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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**INTERNATIONAL CO-PROSECUTOR'S IMMEDIATE APPEAL OF THE TRIAL  
CHAMBER'S EFFECTIVE TERMINATION OF CASE 004/2**

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## I. INTRODUCTION AND BACKGROUND

1. The International Co-Prosecutor (“ICP”) hereby appeals the Trial Chamber’s effective termination of Case 004/2 against Ao An. As detailed below, the Trial Chamber (“TC”) has repeatedly refused to commence the trial of Case 004/2 since 19 December 2019 when the Pre-Trial Chamber (“PTC”) failed to reach a supermajority overturning the Indictment. At that time, the default position mandated by the ECCC Agreement,<sup>1</sup> ECCC Law,<sup>2</sup> and Internal Rules<sup>3</sup> was triggered, which legally seized the TC of the case.
2. However, the TC refused to formally notify or adjudicate the Parties’ subsequent pleadings that were relevant to the trial process as well as several ICP requests to take all necessary actions to progress the case to trial. Initially the TC justified its inaction by stating that it had not been formally notified of the PTC’s Considerations nor had the Case File been forwarded to it. On 16 March 2020, the PTC President made clear that the PTC would take no further action regarding Case 004/2. The ICP then asked the TC to progress the case to trial, including to judicially pronounce on the issues before it. The TC quickly responded, issuing a joint statement (“3 April Statement”) that it declared had “no legal force” but which cited the same justifications for its continued inaction. The TC’s failure to act since 19 December and its expressed intent in the 3 April Statement to continue that inaction, has effectively terminated the proceedings.
3. The ICP submits that the TC legally erred and abused its discretion in effectively terminating Case 004/2, warranting intervention by the Supreme Court Chamber (“SCC”). As detailed below, the TC: i) failed to give effect to the default position which seized it of the case as of 19 December 2019; ii) failed to invoke its legal and inherent jurisdiction to carry out its primary judicial obligation to pronounce on justiciable issues; iii) arbitrarily imposed additional administrative requirements to effectuate formal notification of the PTC’s Considerations; and iv) effectively terminated the case on impermissible grounds. These errors invalidate the effective termination of the case and prejudice the ICP and the other Case 004/2 Parties, as they violate the Parties’

<sup>1</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, Phnom Penh, 6 June 2003 (“ECCC Agreement”), arts 5(4), 6(4), 7(4).

<sup>2</sup> 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 October 2004 (“ECCC Law”), arts 20 new, 23 new.

<sup>3</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”), Rules 77(13)(b), 79(1).

fundamental rights to procedural fairness, legal certainty, and transparency, the right to appeal, and the right to be heard before impartial and independent judges. Had the TC correctly applied the law and/or properly exercised its discretion, Case 004/2 would have progressed to trial.

4. The ICP therefore brings this immediate appeal pursuant to Rule 104(4)(a) and in the interests of justice. The TC's continuing inaction, effectively terminating the case, requires intervention by the SCC to ensure the integrity of the ECCC as an impartial, independent judicial institution which decides cases based on the law and the facts, as well as to ensure the right of all parties to have justice delivered in transparent judicial proceedings.

## II. PROCEDURAL HISTORY

5. On 16 August 2018, the Co-Investigating Judges ("CIJs") issued their Closing Orders regarding the Case 004/2 investigation: the International Co-Investigating Judge ("ICIJ") issued an Indictment<sup>4</sup> while the National Co-Investigating Judge ("NCIJ") issued a Dismissal Order.<sup>5</sup> The Parties then filed written appellate pleadings and made oral submissions to the PTC, arguing the errors and merits of the Closing Orders as well as the procedural consequences of the PTC being unable to reach a supermajority on the appeals.<sup>6</sup>
6. On 19 December 2019, the PTC issued its Considerations on the appeals of the Closing Orders, failing to reach the supermajority required to reverse either the Indictment or the

<sup>4</sup> **D360** Closing Order (Indictment), 16 August 2018 ("Indictment").

<sup>5</sup> **D359** Order Dismissing the Case Against Ao An, 16 August 2018 ("Dismissal Order").

<sup>6</sup> **D359/3** Appeal Register of International Co-Prosecutor's Notice of Appeal Against the NCIJ's Order Dismissing the Case Against Ao An (D359), 12 November 2018; **D359/3/1** International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Ao An (D359), 20 December 2018; **D359/3/4** Ao An's Response to the International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Ao An (D359), 20 February 2019; **D359/3/5** International Co-Prosecutor's Reply to Ao An's Response to the Appeal of the Order Dismissing the Case Against Ao An (D359), 3 April 2019; **D360/5** Appeal Register of [Ao An's] Notice of Appeal Against International Co-Investigating Judges' Closing Order (Indictment), 5 October 2018; **D360/5/1** Ao An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment), 19 December 2018; **D360/9** International Co-Prosecutor's Response to Ao An's Appeal of the Case 004/2 Indictment, 22 February 2019; **D360/11** Reply to the International Co-Prosecutor's Response to Ao An's Appeal of the Case 004/2 Indictment, 1 April 2019; **D360/8** Appeal Register of National Co-Prosecutor's Notice of Appeal Against the ICIJ's Closing Order (Indictment), 12 November 2018; **D360/8/1** National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/02, 14 December 2018; **D360/10** International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 004/2 Indictment, 27 February 2019; **D359/8.1 & D360/17.1** Transcript of the Appeals Hearing, 19 June 2019; **D359/9.1 & D360/18.1** Transcript of the Appeals Hearing, 20 June 2019; **D359/10.1 & D360/19.1** Transcript of the Appeals Hearing, 21 June 2019.

Dismissal Order.<sup>7</sup> The PTC's Considerations were filed publicly and TC Judges Claudia Fenz and Martin Karopkin as well as the TC Greffier, Suy-Hong Lim, were copied on the formal notification email.<sup>8</sup> The same email was also sent to NCIJ You Bunleng,<sup>9</sup> who, at that time, was the only remaining official or staff member in the Office of the Co-Investigating Judges.<sup>10</sup>

7. On 26 December 2019, in accordance with Internal Rules 39(4), 77(13)(b), 79(1), and 80(1), the ICP filed in hard copy with the TC requests for an extension of time to submit her witness and expert list and for a trial management meeting.<sup>11</sup> The ICP also sent courtesy copies via email to the TC Judges, Greffier and Parties. The ICP adopted this practice for all subsequent filings to the TC as the Chamber never authorised a means to electronically file or notify the submissions.
8. On 31 December 2019, Ao An requested that the TC confirm it was not lawfully seized of Case 004/2 or, alternatively, that the TC provide guidance as to the filing of preliminary objections and grant Ao An adequate time (at least 60 days) to file his objections.<sup>12</sup> The ICP filed her response to this request on 6 January 2020.<sup>13</sup>
9. On 13 January 2020, having received no TC order regarding the requested extension of time to file her list, the ICP submitted her Rule 80(1) Witness and Expert List in accord with the date of the requested extension.<sup>14</sup>

<sup>7</sup> **D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 ("PTC's Considerations").

<sup>8</sup> See Email notification from the Case File Officer, 19 December 2019, 4:53 p.m. *Attached as Annex B*.

<sup>9</sup> See Email notification from the Case File Officer, 19 December 2019, 4:53 p.m. *Attached as Annex B*.

<sup>10</sup> See Report of the Secretary-General, 20 September 2019, UN Doc. A/74/359, p. 17, Annex I: Summary of follow-up action taken to implement relevant recommendations ("following the issuance of closing orders in cases 003, 004 and 004/02, all staff positions at the Office of Co-Investigating Judges were abolished as at 30 June 2019 and the international co-investigating judge has submitted his resignation"). On 22 April 2020, the Secretary-General reinstated the ICIJ. See <https://cccc.gov.kh/cn/articles/statement-international-co-investigating-judge-reinstated> for the English version of the announcement.

<sup>11</sup> See International Co-Prosecutor's Request for Extension of the Rule 80 Deadline and a Trial Management Meeting, 26 December 2019, which was delivered in hard copy to the TC Greffier on 26 December 2019 (*attached as Annex O1 (English) and O2 (Khmer)*). See also **D359/36.2 & D360/45.2** Attachment 2 (Email entitled "Information" sent by Suy-Hong Lim on behalf of the TC), 21 January 2020 ("TC Greffier 21 January Email"), attached to **D359/36 & D360/45** International Judges' Memorandum concerning Transfer of Case File 004/2, 12 March 2020 ("12 March Memo"). The TC Greffier 21 January Email acknowledged receipt of the documents sent by the parties to the TC.

<sup>12</sup> See Email sent to the TC Judges from Göran Sluiter on 31 December 2019 at 3:33 p.m. (*attached as Annex C*). Attached to the email was a Letter from the Defence Co-Lawyers to the TC Judges, 30 December 2019 (*attached as Annex P1 (English) and P2 (Khmer)*). See also **D359/36.2 & D360/45.2** TC Greffier 21 January Email acknowledging receipt of the documents sent by the parties to the TC.

