, and coherence in the law's application. Deference to prior decisions based only on the similarities of two disputes weakens the congruence and authority of the law. It is this unwarranted deference, not the mechanical application of faulty law, that "reduces the Cambodian and international public's confidence in the ECCC judiciary".<sup>55</sup> Consistency and legal certainty in judicial decision-making cannot warrant repeating errors — errors that, in this instance, tarnish the ECCC's legitimacy and credibility.<sup>56</sup>

**B. There are clear and cogent reasons to depart from the SCC's Decision in Case 004/2**

17. The SCC's decision in Case 004/2 should not be followed in Case 004, as it was based on the PTC's flawed finding that the simultaneous issuance of two closing orders was illegal, which led the SCC to erroneously conclude that such issuance rendered each closing order null and void.<sup>57</sup> There are numerous cogent reasons to depart from the SCC's finding: (i) contrary to the PTC's position, the issuance of two conflicting closing orders was not illegal; (ii) even if it was, such issuance does not render the closing orders null and void nor does it warrant

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would normally follow its previous decisions and would only depart from them if there were 'cogent reasons' for doing so). Regarding the CIJs' prior practice, *see* Case 004/1-D308/3 Im Chaem Closing Order Reasons, para. 10 (CIJs stating that to maintain "clarity and uniformity of the law" they will give practical deference to SCC jurisprudence but will depart from it where there are "exceptional reasons"); Case 003-D181 Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction, 1 Feb 2016, para. 28 ("it is in the interests of legal certainty and equality before the law for the CIJs to apply legal principles and rules consistently with the views of the SCC unless there are good reasons to the contrary.").

<sup>52</sup> D378/5 Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions, 26 Nov 2018 ("Yim Tith's Final Submission Response"), para. 223 ("SCC's opinion was expressed in the circumstances of Case 001 and does not establish a precedent that must be followed by the CIJs in Case 004").

<sup>53</sup> D378/5 Yim Tith's Final Submission Response, Heading I.A.ii(a), para. 183, fn. 240, *citing* Case 001-E188 Judgement, 26 Jul 2010, fn. 979.

<sup>54</sup> D378/5 Yim Tith's Final Submission Response, Heading I.A.ii(b)(6).

<sup>55</sup> D386 Request to Terminate, para. 44.

<sup>56</sup> *See* ICP Appeal *in toto*.

<sup>57</sup> Case 004/2-E004/2/1/1/2 SCC Immediate Appeal Decision, paras 51 (recalling the PTC's unanimous disposition), 53, 61, 67-69, 71.

terminating the case; and (iii) the Indictment was not overturned by a PTC supermajority, so Case 004 should be sent to trial. These issues are currently before the SCC on appeal.<sup>58</sup>

***1) The opposing Case 004 Closing Orders were not issued illegally***<sup>59</sup>

18. The CIJs correctly held that the issuance of conflicting closing orders in Case 004 was not prohibited within the ECCC legal framework.<sup>60</sup> First, the PTC's finding that only one closing order should have been issued<sup>61</sup> contravenes the CIJs' duty of independence<sup>62</sup> and would require one of the CIJs to violate this duty by acquiescing to his counterpart's diametrically opposed position. Alternatively, it impermissibly places form over substance by requiring that the irreconcilable differences that necessitated two documents be enunciated in only one.<sup>63</sup>

19. Moreover, the United Nations ("UN") and Royal Government of Cambodia ("RGC") foresaw the possibility that equal and independent CIJs would disagree and put permissive mechanisms in place to deal with such disagreements.<sup>64</sup> Indeed, the likelihood of the issuance of two closing orders where there are irreconcilable differences was recognised by the SCC in Case 004/2, when it described this scenario as "almost inevitable".<sup>65</sup> Case 004 is no different.<sup>66</sup>

20. Thus, the language of Rules such as IR 67(1), referring to the issuance of one closing order, must be interpreted in this context and in conjunction with IR 1(2), which expressly provides that a reference to the CIJs includes both acting jointly and each acting individually.<sup>67</sup> The CIJs' prior actions in this case cannot be negated by the PTC's more recent contradictory interpretation of the Rules, particularly in light of the PTC's earlier failure to act when put on notice of the CIJs' intention to issue two conflicting closing orders.<sup>68</sup>

<sup>58</sup> ICP Appeal, paras 36-57.

