ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

ឯកសារដើម
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Case File No:	**003/07-09-2009-ECCC-OCIJ**
Before:	**The Co-Investigating Judges**
Date:	**20 May 2021**
Language(s):	**Khmer and English**
Classification:	**PUBLIC**

DECISION ON INTERNATIONAL CO-PROSECUTOR'S REQUEST TO FORWARD CASE FILE 003 TO THE TRIAL CHAMBER

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I. PROCEDURAL HISTORY

1. On 7 April 2021, over 16 months after the hearings before the Pre-Trial Chamber ("PTC") in this case ended, the PTC issued its Considerations ("003 Considerations")[1] on the appeals by the Defence for Meas Muth ("Defence") and by the National and International Co-Prosecutors ("NCP" and "ICP" respectively). The text and substance of the relevant argument are in significant parts identical to the previous considerations in Case 004/2 ("004/2 Considerations"), which had been issued on 19 December 2019, i.e., over 15 months before the 003 Considerations.[2] In particular, it is worth noting that the PTC did not spend any time discussing the individual crime sites and charges arising in case 003 in any detail.

2. At the time the hearings in Case 003 took place from 27 - 29 November 2019, the considerations in Case 004/2 were clearly close to their final form because they were already issued in three languages on 19 December 2019.[3] This is relevant to our discussion of the ICP's argument, as we will set out below.

3. Both Considerations proceed from the alleged joint default rule that the "investigation proceeds" extrapolated to "the case proceeds".[4] On this basis, we were criticised for issuing split Closing Orders ("COs") and not a joint one which abided by the default rule, i.e., the National Co-Investigating Judge ("NCIJ") would have had to sign the indictment of the International Co-Investigating Judge ("ICIJ"). We note that the PTC did not follow its own joint finding on the default rule, because neither in case 004/2 nor in case 003 was there a joint decision on the merits confirming and forwarding the indictments, as the default rule would appear to suggest.

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[1] **D266/27** & **D267/35**, *Considerations on Appeals Against Closing Orders*, 7 April 2021 ("003 Considerations").
[2] **Case File No. 004/2-D359/24** & **D360/33**, *Considerations on Appeals Against Closing Orders*, 19 December 2019 ("004/2 Considerations").
[3] 004/2 Considerations, English Version (ERN: 01634170-01634444), Khmer Version (ERN: 01634753-01635147), French Version (ERN: 01634445-01634752).
[4] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 255–261, 343; 004/2 Considerations, joint findings at paras 111–112, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 322–323, 685.

4. In case 004/2, the national judges ("NJs") found the indictment to be void[5] and upheld the dismissal, the international judges ("IJs") held the opposite.[6] In case 003, the NJs stated that both COs are valid but then proceeded to order the case file to be archived themselves.[7] The IJs found the indictment valid, but not the dismissal;[8] they also argued that because the NJs had found both COs valid, there was unanimity on the validity of the indictment and the case should thus proceed to trial, with the Co-Investigating Judges ("CIJs") only having to formally forward the case file.[9]

5. On 22 April 2021, the ICP filed an extension request under Internal Rule ("IR") 80(1) by email with the Trial Chamber ("TC").[10] The TC rejected the request by email of its greffier of 27 April 2021 citing as the reason that it had not been formally notified of the indictment.[11]

II. SUBMISSIONS

6. It is based on the assumption of unanimity that the ICP filed her "Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber" ("Request") on 19 April 2021, notified on 25 April 2021.[12] She argues in essence that

- All five PTC judges concluded unanimously that the indictment is valid.[13]
- Consequently, the TC became automatically seised upon the issuance of 003 Considerations pursuant to Rules 77(13) and 79(1).[14]