<sup>13</sup> International Co-Prosecutor's Response to Ao An's Request Regarding the Seizure of Case 004/2, 6 January 2020 (*attached as Annex Q1 (English) and Q2 (Khmer)*). See also **D359/36.2 & D360/45.2** TC Greffier 21 January Email acknowledging receipt of the documents sent by the parties to the TC.

<sup>14</sup> International Co-Prosecutor's Rule 80 Witness and Expert List Submission with Confidential Annex A, 13

10. On 15 January 2020, the ICP hand-delivered an Interoffice Memorandum to the UNAKRT Co-ordinator regarding the progress of Case 004/2 (“ICP’s 15 January Memo”).<sup>15</sup> In the Memorandum, the ICP expressed concern that none of the pleadings she had filed with the TC had been notified to the Parties, and she asked the Office of Administration (“OA”) to consider and implement whatever steps it could to move the process forward administratively and/or resolve the delay.
11. On 20 January 2020, Ao An submitted a summary of his Preliminary Objections via email to the TC.<sup>16</sup>
12. On 21 January 2020, the TC Greffier sent an email to the Parties on behalf of the TC stating that the PTC’s Considerations had not been notified to the TC and neither the Case File nor the Indictment had yet been forwarded.<sup>17</sup> The ICP and Ao An subsequently made several written submissions to the PTC regarding these administrative steps, all of which were made public.<sup>18</sup>
13. On 23 January 2020, the OA responded to the ICP’s 15 January Memo.<sup>19</sup> The response explained that the OA can only implement judicial acts following an instruction or direction of the Chambers as communicated through their greffiers. As such, the OA had “duly completed all its tasks related to this context”.

January 2020 (*attached as Annex R1 (English) & R2 (Khmer)*). See also **D359/36.2 & D360/45.2** TC Greffier 21 January Email acknowledging receipt of the documents sent by the parties to the TC.

<sup>15</sup> Interoffice Memorandum entitled “Progress of Case 004/2, Ao An” from ICP Brenda J. Hollis to UNAKRT Co-ordinator Knut Rosandhaug, 15 January 2020. *Attached as Annex K*.

<sup>16</sup> See Email sent to the TC Judges from Kristin Rosella on 20 January 2020 at 5:09 p.m. (*attached as Annex D*) attaching Summary of Ao An’s Preliminary Objections Under IR 89(1), 20 January 2020 (*attached as Annex S1 (English)*). The TC, Co-Prosecutors and Civil Party Lawyers were copied. See also **D359/36.2 & D360/45.2** TC Greffier 21 January Email acknowledging receipt of the documents sent by the parties to the TC.

<sup>17</sup> **D359/36.2 & D360/45.2** TC Greffier 21 January Email. This email was sent to the Co-Prosecutors, Ao An’s Co-Lawyers, the PTC Judges, and the Director and Deputy Director of Administration.

<sup>18</sup> **D359/25 & D360/34** International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (Ao An) to the Trial Chamber, 4 February 2020; **D359/26 & D360/35** Response to International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (Ao An) to the Trial Chamber, 18 February 2020; **D359/27 & D360/36** [Ao An’s] Request for Confirmation that All Required Administrative Actions have been Taken to Archive Case File 004/02, 24 February 2020; **D359/28 & D360/37** International Co-Prosecutor’s Reply to Ao An’s Response to the ICP’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (Ao An) to the Trial Chamber, 3 March 2020; **D359/30 & D360/39** International Co-Prosecutor’s Response to Ao An’s Request for Confirmation that All Required Administrative Actions have been Taken to Archive Case File 004/2, 5 March 2020; **D359/31 & D360/40** Reply to International Co-Prosecutor’s Response to Ao An’s Request for Confirmation that All Required Administrative Actions have been Taken to Archive Case File 004/02, 17 March 2020.

<sup>19</sup> Interoffice Memorandum entitled “Case 004/02” from Deputy Director of Administration Knut Rosandhaug to ICP Brenda Hollis, 23 January 2020. *Attached as Annex L*.

14. On 28 January 2020, Ao An filed his Witness and Expert List and response to the ICP's list in hard copy with the TC, also providing courtesy copies via email.<sup>20</sup> He repeated this procedure with all subsequent filings to the TC.
15. Also on 28 January 2020, the Records and Archives Unit of the OA ("RAU") received contradicting instructions regarding Case 004/2 from the PTC Greffiers. One Greffier filed a form instructing the RAU to notify the PTC's Considerations to the TC,<sup>21</sup> while another Greffier emailed the RAU instructing it *not* to notify the TC and to archive the Case File.<sup>22</sup>
16. The next day, PTC President Judge Prak Kimsan sent an Internal Memorandum to the Court Management Section ("CMS") Chief, copying the other PTC Judges as well as the Acting Director and Deputy Director of the OA. The memo stated that "[t]he personal opinions and decision of each judge shall have no applicable effect" and "notification to any person or chamber who is not a party of this case is violating the unanimous decision of [the] PTC".<sup>23</sup>
17. Also on 29 January 2020, the PTC International Judges sent an Interoffice Memorandum to the Acting Director and Deputy Director of the OA as well as the Chief of CMS, copying the PTC President and the other National Judges. The memo addressed the relevant law regarding notification of the PTC's Considerations and noted that the PTC President's Rule 77 powers did not give him the authority to instruct CMS—in fact, doing so was in direct conflict with the ECCC Agreement, ECCC Law, and Internal Rules.<sup>24</sup> The PTC International Judges reiterated that the Indictment had not been reversed by supermajority and therefore stood, that the TC was seised of Case 004/2 pursuant to

<sup>20</sup> Ao An's Rule 80 Witness and Expert List Submission with Confidential Annex 1 and His Response to the International Co-Prosecutor's Rule 80 Witness and Expert List Submission, 28 January 2020 (*attached as Annex T*). See also Email from Kristin Rosella, 28 January 2020, 3:48 p.m. (*attached as Annex E*).

<sup>21</sup> **D359/36.4 & D360/45.4** Attachment 4 of the 12 March Memo ("Filing Instruction"), 28 January 2020.

<sup>22</sup> **D359/36.3 & D360/45.3** Attachment 3 of the 12 March Memo ("Filing instruction D359\_24 and D360\_33.pdf"), 28 January 2020.

<sup>23</sup> **D359/36.5 & D360/45.5** Attachment 5 of the 12 March Memo ("Clarification on the decision in the case 004/2"), 29 January 2020, p. 2. On 13 April 2020, this Clarification Memo was added to the Case File as a public document. See **D359/34 & D360/43** President's Memo concerning Notification of Pre-Trial Chamber's Considerations in Case 004/2, 29 January 2020 ("PTC President's 29 January Memo").

<sup>24</sup> **D359/36.6 & D360/45.6** Attachment 6 of the 12 March Memo ("Notification of the Pre-Trial Chamber's Considerations in Case 004/2"), pp. 1-3 (law), p. 5 (the PTC President's powers) *citing* ECCC Agreement, art. 4(1), ECCC Law, art. 12, Internal Rule 77(13). On 13 April 2020, this Notification Memo was added to the Case File as a public document. See **D359/35 & D360/44** Pre-Trial Chamber International Judges' Memorandum concerning Notification of Pre-Trial Chamber's Considerations in Case 004/2, 29 January 2020 ("PTC International Judges' 29 January Memo").

Internal Rule 77(13)(b), and that the Administration was currently instructed to notify the TC of the PTC's Considerations.<sup>25</sup>

18. On 31 January 2020, the Acting Director and Deputy Director of the OA sent an Interoffice Memorandum to the President of the PTC (copying the other PTC Judges) requesting either an "authoritative clarification" on how the RAU should implement the conflicting instructions from the two PTC Greffiers or, in the alternative, an actionable instruction.<sup>26</sup>
19. Unaware that the actions described in paragraphs 15-18 above had taken place, on 4 February 2020, the ICP filed a request asking the TC to request that the PTC take all necessary administrative actions to provide for the immediate transfer of the Indictment and the remaining Case File.<sup>27</sup>
20. On 5 February 2020, the ICP sent an Interoffice Memorandum to the OA requesting that the OA take immediate action to forward Case File 004/2 to the TC in compliance with the PTC's Considerations and the Internal Rules.<sup>28</sup> On 10 February 2020, the OA responded, stating it would only implement judicial acts following an instruction or direction from the relevant chamber.<sup>29</sup>
21. Also on 10 February 2020, in seeming contradiction to the 19 December 2019 formal notification of the PTC Considerations via email to two TC judges and the Greffier,<sup>30</sup> the TC Greffier informed the parties by email that although the TC was aware of the PTC's Considerations, which were publicly available, it had still not been *formally notified* of

<sup>25</sup> **D359/35 & D360/44** PTC International Judges' 29 January Memo, pp. 5-6.