<sup>59</sup> ICP Appeal, paras 18-20, 36-44.

<sup>60</sup> Case 004/2-**D355/1** Decision on Ao An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 Sep 2017 ("Disagreement Disclosure Decision"), paras 14-16. *See also* ICP Appeal, paras 42-44, which provide an analysis of inquisitorial systems at the national and international levels and highlights the unique nature of the ECCC's legal framework that allows the issuance of two contrary closing orders.

<sup>61</sup> **D381/45 & D382/43** Considerations, para. 110 (unanimous).

<sup>62</sup> ICP Appeal, paras 36-37, *citing* ECCC Agreement, arts 3(3), 5(3) and ECCC Law, arts 10 new, 25.

<sup>63</sup> ICP Appeal, para. 37.

<sup>64</sup> ICP Appeal, paras 18-20 (*citing* ECCC Agreement, arts 5(4), 7(1), ECCC Law, arts 14 new (1), 23 new, IRs 72(1)-(2)), 28-30, 38-39. The provisions are expressly permissive and do not make settlement of disagreements before the issuance of closing orders mandatory.

<sup>65</sup> ICP Appeal, para. 40, *citing* Case 004/2-**E004/2/1/1/2** SCC Immediate Appeal Decision, paras 59 (quote), 62.

<sup>66</sup> *See e.g.* **D382** Closing Order, 28 Jun 2019 ("Indictment"), paras 3, 7, 21 noting that the CIJs registered disagreements on 22 Feb 2013, 5 Apr 2013, 21 Oct 2015, 16 Jan 2017, and 21 Jan 2019; **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, para. 1 noting that on 3 December 2008, the ICP reported that the National Co-Prosecutor disagreed with prosecuting the crimes identified in the new Introductory Submissions and therefore refused to sign them.

<sup>67</sup> ICP Appeal, para. 41.

<sup>68</sup> Case 004/2-**D355/1** Disagreement Disclosure Decision, paras 13-18.

**2) The opposing Closing Orders are not null and void even if their simultaneous issuance was illegal<sup>69</sup>**

21. Repeating the SCC's holding in Case 004/2,<sup>70</sup> Yim Tith erroneously asserts that there "is no question" that the closing orders are both null and void as a result of the PTC's decision that their simultaneous issuance was illegal.<sup>71</sup> As discussed earlier, the Case 004 Indictment remains valid, and the Request in fact demands the CIJs to *render* it null and void, before then terminating the case. This claim must fail since not only do the CIJs *not* have the power to nullify their own closing orders, but a decision in Case 004/2 cannot simply be transplanted into Case 004, where, as here, cogent reasons exist to depart from it.<sup>72</sup>

22. Even if, *arguendo*, the issuance of two conflicting closing orders *is* a violation of the ECCC legal framework, it is a procedural error that does not invalidate the Closing Orders.<sup>73</sup> As a starting point, it is well established across the international tribunals, including the ECCC, that a procedural error does not automatically render the resulting action null and void; the Closing Orders were *not* inherently null.<sup>74</sup> Rather, procedural errors must be examined on a case-by-case basis and are often non-fatal and curable,<sup>75</sup> as is the case here. In Case 004, the allegedly illegal issuance of the two conflicting closing orders was cured by the PTC's consideration of the merits of each Closing Order.<sup>76</sup>

23. In addition, it is settled law that not all pre-trial procedural errors prevent a case from proceeding.<sup>77</sup> To determine what remedy is appropriate for any harm caused by such an error,

<sup>69</sup> ICP Appeal, paras 21-24, 45-51.

<sup>70</sup> Case 004/2-E004/2/1/1/2 SCC Immediate Appeal Decision, para. 67. *See also* para. 53.