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[5] **D359/24** & **D360/33,** 004/2 Considerations, Opinions of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, paras. 294, 302(v).
[6] **D359/24** & **D360/33,** 004/2 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 318, 324, 326, 681, 685–686, 694.
[7] 003 Considerations, Opinions of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, paras. 115–118.
[8] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 119, 249–250, 259–260, 262, 284–285, 342.
[9] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 342–343.
[10] *Request for extension of time to file Rule 80 list of witnesses and experts*, Email from Brenda Hollis, ICP, of 22 April 2021, *Request for extension of time to file Rule 80 list of witnesses and experts* (no document number or classification provided), copied to the CIJs.
[11] Email from LIM Suy-Hong, Greffier of the Trial Chamber, of 27 April 2021, *Re: Request for extension of time to file Rule 80 list of witnesses and experts* (no document number or classification provided), copied to the CIJs.
[12] **D270**, *International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021.
[13] **D270**, *International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021, para. 12.
[14] **D270**, *International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021, para. 12.

- Pursuant to IR 77(14) the CIJs, jointly or individually, must immediately forward the 003 Considerations, indictment, and Case File to the TC.[15]
- Pursuant to IR 69(2)(a) *mutatis mutandis* the CIJs, jointly or individually, must instruct the Court Management System ("CMS") to forward the 003 Considerations, Indictment, and Case File to the TC.[16]
- An expeditious transfer is required pursuant to article 12(2) of the ECCC Agreement, articles 33 and 35 new of the ECCC Law, and IR(s) 21(1) and (4).[17]

7. On 11 May 2021, the Defence responded[18] ("Response") – requesting the CIJs to find the ICP's Request inadmissible, and that it should be denied on the following grounds:

- Both COs are null and void, consequently there is no valid indictment to forward to the TC.[19]
- The IJs provided no cogent reasons or legal authority to depart from the Supreme Court Chamber's ("SCC") ruling in Case 004/2.[20]
- The PTC remains seised of the case is the only judicial body authorised to transfer the Case File to the TC.[21]
- The PTC did not find by supermajority that the indictment is valid, consequently it did not notify and transmit the Case File to the TC under Rule 79(1).[22]

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[15] **D270**, *International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021, paras. 13, 16.
[16] **D270**, *International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021, paras. 13, 16.
[17] **D270**, *International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021, paras. 2, 15.
[18] **D270/4**, *Meas Muth's Response to the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 11 May 2021.
[19] **D270/4**, *Meas Muth's Response to the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 11 May 2021, paras. 18–19.
[20] **D270/4**, *Meas Muth's Response to the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 11 May 2021, paras. 18, 20–21.
[21] **D270/4**, *Meas Muth's Response to the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 11 May 2021, paras. 18, 22.
[22] **D270/4**, *Meas Muth's Response to the International Co-Prosecutor's Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 11 May 2021, paras. 18, 23.

III. DISCUSSION

A. Preliminary remarks

8. While we could say a number of things about the PTC's views expressed in the 004/2 and 003 Considerations, we shall focus on three issues with the necessary brevity.[23]

1. Judicial ethics

9. We have for the second time now been treated to the PTC's vitriolic language and thinly veiled insinuation that we issued two separate COs with the intention of derailing the process in Cases 004/2 and 003. Now, the PTC adds the statement that a "pattern" is evolving[24] and that we compounded our previous misconduct by having done so again,[25] despite the fact that even before the considerations in Case 004/2 had been handed down, all our COs had been issued and the PTC knew what the lay of the land was for all cases. Given that *our* approach was consistent and principled, the occurrence of a "pattern" can hardly be surprising.

10. While we opted for judicial restraint on the occasion of the aftermath to the PTC's considerations in Case 004/2, we feel the time has now come to remind our colleagues in the PTC of their duties under their respective national codes of judicial ethics, and of the general law of libel and slander.

11. We restrict ourselves to making explicit reference to Chapters VI and VII of the 2019 French Code of Judicial Ethics[26] in particular because of its helpful clarity. Although the 2007 Cambodian Code of Judicial Conduct does not contain equally explicit provisions, it still prohibits the expression in public of opinions which affect the honour and the respect for the integrity of other judges.[27] The expectations under South Korean law are in substance no less exacting:

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[23] We are, needless to say, to a large degree in agreement with the broader characterisation by the Response of the development of the case and of the PTC's views.
[24] 003 Considerations, para. 108.
[25] 003 Considerations, para. 109.
[26] At www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques.
[27] 2007 Cambodian Code of Judicial Conduct, Nos. 1, 15 and 24.