<sup>26</sup> **D359/36.7 & D360/45.7** Attachment 7 of the 12 March Memo ("Request for clarification under Internal Rule 10(2)"), 31 January 2020.

<sup>27</sup> International Co-Prosecutor's Request that the Trial Chamber Take Action to Obtain Access to the Case 004/2 (Ao An) Indictment and Case File, 4 February 2020 (*attached as Annex U1 (English) and U2 (Khmer)*). See also **D359/36.8 & D360/45.8** Attachment 8 of the 12 March Memo (Email entitled "Concerning ICP request dated 4 February 2020"), sent by TC Greffier and Legal Officer Suy-Hong Lim on behalf of the TC, 10 February 2020 ("TC Greffier 10 February Email"), 11:44 a.m. acknowledging receipt of the ICP's Request.

<sup>28</sup> Interoffice Memorandum entitled "Request for Administrative Action in Compliance with Case 004/02, D359/24 & D360/33, Considerations on Appeals Against Closing Orders, 19 December 2019 (Considerations)" from ICP Brenda J. Hollis to OA Acting Director Tony Kranh and OA Deputy Director Knut Rosandhaug, 5 February 2020. *Attached as Annex M.*

<sup>29</sup> Interoffice Memorandum entitled "Memorandum dated 5 February 2020 regarding case 004/02" from Tony Kranh, Acting Director of Administration, and Knut Rosandhaug, Deputy Director of Administration, to ICP Brenda J. Hollis, 10 February 2020. *Attached as Annex N.*

<sup>30</sup> It is the ICP's understanding that the National TC Judges were not notified of the PTC's Considerations because at the time they were issued, the National TC Judges were not on contract with the ECCC.

them by the PTC and the Case File had not been forwarded. The email concluded that the PTC had to initiate those actions.<sup>31</sup>

22. On 13 February 2020, the ICP filed a request asking the TC to clarify its email of 10 February 2020 and to make the Case 004/2 filings to the TC publicly available in order to ensure transparency of the proceedings.<sup>32</sup> In her request, the ICP questioned why acts that had been sufficient to notify the TC and transfer the Case 001 and 002 Case Files were inexplicably no longer sufficient for Case 004/2.<sup>33</sup> To date, no clarification from the TC has been received.
23. On 11 March 2020, the ICP received via email the Khmer translation of Ao An's summary of his Preliminary Objections.<sup>34</sup> On 23 March 2020, the ICP filed her response with the TC.<sup>35</sup>
24. On 12 March 2020, the Co-Prosecutors, Ao An's Co-Lawyers, and the Civil Party Lawyers received via email an Interoffice Memorandum from the International Judges of the PTC entitled "Transfer of Case File 004/2" ("12 March Memo").<sup>36</sup> The memo and its eight attachments detailed the judicial and administrative stalemating that had taken place in the PTC and OA that had previously been unknown to the parties and has been summarised in paragraphs 15-18 above. The PTC National Judges and the TC Greffier also received copies of the 12 March Memo and its attachments.
25. On 16 March 2020, the PTC President issued a Memorandum ("16 March Memo") to the Co-Prosecutors, Ao An's Co-Lawyers, and the Civil Party Lawyers. The memo, which was issued "[i]n the name of the President", makes clear that in his estimation, the PTC had "already fulfilled its duty" and was not required to take any further administrative action.<sup>37</sup>

<sup>31</sup> **D359/36.8 & D360/45.8** TC Greffier 10 February Email (copying the PTC Judges as well as the Director and Deputy Director of the Office of Administration).

<sup>32</sup> International Co-Prosecutor's Request for Clarification of the Trial Chamber's Email of 10 February 2020 (with Public Annexes A-F), 13 February 2020 ("ICP's Clarification Request to the TC"). *Attached as Annex V1 (English) and V2 (Khmer)*.

<sup>33</sup> ICP's Clarification Request to the TC, paras 21-26.

<sup>34</sup> See Email from Kristin Rosella entitled "Courtesy Copy of the KH Translation of Ao An's Summary of Preliminary Objections", 11 March 2020, 4:33 p.m. *Attached as Annex F (email), Annex S2 (Khmer translation of Ao An's Summary of Preliminary Objections)*.

<sup>35</sup> International Co-Prosecutor's Response to Ao An's Summary of Preliminary Objections Under IR 89(1), 23 March 2020. *Attached as Annex W1 (English) and W2 (Khmer)*.

<sup>36</sup> **D359/36 & D360/45** 12 March Memo.

<sup>37</sup> **D359/37 & D360/46** President's Memorandum dated 16 March 2020, 16 March 2020 ("16 March Memo"), para. 5.



26. On 20 March 2020, the ICP requested that the 12 March Memo, its eight attachments, and the 16 March Memo be added to Case File 004/2 and be made public.<sup>38</sup> The requested documents were subsequently added to the Case File as public documents on 13 April 2020.<sup>39</sup>
27. On 30 March 2020, eight lawyers for the Case 004/2 Civil Parties filed a request to the PTC detailing serious and repeated violations and disregard for the Civil Parties' rights to transparency, legal clarity, participation, and fair and balanced treatment in the Case 004/2 proceedings.<sup>40</sup> The request asked the PTC to safeguard these rights by taking specific remedial measures, and asserted that the ECCC must uphold the Indictment and advance the case file to the TC in the absence of a supermajority of the PTC dismissing the case. To date, the PTC has not addressed this request.
28. Also on 30 March 2020, as a direct result of the PTC's indications that it would take no further action on Case 004/2,<sup>41</sup> the ICP renewed her request for the TC to progress Case 004/2 to trial.<sup>42</sup> Ao An responded on 1 April 2020, stating that he did not consider the TC to be lawfully seised of Case 004/2 and asserting that the TC lacked jurisdiction to entertain the ICP's renewed request.<sup>43</sup>
29. On 3 April 2020, the TC Greffier emailed a statement to the parties ("3 April Statement")<sup>44</sup> that was also publicly posted on the ECCC website.<sup>45</sup> The TC Judges stated that issuing a formal decision was "not possible" and, while they alleged that the 3 April

<sup>38</sup> **D359/32 & D360/41** International Co-Prosecutor's Request to Add the 12 and 16 March PTC Memoranda to Case File 004/2, 20 March 2020, para. 6.

<sup>39</sup> See **D359/36 & D360/45** 12 March Memo; **D359/36.1-D359/36.8 & D360/45.1-D360/45.8** Eight attachments of the 12 March Memo; **D359/37 & D360/46** 16 March Memo.

<sup>40</sup> **D359/33 & D360/42** Civil Party Lawyers' Request for Necessary Measures to be Taken by the Pre-Trial Chamber to Safeguard the Rights of Civil Parties to Case 004/2, 30 March 2020 ("Civil Party Lawyers' Safeguard Request").

<sup>41</sup> See **D359/36 & D360/45** 12 March Memo, paras 34-37; **D359/37 & D360/46** 16 March Memo, para. 5.

<sup>42</sup> International Co-Prosecutor's Renewed Request for the Trial Chamber to take the Necessary Actions to Progress Case 004/2 to Trial including Ordering the Immediate Transfer of the Case 004/2 Case File to the Trial Chamber, 30 March 2020. *Attached as Annex X1 (English) and X2 (Khmer)*.

<sup>43</sup> See Response to International Co-Prosecutor's Renewed Request for the Trial Chamber to Take the Necessary Actions to Progress Case 004/2 to Trial Including Ordering the Immediate Transfer of the Case 004/2 Case File to the Trial Chamber, 1 April 2020 (*attached as Annex Y1 (English) and Y2 (Khmer)*), which was attached to the Email sent to the TC Judges from Kristin Rosella on 1 April 2020 at 6:10 p.m. (*attached as Annex G*).

<sup>44</sup> Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving Ao An, 3 April 2020 ("3 April Statement") (*attached as Authority 16A (English) and 16B (Khmer)*). The Statement was attached to the Email from TC Greffier Suy-Hong Lim entitled "Statement of the Judges of the Trial Chamber", 3 April 2020, 1:49 p.m. (*attached as Annex H*).

<sup>45</sup> Available in English at <https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> (last accessed on the date of this filing).