<sup>71</sup> **D386** Request to Terminate, paras 13-17 (quote at para. 14), 39.

<sup>72</sup> *See* paras 7, 11-17, *supra*.

<sup>73</sup> *Contra* **D386** Request to Terminate, para. 16 *citing* Case 003-D270/7 Decision on Forwarding Case, para. 21.

<sup>74</sup> ICP Appeal, paras 21 (and the jurisprudence cited therein), 45. *See particularly* the SCC's prior ruling to that effect in Case 002-F36 Case 002/01 AJ, para. 100, which the International PTC Judges correctly referenced in this context (*see* **D381/45 & D382/43** Considerations, International Judges' Opinion, para. 164, fn. 338). *See also* **D381/45 & D382/43** Considerations, International Judges' Opinion, paras 164 ("the fact that *certain actions* of the Co-Investigating Judges in producing the Closing Orders were illegal cannot 'logically' lead to [...] a sweeping conclusion [that the Orders were consequentially null and void] without a reasoned demonstration as to why that particular procedural illegality would result in the complete vitiation of the two Closing Orders in question"), 165, 166 ("the International Judges are not convinced that it is a general principle of law that a procedural illegality automatically and always results into nullity"); Case 003-D266/27 & **D267/35** Case 003 Considerations, International Judges' Opinion, paras 263-283, particularly paras 271 (the SCC misread the PTC's unanimous position when it characterised it as a legal declaration of "nullity"), 272-273, 281 ("In sum, the [PTC's] unanimous Considerations can only be faithfully understood as follows: [...] (ii) the [PTC] did *not* hold that both Closing Orders were null and void, despite the [CIJs'] illegal course of action, as the [PTC's] Judges believed that at least one of the Closing Orders was valid").

<sup>75</sup> *See* ICP Appeal, paras 22-23, 45; Case 002-F36 Case 002/01 AJ, para. 100; **D381/45 & D382/43** Considerations, International Judges' Opinion, paras 164, 166.

<sup>76</sup> ICP Appeal, paras 45, 47.

<sup>77</sup> ICP Appeal, paras 21-24, 47.

a number of factors must be considered, including the gravity of the crimes charged, the interests and rights of *all* the parties, and the proportionality of any remedy to the alleged harm.<sup>78</sup> Such an assessment makes clear that termination is not justified.

24. First, 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.<sup>79</sup> Second, the victims, the Cambodian people, and the international community all have an essential interest in prosecuting persons charged with the most serious international crimes.<sup>80</sup> Third, termination is a drastic remedy that should only be implemented in exceptional circumstances, where it would be “odious” or “repugnant” to the administration of justice to allow the proceedings to continue, or where the error caused Yim Tith’s rights to be breached to such an extent that a fair trial was rendered impossible.<sup>81</sup> This high threshold is not met here, and terminating the proceedings on grounds not covered by article 7 of the Cambodian Code of Criminal Procedure is impermissible, as the SCC and TC have confirmed.<sup>82</sup>

25. Yim Tith has suffered no material prejudice or egregious harm that would justify terminating the proceedings against him, and his claim that “continuation of the proceedings would constitute abuse of process”<sup>83</sup> is manifestly unfounded. First, for the reasons already discussed, Yim Tith’s rights to equal treatment and legal certainty would not be breached by sending him to trial based on the charges in the Indictment.<sup>84</sup> Second, there has been no undue delay in this case, as he alleges. *Marini v. Albania*, upon which he relies for the right to a final and speedy determination of his case,<sup>85</sup> also affirms that delays may be justified in particular circumstances, although they “may not be such as to impair the essence of the right protected”.<sup>86</sup> Thus, cases are to be determined within a *reasonable* time without *undue* delay. This comports

<sup>78</sup> ICP Appeal, paras 21, 23, 46.

<sup>79</sup> ICP Appeal, paras 47-48.

<sup>80</sup> ICP Appeal, para. 50 and the jurisprudence cited therein.

<sup>81</sup> ICP Appeal, para. 24 and the jurisprudence cited therein.