VI
Le devoir de dignité procède du serment. Il impose, à l'égard des tiers, des collègues et collaborateurs, une conduite et des propos conformes à l'état de magistrat.

1. Le magistrat doit s'abstenir d'utiliser dans ses écrits, comme dans ses propos, des expressions ou des commentaires qui, en raison de leur forme ou de leur caractère excessif, sont de nature à porter atteinte à l'image de la justice.

2. La liberté juridictionnelle n'autorise pas l'emploi de termes contraires à la dignité.[28]

VII
Le magistrat entretient des relations empreintes de délicatesse avec les justiciables, les témoins, les auxiliaires de justice et les partenaires de l'institution judiciaire, par un comportement respectueux de la dignité des personnes et par son écoute de l'autre. La délicatesse s'entend du comportement d'une person e qui manifeste des qualités de réserve, de discrétion et de prévenance envers autrui.

Le respect du justiciable
1. Le magistrat s'interdit d'utiliser, dans ses écrits comme dans sa communication verbale ou non verbale, des gestes, des propos, des expressions ou commentaires déplacés, condescendants, vexatoires, discriminatoires, agressifs ou méprisants.

Le respect des autres professionnels de justice
6. Dans l'exercice de ses fonctions d'autorité, le magistrat respecte ses interlocuteurs, notamment les magistrats et les fonctionnaires de greffe et l'ensemble de ceux qui concourent à l'œuvre de justice.[29]

12. The PTC's judges' repeated[30] assertion that we "wilfully decided" to evade the disagreement mechanism, the application of the law or the default position, that they cannot exclude the possibility that we engaged in what they for some reason chose to call in French "*mauvaises pratiques*" in the English version of the 003 Considerations,[31] and that we acted with unlawful intentions and planned to disrupt the proceedings in order to prevent justice from taking its course, are not *legal opinions* but *statements of fact* that

[28] English translation: 'The duty to respect dignity stems from the oath taken. It requires colleagues and employees to conduct themselves and converse with third parties in a manner compatible with the position of judiciary member. 1. Members of the judiciary must refrain from using expressions or comments in their written and spoken communications that, due to their form or unreasonable nature, are likely to undermine the image of the judicial system. 2. Judicial freedom does not authorise the use of words contrary to dignity'. – At www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_compendium.pdf.
[29] English translation: 'Members of the judiciary shall show tact in their relations with litigants, witnesses, persons involved in the administration of justice and partners of the judicial institution, by behaving in a way that respects an individual's dignity and by listening to others. Tactfulness means the behaviour of a person who shows the qualities of restraint, discretion and consideration for others. - Respect for the litigant: 1. Members of the judiciary are prohibited from using misplaced, condescending, humiliating, discriminatory, threatening or contemptuous gestures, speech, expressions or comments, whether written or spoken. 6. In exercising their position of authority, members of the judiciary shall respect those whom they address, in particular other judiciary members and staff members of the court's registry and all those who assist in administering justice'. – At www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_compendium.pdf.
[30] 003 Considerations, paras. 90, 107–109; see also 004/2 Considerations, paras. 54 (fn 102), 99, 123.
[31] 003 Considerations, para. 108; In the 004/2 Considerations they used the term "malpractice" at paras. 54 (fn 102) and 123.

would in any other context be considered highly libellous: What our colleagues say, without a shred of evidence other than their own skewed interpretation of the events, is in effect nothing else but that we perverted the course of justice, the worst professional accusation that can be made against a judge, and which also means alleging that we committed a criminal offence.

13. We doubt that this was, on the one hand, an evaluation the PTC judges were required to make in the exercise of their appellate jurisdiction, hence it was entirely gratuitous. On the other hand, making what are in essence seriously libellous statements, from liability for which the PTC's judges are only protected by Articles 19 and 20 of the 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 ("UN-RGC Agreement"), is hardly in compliance with the principles excerpted above, especially the exhortation at *délicatesse.* Nor do we think judges should be free to treat their colleagues any less courteous than the litigants.