Statement had no legal force, it was issued jointly in the hope that it would provide transparency and clarity to the public and the parties.<sup>46</sup> The International Judges of the TC expressed a belief that “an argument could be made that under the unique circumstances of the case the Chamber has *inherent authority* to address some of the preliminary issues raised by the parties”, but the National Judges asserted that the TC did not have the case file, they believed the case was closed before the PTC, and the TC did not have any authority to make *any* decision regarding the case.<sup>47</sup> The Parties were informed that the relevant documents and requests served by the Parties to the TC would be returned, and the National Judges unequivocally declared that “there will not be a trial of Ao An now or in the future”.<sup>48</sup>

30. On 9 April 2020, the Case 004/2 documents that the ICP had filed in hard copy to the TC were returned to the ICP, marked “Return to sender 9-4-2020”.<sup>49</sup>

### III. APPLICABLE LAW

#### A. ADMISSIBILITY OF THE APPEAL

31. Rule 104(4)(a) provides that decisions of the TC “which have the effect of terminating the proceedings” are subject to immediate appeal to the SCC. An immediate appeal must be filed within 30 days of the date of the impugned decision or its notification.<sup>50</sup>
32. Rule 21(1) provides in relevant part:

The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:

- a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...];
- c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings [...].

<sup>46</sup> 3 April Statement, p. 2.

<sup>47</sup> 3 April Statement, p. 2.

<sup>48</sup> 3 April Statement, p. 2.

<sup>49</sup> Email from Vannarith Toch to the OCP entitled “Documents filed in hard copies to TC CF004/2 are returned to OCP this afternoon”, 9 April 2020, 1:59 p.m. (*attached as Annex I*); “Return to Sender” receipts of the filings returned from the TC to the ICP on 9 April 2020 (*attached as Annex J*).

<sup>50</sup> Rule 107(1).

### B. STANDARD OF APPEAL

33. Rule 104(1) provides that the SCC shall decide an appeal against a decision of the TC when there is a) an error on a question of law invalidating the decision, or b) an error of fact which has occasioned a miscarriage of justice. An immediate appeal against a TC decision may also be based on a discernible error in the exercise of the TC's discretion which resulted in prejudice to the appellant.<sup>51</sup>

### C. TERMINATION OF ECCC PROCEEDINGS

34. Rule 2 states in relevant part:

Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the [...] Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws.

35. Article 12(1) of the ECCC Agreement provides:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.<sup>52</sup>

36. Under Cambodian law:

The reasons for extinguishing a charge in a criminal action are as follows:

1. The death of the offender;
2. The expiration of the statute of limitations;
3. A grant of general amnesty;

<sup>51</sup> Rule 104(1).

<sup>52</sup> ECCC Law, art. 33 new reinforces Article 12(1), providing in relevant part: "The Extraordinary Chambers of the trial court shall 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 procedures 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." *See also* ECCC Law, art. 37 new ("The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.").

4. Abrogation of the criminal law;
5. The res judicata.

When a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated.<sup>53</sup>

#### D. THE “DEFAULT POSITION” UNDERLYING THE ECCC’S LEGAL FRAMEWORK

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

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. [...] If there is no majority, as required for a decision, the investigation or prosecution **shall proceed**.<sup>54</sup>

38. Rule 77(13) states:

A decision of the [Pre-Trial] Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, **the default decision of the Chamber shall be** as follows:

(a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.

(b) As regards appeals against indictments issued by the Co-Investigating Judges, **that the Trial Chamber be seised** on the basis of the Closing Order of the Co-Investigating Judges.<sup>55</sup>

39. Rule 79(1) provides that:

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

40. Rule 1(2) provides, in relevant part:

[U]nless otherwise specified, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually, whether directly or through delegation [...].

<sup>53</sup> Code of Criminal Procedure of the Kingdom of Cambodia, 7 June 2007 (“CCCCP”), art. 7.

<sup>54</sup> Emphasis added. *See also* ECCC Agreement, arts 5(4), 6(4); ECCC Law, art. 20 new.

<sup>55</sup> Emphasis added.

## IV. SUBMISSIONS

### A. ADMISSIBILITY

#### 1. The Appeal is admissible pursuant to Internal Rule 104(4)(a)

41. Rule 104(4)(a) provides that TC decisions which have the effect of terminating the proceedings are subject to immediate appeal to the SCC. Every aspect of this Rule is satisfied by the circumstances of this Case. First, as discussed below in the Merits section of this Appeal, the Trial Chamber was lawfully seised of Case 004/2,<sup>56</sup> thus there were proceedings to terminate.<sup>57</sup>
42. Second, despite the TC's declaration that "issuing a formal decision" was not possible and its specious description of the 3 April Statement as a "joint statement" with "no legal force",<sup>58</sup> the TC's inaction<sup>59</sup> combined with the 3 April Statement constitutes a "decision" capable of being appealed to the SCC. The SCC has previously found that a TC memorandum constituted a "decision" because it possessed "*indicia* of an authoritative judicial act, despite lacking solemn form".<sup>60</sup> The SCC has also found that "practices departing from judicial formalism and symbolism do not render the acts void"; rather, they are "reviewed in the aspect of fairness, in terms of sufficient clarity as to their existence, content and procedural consequences".<sup>61</sup>
43. Under this analysis, the TC's failure to take any action whatsoever in regard to Case 004/2, including authorising electronic filings and notifications, was made repeatedly and sufficiently clear from 19 December 2019, and the 3 April Statement made equally clear that nothing would change.<sup>62</sup> The TC's physical return of the documents to the Parties without ever considering them was an authoritative judicial act that further demonstrated

<sup>56</sup> See Section IV.B.1, *infra*.

<sup>57</sup> Case 002-E306/7/3/1/4 Decision on Civil Parties' Immediate Appeal Against the Trial Chamber's Decision on the Scope of Case 002/02 in Relation to the Charges of Rape, 12 January 2017, para. 23. The SCC noted that resolving whether there were proceedings to effectively terminate was "closely intertwined with the merits of the Appeal" and it therefore joined the admissibility question to consideration of the merits, as admissibility would turn on whether or not the Trial Chamber was seised of the factual allegations of rape occurring outside the context of forced marriage. However, the SCC never entertained the issue as it found that the appeal was untimely.

<sup>58</sup> 3 April Statement, p. 2.

<sup>59</sup> As described in the Procedural History section, *supra*, particularly paras 29-30.

<sup>60</sup> Case 002-E163/5/1/13 Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013 ("SCC Case 002/01 Scope Decision"), para. 30. See also Case 002-E176/2/1/4 Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012 ("SCC Rule 35 Decision"), para. 25.

<sup>61</sup> Case 002-E163/5/1/13 SCC Case 002/01 Scope Decision, para. 30.

<sup>62</sup> As described in the Procedural History section, *supra*.

that the TC would not exercise jurisdiction to engage with, let alone dispose of, submissions in Case 004/2.<sup>63</sup> The National Judges went even further to express their intent. Not only did they state their belief that “this case was closed before the [PTC]”, but they also went so far as to unequivocally declare that “there will not be a trial of Ao An *now or in the future*”.<sup>64</sup>

44. The SCC has held that inaction can equate to a decision that effectively terminates the proceedings,<sup>65</sup> and the TC’s decision not to act in Case 004/2 meets this standard. In short, the TC has effectively terminated the proceedings against Ao An without arriving at a judgment and leaving the Parties without an opportunity to appeal against a judgment.<sup>66</sup> For all of these reasons, the TC’s “decision” is subject to immediate appeal pursuant to Internal Rule 104(4)(a).
45. Rule 107 provides that a decision of the TC which is open to immediate appeal as provided for in Rule 104(4)(a) shall be filed within 30 (thirty) days of the date of the decision or its notification. The 3 April Statement was notified via email to the Case 004/2 parties on 3 April 2020, making this appeal due by 4 May 2020.<sup>67</sup>

## 2. The Appeal is admissible pursuant to the SCC’s Inherent Jurisdiction

46. Even if, *arguendo*, it is determined that the TC’s inaction and 3 April Statement do not constitute a “decision” that is appealable pursuant to Internal Rule 104(4)(a), the ICP

<sup>63</sup> See para. 30, *supra*.

<sup>64</sup> 3 April Statement, p. 2, penultimate paragraph, emphasis added.

<sup>65</sup> See e.g. Case 002-E284/4/8 Decision on Immediate Appeals Against the Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013 (“SCC Second Severance Decision”), paras 21-26 (The SCC noted that the TC had failed to provide a tangible plan or any information regarding subsequent cases to be tried in the course of Case 002 and had also abstained from resolving any issues as to how any subsequent trials might be conducted. The SCC held that this resulted in a *de facto* stay of proceedings that did not carry a sufficiently tangible promise of resumption to permit arriving at a judgment on the merits for part of the remaining charges in the Closing Order. The appeal was found admissible under Rule 104(4)(a).). See also Case 002-A189/I/8 Decision on Ieng Sary’s Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, paras 22-24 (finding that the failure of the CIJs to rule on a Defence Request as soon as possible in circumstances where a delay in making a decision deprived the Charged Person of the possibility of obtaining the benefit he sought, amounted to a constructive refusal of the application, which was appealable); A117/2/2 Decision on Appeal Against Constructive Dismissal of Ta An’s Fourth Request for Investigative Action, 22 October 2014, para. 8.