<sup>82</sup> See ICP Appeal, para. 57. Code of Criminal Procedure of Cambodia, adopted 7 Jun 2007, translated 9 Sep 2008 (“CCCP”), art. 7 explicitly limits the causes of extinction of criminal action, beyond a dismissal or acquittal on the merits, to five circumstances (death of the offender, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*), none of which apply to Case 004. See also French Code of Criminal Procedure, as at 14 Feb 2020, art. 6; 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 (both finding that ECCC proceedings may only be terminated on one of the limited grounds set out in art. 7 of the CCCP).

<sup>83</sup> D386 Request to Terminate, para. 45.

<sup>84</sup> See paras 11-17, *supra*.

<sup>85</sup> Asserting the right in D386 Request to Terminate, paras 1, 9, 40-41 and citing *Marini v. Albania*, No. 3738/02, Judgment, 18 Dec 2007 (“*Marini*”), paras 120-123 in fns 15, 17, 18 to support that right. See also fn. 107 citing Case 003-D270/7 Decision on Forwarding Case, para. 26, which in turn discusses *Marini*.

<sup>86</sup> *Marini*, para. 126.

with the plain language of IR 21(4), human rights instruments, and international criminal jurisprudence.<sup>87</sup>

26. An assessment of what is “undue” must be made “in light of the circumstances” of the case which, amongst other factors, include the legal and factual complexity of the proceedings.<sup>88</sup> Yim Tith has rightly acknowledged the enormity and complexity of Case 004,<sup>89</sup> which is further confirmed by, *inter alia*, the number of crimes charged against him, the varying modes of responsibility, the geographic and temporal scope of the case, and the quantity of evidence on the Case File.<sup>90</sup>

27. An undue delay analysis must also weigh any alleged prejudice against “the general necessity for the investigation and judicial processes to advance”.<sup>91</sup> In this regard, there are four

<sup>87</sup> Yim Tith’s reliance on the authorities listed in **D386** Request to Terminate, fns 15 and 110 to support the asserted right to a “speedy” final determination of his case is misplaced. *See e.g.* IR 21(4) (“Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.”); ECCC Law, art. 35 new, which erroneously says “to be tried without delay” in the English version but correctly says “À être jugée sans retard excessif” (emphasis added) in the French version; ICCPR, art. 14(3)(c) (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] (c) To be tried *without undue delay*” (emphasis added)); (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov 1950, 213 UNTS 221 (as amended), art. 6(1) (“entitled to a fair and public hearing within a reasonable time”); African (Banjul) Charter on Human and Peoples’ Rights, 27 Jun 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 7(1)(d) (“right to be tried within a reasonable time”); American Convention on Human Rights: “Pact of San José, Costa Rica”, San José, 22 Nov 1969, 1144 UNTS 143, art. 8(1) (“right to a hearing [...] within a reasonable time”); Rome Statute, art. 67(1)(c) (“To be tried without undue delay”); *Frydlender v. France*, No. 30979/96, Judgment, 27 Jun 2000 (“*Frydlender*”), para. 45 (“right to a final decision within a reasonable time”). *See also Halilović*, IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, Appeals Chamber, 27 Oct 2006 (“*Halilović* Appeal Hearing Decision”), para. 17 (“the right to be tried without undue delay does not protect against *any* delay in the proceedings; it protects against *undue* delay.” (original emphasis)); *Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, Appeals Chamber, 14 Dec 2015 (“*Nyiramasuhuko* AJ”), para. 364.

<sup>88</sup> *See e.g. Halilović* Appeal Hearing Decision, para. 17; *Nyiramasuhuko* AJ, paras 360, 362; *Renzaho*, ICTR-97-31-A, Judgement, Appeals Chamber, 1 Apr 2011, para. 238; *Šešelj*, IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, Trial Chamber, 10 Feb 2010 (“*Šešelj* Abuse of Process Decision”), para. 30; *Ayyash et al.*, STL-11-01/T/TC, Judgment, Trial Chamber, 18 Aug 2020, para. 966.