14. We very much hope that this reminder will ensure that we, the parties and the public will be spared a repetition of such an undignified and unprofessional spectacle in the PTC's future decisions, and we encourage the judges of the PTC to return to proper judicial decorum akin to the restraint shown by the SCC in its termination order of 10 August 2020 in Case 004/2 when it scrutinised and criticised the PTC's own failure to provide a final ruling:[32]

> It must be recalled that the Pre-Trial Chamber stated that "[i]n the specific case of appeals against closing orders Internal Rule 79(1) suggests that [it] has the power to issue a new or revised closing order that will serve as a basis for the trial." Emphasising that [it] "has previously decided that it fulfils the role of the Cambodian Investigation Chamber in the ECCC which when seised of a dismissal order as a consequence of an appeal shall investigate the case by itself." These explicit findings would lead a reasonable reader to conclude that the Pre-Trial Chamber was aware of its powers to go beyond declaring the illegality of the situation relating to issuance of two conflicting Closing Orders and to issue its own valid closing order. However, it elected not to take that route. The Pre-Trial Chamber, having *unanimously* declared "that the Co-Investigating Judges' issuance of the Two Conflicting

[32] **Case File No. 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 August 2020, paras. 52–53, 61–62.

Closing Orders was illegal, violating the legal framework of the ECCC", *should have gone a step further and provided an actual final ruling*.[33]

2. Our alleged duty to submit the disagreement for resolution to the PTC

15. Flowing from the above, a comment on the PTC's main accusation about us not presenting the disagreement to the PTC is now also in order. The PTC makes much of our alleged duty to present our disagreement on personal jurisdiction to the PTC for resolution. However, we fail to comprehend the PTC's laboured criticism in this respect. The PTC's NJs had on multiple occasions in Cases 003,[34] 004/2,[35] as well as 004/1 and 004[36] expressed their view that they did not accept that the ECCC had jurisdiction over

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[33] **Case File No. 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 August 2020, para. 61 – footnotes omitted and emphasis in final line added.

[34] *See for example,* **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 April 2016, Opinions of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, para. 27; **D165/2/26**, [Public Redacted Version] *Decision related to (1) appeal against decision on nine applications to seise the Pre-Trial Chamber with requests for annulment and (2) the two annulment requests referred by the International Co-Investigating Judge*, 13 September 2016, Opinions of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy regarding Meas Muth's Nine Applications for Annulment, para. 96; **D87/2/1.7/1/1/7**, [Public Redacted Version] *Decision on Appeal Against the International Co-Investigating Judge's Decision on Request for Clarification concerning Crimes Against Humanity and the Nexus with Armed Conflict*, 10 April 2017, Opinions of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, para. 72.

[35] **Case File No. 004/2-D257/1/8**, *Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage,* 17 May 2016, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 14; **Case File No. 004/2-D299/3/2**, *Consideration on AO AN's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng*, 14 December 2016, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 38; **Case File No. 004/2-D263/1/5**, *Consideration on AO An Application for Annulment of the Investigation Action related of Wat Ta Meak*, 16 December 2016, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 41; **Case File No. 004/2-D260/1/1/3**, *Considerations on Appeal Against Decision on AO An's Fifth Request for Investigative Action*, 16 June 2016, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 29; **Case File No. 004/2-D276/1/1/3**, *Decision on Appeal Against the Decision on AO An's Sixth Request for Investigative Action*, 16 March 2017, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 28; **Case File No. 004/2-D320/1/1/4**, *Decision on Appeal Against the Decision on AO An's Twelfth Request for Investigative Action*, 16 March 2017, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 18; **Case File No. 004/2-D277/1/1/4**, *Decision on Appeal Against Decision on AO An's Seventh Request for Investigative Action*, 3 April 2017, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 18; **Case File No. 004/2-D343/4**, *Decision on appeal against the decision on AO An's tenth request for investigation action*, 26 April 2017, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 17; see also 004/2 Considerations, paras. 225, 250–251.