<sup>66</sup> Case 002-E284/4/8 SCC Second Severance Decision, para. 21. See also Case 002-E138/1/7 Decision on Immediate Appeal Against the Trial Chamber’s Order to Release the Accused Ieng Thirith, 13 December 2011, para. 15; Case 002-E163/5/1/13 SCC Case 002/01 Scope Decision, para. 22; Case 002-E301/9/1/1/3 Decision on Khieu Samphan’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, para. 17.

<sup>67</sup> See Email from TC Greffier Suy-Hong Lim entitled “Statement of the Judges of the Trial Chamber”, 3 April 2020, 1:49 p.m. (*attached as Annex H*); Rule 39(3). The ICP notes that Rule 106 instructs that immediate appeals be filed with the TC. Due to the exceptional and unusual nature of this appeal and the history of the case to date, the ICP is filing this appeal with the TC and directly with the SCC as well.

submits that the SCC must hear this appeal pursuant to its inherent jurisdiction. The SCC has previously determined that it has inherent jurisdiction to consider an appeal “implicated in circumstances in which there is an imperative need to ensure a good and fair administration of justice”.<sup>68</sup> It has also stated that in order to guarantee a fair trial and properly fulfil the Court’s mission, all ECCC judicial organs must, *at all times*, have the power to do what is necessary to maintain the integrity of proceedings and respect for justice.<sup>69</sup>

47. Other international criminal tribunals have recognised a Chamber’s power to exercise its inherent jurisdiction to decide a matter in the absence of a specific statutory provision. This includes circumstances in which no court had the power to pronounce on the matter due to “legal impediments or practical obstacles”, when it was necessary to remedy possible gaps in legal proceedings, or when the Court needed to ensure that justice was not only done but was also *seen* to be done.<sup>70</sup> These circumstances are applicable to the situation at hand in Case 004/2 and further demonstrate why the SCC should intervene.

<sup>68</sup> Case 002-E463/1/3 Decision on Khieu Samphan’s Urgent Appeal Against the Summary of Judgment Pronounced on 16 November 2018, 13 February 2019, para. 17.

<sup>69</sup> Case 002-E116/1/7 Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber’s Decision on Fairness of Judicial Investigation, 27 April 2012 (“SCC Fairness Decision”), para. 30 (the SCC also stated that it was “internationally firmly established” that the power to deal with “interference with the administration of justice” accrues to any court “by virtue of its judicial role”).

<sup>70</sup> See e.g. *In the Matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, Appeals Chamber, 10 November 2010, paras 45 (“[Inherent jurisdiction] can, in particular, be exercised when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles. The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.”), 46, 48 (“The practice of international judicial bodies shows that the rule endowing international tribunals with inherent jurisdiction has the general goal of remedying possible gaps in the legal regulation of the proceedings.”); *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, Trial Chamber, 3 July 2003, paras 112, 114 (The Trial Chamber affirmed that while it was not required to take any further action, it had an overarching interest and commitment to ensure that “justice is not only done but justice is seen to be done”. It therefore ordered special steps to be taken that would fully represent the accused’s interests.); *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, Trial Chamber, 27 May 2005, paras 9 (“The Tribunal’s Chambers have consistently affirmed the Tribunal’s inherent power, which exists independently of any statutory reference, to punish conduct which tends to obstruct, prejudice or abuse the Tribunal’s administration of justice. This power is necessary to ensure that the Tribunal’s exercise of jurisdiction is not frustrated and its basic judicial functions are safeguarded.”), 10-12 (and the jurisprudence cited therein), 13 (“judges of this Tribunal exercise the inherent power to take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect for justice”); *Prosecutor v. Blaškić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997, paras 33, 35 (a Court’s inherent power to make a judicial determination necessary for the exercise of its primary jurisdiction is closely related to the Court’s ability to discharge the mission entrusted to it); *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, Appeals Chamber, 3 November 1999, para. 76 (“It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice [...]. The use of such supervisory powers serves three

48. As a result of the TC's inaction and 3 April Statement, the SCC's exercise of its inherent jurisdiction in this case is crucial, as the SCC is now the sole entity able to maintain the integrity of the proceedings and safeguard the interests of justice. Important issues are at stake: judicial disposition of cases before the Court in accord with the law and the facts of each case; disposition of cases by fair, impartial, and independent judges; and respect for the fundamental rights of the victims as enshrined in Rule 21(1), including procedural fairness, transparency, the right to be heard, and the right to a reasoned opinion before impartial and independent judges.<sup>71</sup> Moreover, if the SCC refuses to intervene, the right of appeal will be rendered meaningless, as the Parties will be left with an improperly halted case and no further recourse. Finally, SCC intervention is necessary to ensure legal certainty because disposition of Cases 003 and 004, which are currently before the PTC on appeal of their own respective conflicting Closing Orders, will likely result in the same judicial impasse that has occurred in Case 004/2.
49. In conclusion, the ICP submits that this appeal is admissible before the SCC. The TC's actions amount to effective termination in accordance with jurisprudence, and that is appealable to the SCC under Rule 104(4)(a). The SCC also has the authority to exercise its inherent jurisdiction "to dispose of [the] legal matter before it in a definite manner" and resolve the "substantive and/or procedural issue".<sup>72</sup>

functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process."); *The Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Severance of Andre Rwamakuba and Amendments of the Indictment, Trial Chamber, 7 December 2004, para. 22.

<sup>71</sup> Note that the Civil Parties raised the issue of serious and repeated violations of the rights of Civil Parties in these proceedings, including the rights to be heard, to representation, to legal certainty, and to the transparency and publicity of the proceedings. Note further that although these issues were raised in **D359/33 & D360/42** Civil Party Lawyers' Safeguard Request, paras 2, 4, 27-45, the submission was filed after the PTC President had declared the PTC would take no further action, and to date the PTC has not adjudicated the issues. The submission explains that the PTC is the only Chamber where the Civil Party Lawyers could file the Request to safeguard their rights, as no Civil Party Lead Co-Lawyers have been recognised by the OA or PTC, and the Civil Party Lawyers have no automatic standing to make submissions before the TC or SCC (only Civil Party Lead Co-Lawyers have been permitted to do so at the trial stage and beyond).

<sup>72</sup> Case 002-E176/2/1/4 SCC Rule 35 Decision, para. 25 (emphasis added). See also **D359/24 & D360/33** PTC's Considerations, para. 122 (unanimous): "The judicial duty to pronounce, based on the law, a decision on a matter in dispute (*jurisdictio*) lies at the heart of a judge's highest responsibility and function. As such, pronouncements adjudicating and settling matters in dispute enjoy a legal obligatory nature and effect (*imperium*) unlike the submissions made by parties. However, the judge cannot refrain from adjudicating the matter before him or her and from arriving at a conclusion that effectively decides this matter." (emphasis added); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, The Law Association for Asia and the Pacific, 28 August 1997 ("Beijing Principles"), art. 3: "Independence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature." (emphasis added).



## B. MERITS

### 1. The TC erred in law in effectively terminating Case 004/2 through its failure to progress the case to trial since 19 December 2019, culminating in its 3 April Statement

50. In the 3 April Statement, the TC determined that “the International Judges of the Pre-Trial Chamber have demonstrated that it is impossible for a Chamber of the ECCC to take judicial action when it is divided about the need to do so”.<sup>73</sup> This position is incorrect at law. Had the TC properly applied the correct legal standard, it would have found that the PTC’s failure to reach the required majority to overturn the Indictment triggered the “fundamental and determinative” default position underlying the entire ECCC legal framework.<sup>74</sup> As mandated by that position, the TC would have consequently had to find that it was seised of Case 004/2 as of 19 December 2019 when the required PTC supermajority was not reached, and it would have ordered CMS to forward the Case File as an action consequent to its jurisdiction over the case or in the exercise of its inherent jurisdiction.
51. The ECCC Agreement and ECCC Law both provide that when the Co-Prosecutors or CIJs disagree on progressing a case, the case moves on to the next stage absent a supermajority of the PTC blocking its progress.<sup>75</sup> Although the PTC Judges disagreed on the disposition of the conflicting Closing Orders, they unanimously agreed on the principle that, in the absence of a supermajority decision, the default position that the “investigation shall proceed”<sup>76</sup> is “intrinsic to the ECCC legal framework”,<sup>77</sup> and is “fundamental and determinative”.<sup>78</sup> Crucially, they stressed that this fundamental default position “cannot be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions, taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless.”<sup>79</sup>
52. The default position is also enshrined in Rule 77(13)(b), which is *lex specialis* relating to indictments and therefore prevails over the general terms of Rule 77(13)(a) regarding

<sup>73</sup> 3 April Statement, p. 2.