<sup>89</sup> *See e.g. D361/3* Yim Tith’s Reply to the International Co-Prosecutor’s Response to Yim Tith’s Request for Adequate Preparation Time, 28 Jun 2017, para. 4 (also noting that it would be fundamentally unjust to rush to close the investigation without affording him a proper opportunity to participate).

<sup>90</sup> *See e.g. D382* Indictment, paras 151, 992-1040, pp. 475-487, detailing the alleged crimes that occurred at more than 20 sites throughout the Southwest and Northwest Zones, Yim Tith’s various positions of leadership throughout the DK regime, and the multiple modes of liability including membership in three distinct Joint Criminal Enterprises; **D384** Order on Admissibility of Civil Party Applications, 28 Jun 2019, para. 2 (noting that 2,014 people had applied to become civil parties in Case 004). The ICP further notes that, prior to the severance of Case 004, Yim Tith was one of three charged persons. The Introductory and Supplementary Submissions seized the CIJs with, *inter alia*, purges targeting internal enemies in the Central and Northwest Zones, persecution and genocide of the Cham (in the Central Zone) and the Khmer Krom (in the Northwest and Southwest Zones), and forced marriages in various locations. *See e.g. D378/2.3* Annex B – Procedural History, 4 Jun 2018, paras 1-3 (re. scope of the *saisine*), 12 (re. severance), 16 (re. quantity of evidence).

<sup>91</sup> *See e.g. Case 002-D314/1/8* Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 Jun 2010, para. 70; *Case 003-D120/3/1/8* Considerations on Meas Muth’s Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on Meas Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 Apr 2016, Opinion of Judges Beauvallet and Baik (The “Undersigned Judges”) Regarding the Merit of the Appeal, para. 36; *Boddaert v. Belgium*, No.

crucial considerations in Case 004. First, Yim Tith has never been in custody.<sup>92</sup> Second, the charges against him are of the utmost seriousness.<sup>93</sup> Third, the ECCC's mandate is to bring to trial those within its jurisdiction.<sup>94</sup> Fourth and perhaps most importantly, the PTC unanimously held that the delays resulting from the CIJs' failure to strictly adhere to the ECCC's legal framework had not "so seriously erode[d] the fairness of the proceedings that it would be oppressive to continue", nor had the overall duration of Case 004 sufficiently demonstrated that a fair trial by the TC was either impossible or irremediably vitiated.<sup>95</sup> In short, there was no undue delay and no prejudice caused by the issuance of conflicting closing orders. When weighing this finding against the other considerations, the balance overwhelmingly favours advancing Case 004 to trial, not terminating it.

28. It would therefore be vastly disproportionate to terminate Case 004 when the issuance of the conflicting closing orders has not caused any material harm nor deprived Yim Tith of any of his lawful rights.<sup>96</sup> Such a decision would entirely disregard the ECCC legal framework, the settled law on appropriate remedies for procedural errors, and the fundamental rights and interests of the parties, all of which necessitate fair adjudication of the grievous crimes with which Yim Tith is charged.

### 3) *The Indictment was not overturned by a supermajority*<sup>97</sup>

29. The Case 004 Indictment was not *overturned* by a supermajority (and the Dismissal Order was not *upheld* by a supermajority).<sup>98</sup> As such, the case goes to trial based on what the PTC unanimously described as the "fundamental and determinative" default position that the "investigation shall proceed",<sup>99</sup> a core principle which the International PTC Judges rightly

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12919/87, Judgment, 12 Oct 1992, para. 39 ("Article 6 [...] commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice.") applied in *Coëme and others v. Belgium*, Nos 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, Judgment, 22 Jun 2000, para. 140.

<sup>92</sup> General Comment No. 32, para. 35; *Abdoella v. The Netherlands*, No. 12728/87, Judgment, 25 Nov 1992, para. 24 ("detention is a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met"); **D381/45 & D382/43** Considerations, para. 520.