[36] *See for example*, **Case File No. 004/1-D298/2/1/3,** *Considerations on Im Chaem's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews*, 27 October 2016, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy concerning the Merits of the Application, para. 39; **Case File No. 004-D344/1/6**, *Considerations on Yim Tith's Application to Annul the Investigation into Forced Marriage in Sangkae District (Sector 1)*, 25 July 2017, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 14; **Case File No. 004-D345/1/6**, *Considerations on Yim Tith's Application to Annul Investigative Action and Orders Relating to Kang Hort Dam,* 11 August 2017, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 16.

any of the remaining charged persons after cases 001 and 002, long before the closure of the investigations in any of the remaining cases. These judges were still the same at the time of our COs and there was no reason to think they would miraculously change their minds in the context of the COs. There was thus no point whatsoever in triggering the disagreement procedure over jurisdiction before the PTC, because the result was a foregone conclusion. To have done so would have meant needless delay and a useless waste of time and resources, as actually the 004/2 and 003 Considerations themselves impressively show. Had we done what the PTC requires of us, we would simply have been back at the start months later.

16. The way IR 77(13) is worded did, however, cause problems of interpretation on any appeal. To provide advance warning of the need to consider the implications, and nothing else, was the purpose of our early notice to the parties and the PTC on the matter in the decision of 18 September 2017, not the ex-ante announcement [!] of some nefarious secret plot to undermine the administration of justice.[37]

17. We are unsure whether the PTC meant to say in case 004/2 – and their views expressed then now obviously have repercussions in case 003 – that we should also have submitted our intention to issue split COs for resolution as a point of law, and what the consequences of the finding of their illegality would be.

18. Firstly, we did not *disagree* about our power to issue split COs, as we had made abundantly clear in our *joint* decision of 18 September 2017 in case 004/2.[38] We had naturally hoped, for example, that one of the parties would appeal that decision in order to obtain an early ruling on this crucial question of law by the PTC. Even if the appeal might have been inadmissible, it would have given the PTC occasion to issue advice in the form of an *obiter dictum*. However, the PTC would actually already have had the opportunity to do so *proprio motu* in its considerations in Case 004/1[39] – which came *after* the above-mentioned decision of 2017 but before the CO in case 004/2 – where it discussed the

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[37] 003 Considerations, joint findings at paras. 90, 107–109, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 273, 275; see also 004/2 Considerations, paras. 54 (fn 102), 99, 123.
[38] **Case File No. 004/2-D355/1**, *Decision on Ao An's Urgent request for disclosure of documents relating to disagreements*, 18 September 2017, paras. 6–18.
[39] **Case File No. 004/1-D308/3/1/20**, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018.

lawfulness of splitting a CO into a dispositive part and subsequent reasons, which it also classified *per curiam* as a grave procedural error.[40]

19. If the PTC had such fundamental and grave concerns about the lawfulness of split COs in case 004/2, this cannot have been an unforeseeable and recent epiphany for its judges that came upon them only when drafting the 004/2 Considerations, and a clear early *obiter* notice in Case 004/1 to that effect would have been practically prudent and highly useful, regardless of the PTC's consistent dogmatic aversion to issuing advisory opinions (on that see para. 20 below). Had we been given such notice of the PTC's allegedly joint views in a timelier manner, all remaining cases could have been dealt with as soon as possible by joint decision – which, as we will explain further below, could only have meant the immediate termination of all cases remaining after the dismissal in case 004/1. This would, last but not least, have saved us an enormous amount of time and efforts, and, not to put too fine a point on it, the international donors as well as the RGC a large part of their financial contributions to the ECCC budget.

20. Secondly, even if we had asked the PTC for a ruling on the issue of the lawfulness of split COs, we would very likely have been told that this was not a disagreement procedure but a request for an advisory opinion, something which the PTC has from the very beginning[41] consistently refused to entertain.[42] In particular, it should be noted that the

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[40] **Case File No. 004/1-D308/3/1/20**, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, paras. 32–35.