<sup>74</sup> **D359/24 & D360/33** PTC’s Considerations, para. 112 (unanimous).

<sup>75</sup> ECCC Agreement, arts 5(4), 6(4), 7(4); ECCC Law, arts 20 new, 23 new.

<sup>76</sup> **D359/24 & D360/33** PTC’s Considerations, para. 106 *citing* Case 002-**D427/1/30** Decision on Ieng Sary’s Appeal Against the Closing Order, Pre-Trial Chamber, 11 April 2011, para. 274.

<sup>77</sup> **D359/24 & D360/33** PTC’s Considerations, para. 106.

<sup>78</sup> **D359/24 & D360/33** PTC’s Considerations, para. 112.

<sup>79</sup> **D359/24 & D360/33** PTC’s Considerations, para. 112. *See also* para. 111 where the PTC unanimously affirmed that the purpose of the default position is to secure effective justice in the ECCC context and avoid procedural stalemates that would hamper the effectiveness of proceedings.

orders “other than an indictment”.<sup>80</sup> Like “Indictment”, “Dismissal Order” and “Closing Order” are defined terms in the Internal Rules.<sup>81</sup> Had the drafters wished to specifically address the effect of the failure of the PTC to overturn a dismissal order, they clearly could have done so in Rule 77(13)(a) but chose not to. In contrast, Rule 77(13)(b) implements the expressed intent of the United Nations and the Royal Government of Cambodia at the time they concluded the ECCC Agreement<sup>82</sup> and therefore must prevail.

53. Rule 77(13)(b) *requires* that the TC be seized of the Indictment when the required supermajority is not attained. In short, the Indictment remains “live” and the TC *shall be seized* on the basis of that Indictment. SCC jurisprudence supports this outcome, holding that:

If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed.’<sup>83</sup>

54. To be clear, the SCC discussed this scenario in the context of either one or both of the CIJs referring the proposed issuance of a conflicting indictment and dismissal order to the PTC under the disagreement settlement mechanism envisioned by the Rules. However, the SCC’s substantive outcome is equally applicable to the situation in which the PTC did not attain a supermajority on whether either judge erroneously issued his

<sup>80</sup> The Latin expression *lex specialis* refers to a doctrine relating to the interpretation of laws according to which a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).

<sup>81</sup> See Internal Rules, pp. 83-84.

<sup>82</sup> See e.g. **D324.30** Letter from UN Secretary General to Prime Minister H.E. Hun Sen, 19 April 2000, Annexed Note from Hans Corell to Secretary General, Subject: Urgent call from Cambodia – Options to settle differences between investigating judges/prosecutors, 19 April 2000, EN 01326090 (On the same day that the UN first provided the article 7(4) wording to the RGC, Hans Corell, the Under Secretary General for Legal Affairs and Legal Counsel of the UN, recorded a conversation with Deputy Prime Minister Sok An, the RGC’s chief negotiator, rejecting his call to have a supermajority requirement to *approve* the continuation of an investigation or prosecution. Hans Corell explained that the disagreement mechanism as drafted meant “you would need a supermajority to stop the investigation or prosecution”); **D324.36** Statement by Under Secretary General Hans Corell Upon Leaving Phnom Penh on 17 March 2003, 17 March 2003, EN 01326112. See also **D359/3/1.1.43** David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246 (EN 01598756) (David Scheffer, the U.S. Ambassador at Large for War Crimes Issues, was heavily involved in the ECCC negotiations and expressed the same view: “The only way the prosecution or investigation is *halted* is if the [PTC] decides by supermajority vote that it should end. The rationale behind this procedure is that it prevents one [CIJ] or one Co-Prosecutor from blocking an investigation or prosecution, respectively, by failing to reach agreement with his or her counterpart or simply derailing an investigation or prosecution due to political or other kinds of influence.” (emphasis added)).

<sup>83</sup> Case 001-F28 Appeal Judgement, 3 February 2012, para. 65 *citing* ECCC Law, art. 23 new, ECCC Agreement, art. 7(4), Internal Rule 72(4)(d).

Dismissal Order or Indictment. To find otherwise would do exactly what the PTC Judges unanimously warned against—namely, override or deprive the default position of its fullest weight and effect, which would lead to a “manifestly unreasonable legal result”.<sup>84</sup> Simply put, it would nullify the ECCC’s legal framework.

55. Rule 79(1) also mandates that the TC *shall be seised* of an indictment.<sup>85</sup> The fact that a supermajority of the PTC Judges did not seise the TC of the case is irrelevant, as Rule 79(1)’s use of the word “or” also allows the seisure to be based on an indictment from the CIJs. When read in conjunction with Rule 1(2), any reference to CIJs in the Internal Rules includes a CIJ acting individually. Thus, the Indictment was not overturned by a supermajority on appeal, remained “live”, and the TC is seised by it.
56. The mandatory provisions of these Rules are further supported by the purpose of the ECCC Agreement and ECCC Law, which is to “[bring] to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”.<sup>86</sup> They are also compatible with the objective of the disagreement settlement mechanism, which is to “prevent a deadlock from derailing the proceedings from moving to trial”.<sup>87</sup>
57. For all of the above reasons, the TC’s erroneous failure to correctly apply the default position invalidates its decision. The ICP submits that only SCC intervention can now ensure that the default position to proceed to trial is properly implemented. To do otherwise would contradict the entire ECCC legal framework, deny the victims’ and Civil Parties’ right to justice, and undermine the integrity of the ECCC proceedings.

**2. The TC erred in law and abused its discretion when it refused to exercise its inherent jurisdiction to fulfil its primary judicial obligation of deciding justiciable issues before it**

58. The TC refused to follow the correct law and discernibly erred in the exercise of its discretion when it concluded that it had no authority to make *any* decision regarding Case 004/2. While this conclusion was expressed as the National Judges’ view in the 3 April Statement and thus did not carry the weight of a supermajority decision,<sup>88</sup> the TC’s continued inaction in regard to the Parties’ pleadings and the physical return of those

<sup>84</sup> **D359/24 & D360/33** PTC’s Considerations, para. 112.

<sup>85</sup> Emphasis added.

<sup>86</sup> ECCC Agreement, art. 1 (emphasis added), ECCC Law, art. 1 (emphasis added).

<sup>87</sup> See **D359/24 & D360/33** PTC’s Considerations, International Judges’ Opinion, para. 323 and the citations therein.

<sup>88</sup> 3 April Statement, p. 2.

pleadings signified the entire Chamber's refusal to make any decision regarding Case 004/2.<sup>89</sup>

59. The TC's refusal to exercise its inherent jurisdiction to decide the justiciable issues before it regarding the judicial impasse ignored the SCC's declaration that in order to guarantee a fair trial and properly fulfil the Court's mission, all ECCC judicial organs must, *at all times*, have the power to do what is necessary to maintain the integrity of the proceedings and respect for justice.<sup>90</sup> It also contravened the Judges' ethical obligations,<sup>91</sup> including the duty "to pronounce, based on the law, a decision on a matter in dispute" which "lies at the heart of a judge's highest responsibility and function."<sup>92</sup>
60. Had the TC followed the correct law and invoked its inherent jurisdiction, it would have had to find that the PTC President had no authority to block the forwarding of the Case File to the TC,<sup>93</sup> and it would have ordered that the Case File be forwarded to the TC

<sup>89</sup> See paras 7, 9, 22, 29-30, 42-43, *supra*.

<sup>90</sup> Case 002-E116/1/7 SCC Fairness Decision, para. 30 (emphasis added). In the same paragraph, the SCC also stated that it was "internationally firmly established" that the power to deal with "interference with the administration of justice" accrues to any court "by virtue of its judicial role".

<sup>91</sup> See *e.g.* ECCC Law, art. 33 new ("The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights."); Code of Judicial Ethics adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008 and amended on 5 September 2008, arts 2(1) ("Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions."), 3(1) ("Judges shall conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary."), 5(1) ("Judges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties."); Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 2 ("The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."), Principle 6 ("The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."). See also Beijing Principles, art. 3 ("Independence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over *all issues of a justiciable nature.*" (emphasis added)); Case 002-E176/2/1/4 SCC Rule 35 Decision, para. 25.

<sup>92</sup> **D359/24 & D360/33** PTC's Considerations, para. 122 (unanimous).