<sup>93</sup> See e.g. *Rwamakuba*, ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, Trial Chamber, 3 Jun 2005, para. 19 ("the reasonableness of the length of the proceedings has to be assessed on a case by case basis, in light of several factors, including: the gravity of the charges against the Accused"); *Šešelj* Abuse of Process Decision, paras 29-30; **D382** Indictment, pp. 475-487 (charging Yim Tith with genocide; numerous crimes against humanity including murder, torture, enslavement, and other inhumane acts; war crimes; and violations of the 1956 Cambodian Penal Code).

<sup>94</sup> ECCC Law, arts 1, 2 new; ECCC Agreement, art. 1.

<sup>95</sup> **D381/45 & D382/43** Considerations, paras 73-79 (quote at para. 78). Note that this finding was rendered just 31 days before the **D386** Request to Terminate repeated the same claims of delay.

<sup>96</sup> ICP Appeal, paras 48, 50-51, 73. *Contra* **D386** Request to Terminate, paras 45, 47.

<sup>97</sup> ICP Appeal, paras 25-30, 52-57.

<sup>98</sup> **D381/45 & D382/43** Considerations, pp. 49-50 (Disposition); International Judges' Opinion, paras 174-176, 539, p. 225 (Disposition).

<sup>99</sup> **D381/45 & D382/43** Considerations, paras 100, 104, fn. 223. This principle is articulated in articles 5(4) and

termed the “principle of continuation of judicial investigation and prosecution”.<sup>100</sup> The failure to implement this mandatory principle does not negate the mandate, it simply demonstrates an error of law.



30. In applying the principle of continuation, Rule 77(13)(b)—which specifically relates to indictments—prevails as *lex specialis* over the general terms of Rule 77(13)(a) regarding all other orders. Had the drafters of the Rules intended a dismissal order to end a case absent a supermajority overturning it, they would have expressly stated so.<sup>101</sup> Thus, even in a situation where a dismissal order stands in parallel to an indictment (which is not the case here), the case would proceed to trial on the basis of the indictment because proceedings are only halted by a PTC supermajority overturning the indictment.<sup>102</sup>

31. Failing to respect the principle of continuation would produce “a manifestly unreasonable legal result, violating both international law and Cambodian law”,<sup>103</sup> including the overriding principles that proceedings must comply with legality, fairness and effectiveness. The ICP agrees with Yim Tith to the extent that there is a right to obtain a final determination of the case.<sup>104</sup> But in contrast to *Marini*, upon which he relies,<sup>105</sup> the ECCC legal framework is structured to ensure legal certainty and a final determination of the issues in the event the requisite majority is not reached, by providing that the proper next step is to forward the Indictment and case file to the TC.<sup>106</sup>

#### IV. RELIEF REQUESTED

32. For all the foregoing reasons, Yim Tith’s Request should be dismissed.

Respectfully submitted,

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

7(4) of the ECCC Agreement, accepted by both the RGC and the UN, is reflected in article 23 new of the ECCC Law, and is regularly applied at the ECCC.

<sup>100</sup> **D381/45 & D382/43** Considerations, International Judges’ Opinion, paras 169, 174, 533, 538. *See also* Case 003-**D266/27 & D267/35** Case 003 Considerations, International Judges’ Opinion, paras 256, 261; Case 004/2-**D359/24 & D360/33** Case 004/2 Considerations, International Judges’ Opinion, para. 320.

<sup>101</sup> ICP Appeal, para. 54.

<sup>102</sup> *See further* ICP Appeal, fn. 99.

<sup>103</sup> ICP Appeal, para. 55, *citing* **D381/45 & D382/43** Considerations, para. 104.

<sup>104</sup> **D386** Request to Terminate, para. 9, *citing, inter alia, Frydlender*, para. 45 and *Multiplex v. Croatia*, No. 58112/00, Judgment, 10 Jul 2003, para. 45.

<sup>105</sup> *Marini*, para. 118. *Contra* **D386** Request to Terminate, para. 9.

<sup>106</sup> *See further* **D381/45 & D382/43** Considerations, International Judges’ Opinion, paras 521-523, 539, p. 225 (Disposition).