[41] **Case File No. 002-D345/5/11**, *Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order on Ieng Sary's Motion against the Application of Command Responsibility*, 9 June 2010, para. 11 'The Co-Investigating Judges are not obliged to give declaratory decisions, as has been effectively requested in the Motion, and the Pre-Trial Chamber will not provide advisory opinions and *cannot fetter the exercise of the discretions of the Co-Investigating Judges in respect of their decisions to be expressed in the Closing Order*' [emphasis added].

[42] **Case File No. 004-D381/42** & **D382/41**, *Decision on Yim Tith's urgent request for dismissal of the defence support section's action plan decision*, 18 March 2021, para. 11 'the Chamber recalls that it does not provide advisory opinions'; **Case File No. 004/2-D359/17** & **D360/26**, *Decision on AO An's Urgent Request for Continuation of AO An's Defence Team Budget*, 2 September 2019, para. 6; **Case File No. 004/2-D347.1/1/7**, *Decision on Ao An's appeal against the notification on the interpretation of "Attack against the civilian population" in the context of crimes against humanity with regard to a state's or regime's own armed forces*, 30 June 2017, para. 16; **Case File No. 004-D306/17.1/1/9**, *Decision on Yim Tith's appeal against the notification on the interpretation of "Attack against the civilian population" in the context of crimes against humanity with regard to a state's or regime's own armed forces*, 30 June 2017, para. 19 'The Pre-Trial Chamber reiterates that it will not provide advisory opinion and cannot fetter the exercise of the discretion of the Co-Investigating Judges in respect of their decisions to be expressed in a closing order'; **D158/1**, [Public Redacted Version] *Decision on Request for the Pre-Trial Chamber to take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order and to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, If Necessary*, 28 April 2016, para. 14 'The Pre-Trial Chamber has no jurisdiction to deal with hypothetical matters or provide advisory opinions'; **Case File No. 004/2-D208/1/1/2**, *Decision on OA An's Appeal Against the Decision Rejecting his request for Information Concerning the Co-Investigating Judges'*

Defence for Yim Tith in Case 004 had as early as August 2014 requested the PTC to provide its own understanding of the very question of law relevant to this matter, namely "[i] should there be a disagreement between the Co-Investigating Judges on whether to dismiss the case against the Appellant or to indict him; and [ii] … should the disagreement come before the Pre-Trial Chamber and the Pre-Trial Chamber fail to achieve the super-majority when deciding on the disagreement". The PTC found "that the scenario envisaged in the Request … [was] hypothetical", and as such, the PTC held that it had "no jurisdiction to deal with hypothetical matters or provide advisory opinions".[43] Hence, any suggestion that we would have been under any duty to submit any question of law would be outlandish.

21. Thirdly, we – much like the SCC – are at a loss as to how the PTC's judges could say *per curiam* in case 004/2 that split COs are manifestly illegal and a violation of the very framework of the ECCC, only for the NJs and IJs to proceed to discuss the merits of each and to split themselves in upholding the CO the result of which appealed to them. If our error in issuing split COs was as egregious as described at length by the PTC in both Considerations, the COs should ideally have *both* been immediately and unanimously quashed for serious procedural defect without the PTC spending any time on discussing the merits, and the case be remanded to us with instructions not to split the CO. A procedural error of such an order of magnitude in any decision during the investigations would have inevitably led to its annulment and its being struck from the case file as void. The surprising stance taken by the IJs in the 003 Considerations that this error did not