<sup>93</sup> Rule 77 limits the PTC President's ex-officio powers to: verifying that the case file is up to date and setting a hearing date (*see* Rule 77(3)(a)); determining what hearings may require a substantial length of time to hear and therefore require the Reserve PTC Judges to be present (*see* Rule 77(7)); deciding, after consultation with the remaining judges, to adjourn the proceedings or designate a Reserve Judge to sit in place of an absent sitting Judge so that the proceedings can continue (*see* Rule 77(8)); appointing one international and one national judge to be co-rapporteurs (*see* Rule 77(10)); and deciding, in the event of a CIJ release or dismissal order, to refuse or grant the release of a Charged Person in provisional detention (*see* Rule 77(15)). See also **D359/35 & D360/44** PTC International Judges' 29 January Memo, p. 5. The PTC President's unilateral action also contravened the underlying principles of the supermajority rule and the default position, which were both created to safeguard against individuals attempting to block the case from proceeding. See *e.g.* **D359/3/1.1.43** David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246 (EN 01598756). David

rather than hinging its inaction on the premise that only the PTC could initiate such an action.<sup>94</sup>

61. This exercise of the TC's discretion was essential to maintaining the Court's integrity, preserving the rights of the Parties, and setting a reasoned precedent for similar procedural circumstances likely to arise in Cases 003 and 004. Had the TC correctly applied the law and/or properly exercised its discretion, Case 004/2 would have progressed to trial. The TC's refusal to exercise its discretion prejudiced the ICP and other Case 004/2 Parties as it violated their fundamental rights to procedural fairness, transparency, the right to be heard, and legal certainty.<sup>95</sup> The TC's error was so unreasonable and plainly unjust that it amounted to an abuse of discretion. In addition, the TC's error of law invalidates its effective termination of the proceedings. Both warrant SCC intervention.

**3. The TC erred in law and abused its discretion when it failed to follow the correct procedural law and arbitrarily imposed administrative steps not previously required, effectively blocking Case 004/2 from proceeding to trial**

62. The TC legally erred when it failed to follow established procedural practice that had been accepted for formal notification of the PTC's decisions in Case 002, claiming instead that it had "never been formally notified" of Case 004/2.<sup>96</sup> As a result of this failure, the TC committed a discernible error in the exercise of its discretion, arbitrarily imposing additional administrative steps that had not been previously required in order to effectuate formal notification of the PTC's Considerations in Case 004/2. This error prejudiced the ICP and the other Case 004/2 Parties because it blocked Case 004/2 from proceeding to trial, thereby violating their rights to procedural fairness, legal certainty

Scheffer, the U.S. Ambassador at Large for War Crimes Issues, was heavily involved in the ECCC negotiations and expressed the view that "The only way the prosecution or investigation is *halted* is if the [PTC] decides by supermajority vote that it should end. The rationale behind this procedure is that it prevents one [CIJ] or one Co-Prosecutor from blocking an investigation or prosecution, respectively, by failing to reach agreement with his or her counterpart or simply derailing an investigation or prosecution due to political or other kinds of influence." (emphasis added).

<sup>94</sup> See Case 002-E9 Order to File Material in Preparation for Trial, 17 January 2011 ("TC Preparation Order"), Introduction at EN 00635755 (noting that the TC was seised pursuant to the Decisions rendered by the PTC on 13 January 2011) and para. 2 (noting that the PTC formally forwarded the Case File to the TC greffiers on 14 January 2011). This Order makes clear that seizure and the forwarding of the case file are separate acts – seizure *bestows* jurisdiction to the TC and forwarding the case file is an administrative consequence of that seizure. See further the discussion in paras 50-57, *supra*, on the TC being seised of Case 004/2 as of 19 December 2019 and paras 21, 29 regarding the TC's claim that only the PTC could initiate the action to forward the case file.

<sup>95</sup> See also the discussion regarding the violation of the Civil Parties' rights in fn. 71, *supra*.

<sup>96</sup> 3 April Statement, p. 2. The TC never explained why it considered that it had never been formally notified of the case, but regardless of the grounds, the TC's claim is legally wrong.

and transparency, and the right to appeal. The TC's errors invalidate its decision and constitute an abuse of discretion.

63. In Case 002, the TC's order to the Parties to prepare materials for trial ("TC Preparation Order") noted that the TC was seised of the case as of 13 January 2011,<sup>97</sup> which was the date that the PTC decisions on the appeals against the Case 002 Closing Order were issued and notified.<sup>98</sup> Notification was effectuated when the Case File Officer sent a formal notification email of each decision, copying the Trial Chamber Greffier.<sup>99</sup> Notably, the TC judges were not included in the Case File Officer's email distribution list, yet the TC considered itself formally notified of the decisions on the basis of the TC Greffier's receipt of the notification emails.
64. The practice followed by the TC in the TC Preparation Order is consistent with articles 2.1 and 2.4 of the Practice Direction on Filings of Documents before the ECCC.<sup>100</sup> Article 2.1 states that the filing of documents shall be made directly to the Greffier of the Chambers through the Case File Officer. This provision makes clear that the Greffier is the formal conduit for notification to the Judges of the TC. In keeping with this role, it was the TC Greffier who sent the 21 January, 10 February and 3 April emails on behalf of the TC to convey the Judges' views to the Parties.<sup>101</sup>
65. Article 2.4 of the Practice Direction, when read in conjunction with Article 2.1, provides further instruction on the formal notification process. It provides that documents filed before the ECCC shall be submitted to the Case File Officer, who shall immediately forward the documents to the relevant greffier, as provided in the Internal Rules.<sup>102</sup> In other words, filed documents submitted to the Case File Officer are required to be

<sup>97</sup> Case 002-E9 TC Preparation Order, Introduction at EN 00635755.

<sup>98</sup> As opposed to the date that the Case File was formally forwarded to the TC, which was 14 January 2011. See Case 002-E9 TC Preparation Order, para. 2; Case 002-E313 Case 002/01 Judgement, 7 August 2014, para. 23 ("The Trial Chamber was seised with the Case File following resolution of all appeals against the Closing Order on 13 January 2011."); Case 002-E465 Case 002/02 Judgement, 16 November 2018, para. 33.

<sup>99</sup> See the Case File Officer's formal notification lists of: Case 002-D427/1/26 Decision on Ieng Sary's Appeal Against the Closing Order, 13 January 2011 at 1:58 p.m. (*attached as Annex A1*); Case 002-D427/2/12 Decision on Ieng Thirith and Nuon Chea's Appeal Against the Closing Order, 13 January 2011 at 2:00 p.m. (*attached as Annex A2*); Case 002-D427/3/12 Decision on Ieng Thirith and Nuon Chea's Appeal Against the Closing Order, 13 January 2011 at 2:02 p.m. (*attached as Annex A3*); Case 002-D427/4/14 Decision on Khieu Samphan's Appeal Against the Closing Order, 13 January 2011 at 2:11 p.m. (*attached as Annex A4*). In each, TC Greffier Matteo Crippa was copied in the notification email.

<sup>100</sup> Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/Rev.8, amended on 7 March 2012 ("Practice Direction").

<sup>101</sup> As detailed in paras 12, 21 and 29, *supra*.

<sup>102</sup> Practice Direction, art. 2.4.

notified immediately (via email) to the Greffier, *not* to all of the Judges in that Chamber individually.

66. Finally, Rule 77(14)'s silence as to whether anyone beyond the people specified in the Rule can be notified of PTC appellate decisions (or considerations) should not be interpreted to prohibit formal notification to anyone not listed in the Rule.<sup>103</sup> Were formal notifications beyond the specified list actually prohibited, the PTC would not be allowed to notify its decisions or considerations to the public, as that goes beyond the CIJs, Co-Prosecutors and "other parties" specified in the Rule. Clearly, that is not the case and such an argument must fail.
67. The ICP submits that the TC erred in this case by failing to follow the procedure followed in Case 002. Had the TC applied the correct law, it would have had to conclude that the TC was formally notified of the PTC's Considerations in Case 004/2 when the Case File Officer sent the formal email notification on 19 December 2019 at 4:53 p.m., copying the TC Greffier.<sup>104</sup> Whether or not any or all of the TC Judges were also included in the distribution list would have had no bearing on this determination, and the TC Greffier's inclusion in the notification would not have been considered to be prohibited by Rule 77(14).
68. However, because the TC failed to apply the correct procedure to constitute formal notification, it refused to acknowledge the significance of the Case File Officer's 19 December 2019 email copying the TC Greffier and instead repeatedly asserted that it had never been formally notified of the PTC's Considerations.<sup>105</sup> It then used the alleged lack of formal notification as a partial justification for its inaction in deciding the submissions before it and determined it had no jurisdiction, effectively blocking the case from progressing.<sup>106</sup> In other words, the TC erroneously equated the administrative action of formal notification to a jurisdictional prerequisite. The ICP emphasises that formal

<sup>103</sup> *Contra* **D359/34 & D360/43** PTC President's 29 January Memo, p. 2. Moreover, as the Case 002 example illustrates, formal notification to the TC Greffier was considered valid despite the provisions of Rule 77(14).

<sup>104</sup> See Email notification from the Case File Officer, 19 December 2019, 4:53 p.m. (*attached as Annex B*).

<sup>105</sup> **D359/36.2 & D360/45.2** TC Greffier 21 January Email ("these Considerations have so far not been notified to the Trial Chamber"); **D359/36.8 & D360/45.8** TC Greffier 10 February Email ("The *Trial chamber* has still not been *formally notified* by the Pre-Trial Chamber of the Considerations."); 3 April Statement, p. 2 ("The Trial Chamber notes that it has never been formally notified of the case").

<sup>106</sup> 3 April Statement, p. 2: "The Trial Chamber also understands that most of the case file is confidential and considers that to be a substantial issue in that the Trial Chamber has no access to that material and can have no access to it, *unless and until there is proper notification* and transfer of the file." (emphasis added). The effective termination of the case is detailed fully in paras 41-45, *supra*, and paras 71-76, *infra*.

notification is an administrative act *consequent* to the TC having jurisdiction, not an act that *confers* jurisdiction. It is therefore not a valid justification for preventing the TC from progressing Case 004/2 to trial.<sup>107</sup>

69. In any event, it is clear that the TC arbitrarily imposed additional administrative steps to achieve formal notification in Case 004/2 that were not required in Case 002. What is *not* clear, however, is exactly what those additional administrative steps were, as the TC never explained why it did not consider itself formally notified.<sup>108</sup> It is therefore unknown if the TC conditioned notification on the PTC's approval by a supermajority vote in some sort of instruction to the TC or to CMS, or whether it found the notification to be deficient because all of the TC Judges were not individually notified of the PTC's Considerations by the Case File Officer.<sup>109</sup> Both requirements contravene previously established and accepted procedure.<sup>110</sup>
70. The TC's errors invalidate its effective termination of the case and prejudice the ICP and other Case 004/2 Parties by violating their rights to procedural fairness, legal certainty, and transparency.<sup>111</sup> Had the TC correctly applied the law and/or properly exercised its discretion, Case 004/2 would have progressed to trial. The TC's errors were unreasonable and plainly unjust and SCC intervention is the only recourse that the ICP has to remedy such an outcome.

<sup>107</sup> As discussed in paras 50-57, *supra*, jurisdiction was conferred on the PTC as of 19 December 2019 when the PTC failed to achieve a supermajority to overturn the Indictment and the PTC was seised of Case 004/2 pursuant to Rules 77(13)(b) and 79(1).

<sup>108</sup> See ICP's Clarification Request to the TC, paras 21-24. *Attached as Annex V1 (English) and V2 (Khmer)*.

<sup>109</sup> It is the ICP's understanding that the National TC Judges were not notified of the PTC's Considerations because at the time they were issued, the National TC Judges were not on contract with the ECCC.

<sup>110</sup> PTC Considerations often contain no instructions to either the TC or CMS regarding who should receive formal notification, yet that does not preclude them from being recognised as formally notified once the Case File Officer sends an official email notification. See e.g. **D257/1/8** Considerations on Ao An's Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage, 17 May 2016, Disposition (unanimous) at EN 01241203; **D239/1/8** Considerations on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge Her *In Absentia*, 1 March 2016, Disposition at EN 01210634; Case 003-**D174/1/4** Considerations on [Redacted] Appeal Against the International Co-Investigating Judge's Decision to Charge [Redacted] with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, Disposition at EN 01235531. The fact that all TC Judges do not have to be individually formally notified has already been discussed at paras 63-67, *supra*.

<sup>111</sup> These fundamental rights are safeguarded by Internal Rule 21(1). See also the discussion regarding the violation of the Civil Parties' rights in fn. 71, *supra*.



#### 4. The TC erred in law when it effectively terminated Case 004/2 on impermissible grounds

71. In the 3 April Statement, the three National Judges of the TC unequivocally expressed the view that “there will not be a trial of Ao An now or in the future” and *all* of the Judges stated that issuing a formal decision was “not possible”.<sup>112</sup> The TC premised its inaction on the following:

The Trial Chamber notes that it has never been formally notified of the case and it has not received the case file. [...] The Trial Chamber also understands that most of the case file is confidential and considers this to be a substantial issue in that the Trial Chamber has no access to that material and can have no access to it, *unless and until there is proper notification and transfer of the file.*<sup>113</sup>

72. It must be noted that this declaration was made after the TC referenced the 16 March Memo in which the PTC President stated that the PTC would not take any further administrative action to notify the TC or to forward the Case File.<sup>114</sup> In other words, the TC said it would not act in the absence of an administrative action which it was fully aware would never take place. This effectively terminated the proceedings on a ground not permissible by law. As such, the TC has committed an error of law and acted outside of its legal authority, which invalidates its decision.
73. The legal grounds for termination at this stage of the proceedings are not addressed by the Internal Rules. In such a situation, Chambers are obligated by Internal Rule 2 to decide questions in accordance with article 12(1) of the ECCC Agreement and articles 33 new and 37 new of the ECCC Law.<sup>115</sup> Under these provisions, “procedure shall be in accordance with Cambodian law”, and when Cambodian law does not deal with the issue, guidance may be sought in procedural rules established at the international level.
74. Cambodian procedural law states that criminal action may only be extinguished upon the death of the accused, the expiration of the statute of limitations, the grant of an amnesty, the abrogation of the law, or *res judicata*.<sup>116</sup> The SCC and TC have both held that the

<sup>112</sup> 3 April Statement, p. 2.

<sup>113</sup> 3 April Statement, p. 2 (emphasis added).

<sup>114</sup> 3 April Statement, p. 2.

<sup>115</sup> See Internal Rule 2.

<sup>116</sup> CCCP, art. 7. See also French Code of Criminal Procedure, 12 August 2011, art. 6 (“L’action publique pour l’application de la peine s’éteint par la mort du prévenu, la prescription, l’amnistie, l’abrogation de la loi pénale et la chose jugée.” Unofficial translation: “Criminal proceedings are extinguished by the death of the defendant, expiry of the statute of limitations, amnesty, repeal of the criminal law and *res judicata*.”).

ECCC has no authority to order termination for other reasons.<sup>117</sup> As for rules established at the international level, terminations or stays of proceedings have occasionally been granted by other tribunals, but examples are few and reflect situations in which discontinuance is considered to be the *only* remedy capable of ensuring the fairness of proceedings or is otherwise imperative in the interests of justice.<sup>118</sup> None of these apply to Case 004/2.

75. Internal Rule 2 also required the TC to pay “particular attention to the fundamental principles set out in Rule 21”, which include fair and adversarial proceedings that preserve a balance between the rights of the parties and ensuring that victims are kept informed and that their rights are respected throughout the proceedings.<sup>119</sup> The TC’s effective termination of the proceedings violated these principles.<sup>120</sup>
76. The TC’s error of law invalidates its decision to terminate the proceedings and warrants SCC intervention. The ICP respectfully requests that the SCC amend and revise the TC’s decision in accordance with the correct law, as fully discussed in the preceding sections.

#### V. RELIEF REQUESTED

77. For all of the foregoing reasons, the International Co-Prosecutor requests that the Supreme Court Chamber:
- a) Accept this immediate appeal as admissible;
  - b) Order the transfer of the Case 004/2 Case File to the SCC for purposes of this appeal;

<sup>117</sup> 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 December 2012, para. 38; Case 002-E116 Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011, paras 16-17 (finding that ECCC proceedings may only be terminated under Internal Rule 89(1)(b) on one of the limited grounds set out in art. 7 of the CCCP).

<sup>118</sup> See e.g. *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion for Stay of Proceedings, Trial Chamber, 8 April 2010, para. 4 (acknowledging that the extreme remedy of a stay of proceedings may be granted where serious violations of the accused’s human rights render a fair trial impossible); *The Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, para. 30.

<sup>119</sup> Internal Rules 2, 21(1)(a-c).

<sup>120</sup> See e.g. paras 29-30, 43-44, *supra*, discussing the TC’s lack of transparency and failure to consider the parties’ submissions in any way; and fn. 71, *supra*, discussing the repeated and serious violation of the rights of Civil Parties and victims in Case 004/2.

- c) Find that the TC is seized of Case 004/2 and order the TC to hear the case expeditiously, ordering any administrative steps relevant to such action, including transferring the Case File (including the Indictment) from the SCC to the TC;
- d) Recognise the repeated and serious violations of the rights of the ICP, Civil Parties and victims and address them accordingly;
- e) Order that all of the Parties' submissions that were returned by the TC be judicially determined in a fair, impartial and independent manner by the TC in accord with the law and the facts of this case;
- f) Order that all of the Parties' submissions be assigned document numbers and publicly notified in order to restore transparency and integrity to the proceedings; and
- g) Publicly issue a fully reasoned decision that will provide legal certainty and restore the functioning of this Court to one that transparently makes decisions based on the law and facts before it.

Respectfully submitted,

Date	Name	Place	Signature
4 May 2020	Brenda J. HOLLIS International Co-Prosecutor		