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Disagreement of 5 April 2013, 22 January 2015, para. 8 'The Pre-Trial Chamber has emphasised that Internal Rule 21 does not provide an avenue for the Chamber to resolve hypothetical questions or provide advisory opinions'; **D117/1/1/2**, [Public Redacted Version] *Decision on Appeal against the international Co-investigating judge's order on suspect's request concerning summons signed by one Co-investigating judge*, 3 December 2014, para. 15; **Case File No. 004-D212/1/2/2**, *Decision on YIM Tith's Appeal Against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge*, 4 December 2014, para. 6; **Case File No. 004-D205/1/1/2,** *Decision on YIM Tith's Appeal Against the Decision Denying His Request for Clarification*, 13 November 2014, paras. 7–8; **D87/2/2**, [Public Redacted Version] *Decision on Appeal Against the Co-investigating Judges' Constructive Denial of Fourteen of Submissions to the [Office of the Co-investigating Judges]*, 23 April 2014, paras. 25–26; **Case File No. 002-D345/5/11**, *Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order on Ieng Sary's Motion against the Application of Command Responsibility,* 9 June 2010, para. 11 'The Co-Investigating Judges are not obliged to give declaratory decisions, as has been effectively requested in the Motion, and the Pre-Trial Chamber will not provide advisory opinions and cannot fetter the exercise of the discretions of the Co-Investigating Judges in respect of their decisions to be expressed in the Closing Order'; see also **D174/1/4**, [Public Redacted Version] *Considerations on Appeal against the International Co-Investigating Judge's Decision to Charge with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility*, 27 April 2016, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, para. 24 'the Undersigned Judges will not provide advisory opinions'.

[43] **Case File No. 004-D205/1/1/2**, *Decision on YIM Tith's Appeal Against the Decision Denying His Request for Clarification*, 13 November 2014, paras. 7–8.

make the COs void in itself[44] is difficult to comprehend, and this is also evidenced by the view taken by the SCC in its termination order in case 004/2,[45] which the PTC's IJs now criticise as well in rather strident tones.[46]

22. Fourthly, by upholding the NCIJ's dismissal order in case 004/2 the NJs did not abide by their own joint ruling in paras. 111 and 112 of the 004/2 Considerations that the default rule is that the case always proceeds. By their own logic, they should have joined their international colleagues in forwarding the indictment to the TC and the question of whether IR 77(13)(b) applies directly or not to the present scenario would have been solved: The default rule as expressed in paras. 111 and 112 actually would have disposed of the problem of the applicability of IR 77(13)(b).

23. Finally, only the joint part of the PTC's Considerations can have any binding effect because it was drafted unanimously. The IJs' insistence in both case 004/2 and case 003 that the indictment stands – and the dismissal is *ultra vires* or "less in conformity" with the applicable law[47] – simply because that outcome is in accordance with the default rule,[48] is ultimately unconvincing, given that the NJs, albeit contrary to what they had held jointly with the IJs, chose to pursue the opposite direction, thus putting the substance and reach of the alleged default rule in doubt, and due to the lack of a super-majority each view was and is at the end of the day procedurally nothing else but the NJs' or IJs' personal interpretation.

24. The fact that for reasons not known to us the NJs performed a linguistic U-turn and said in case 003 that *both COs are valid* does not change that conclusion, because they still went ahead and directly gave the *administrative* instruction that case file 003 be archived.[49]

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[44] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 259, 262, 284, 342.
[45] **Case File No. 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 August 2020, paras. 52–53, 61.
[46] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 267–283.
[47] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 119, 249–250, 259–260, 262, 284–285, 342; 004/2 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 318, 324, 326, 681–682, 685, 694.
[48] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 257, 261–262, 284; 004/2 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, paras. 322–333, 685.
[49] 003 Considerations, Opinions of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, paras. 115–118.

25. To sum up, the impasse – previously in case 004/2 and now in case 003 – was and is at the end of the day of the PTC's own making, because like in Case 004/1 it opted to merge the ruling on the procedural errors, on which all PTC judges agreed, with that on the merits, on which they all knew beforehand that they would not. In case 004/1 that was ultimately harmless because we decided jointly to dismiss the case and the outcome on the merits was clear *ab initio* – the same could obviously not apply to the cases where we did not agree. The PTC therefore twice had the opportunity to break the deadlock itself in three different manners, by

    - either unanimously remanding the case back to us for serious procedural error – and without engaging with the merits – with instructions to issue one joint CO,
    - or doing so itself by unanimously applying its own alleged default rule and sending the case for trial,
    - or, given the actual remaining disagreement in the PTC evident from both Considerations, terminating the case, as the SCC had to do ultimately in case 004/2.[50]

    The SCC was clear in its views in case 004/2 that the PTC *had* to choose a final disposition for the case before it. However, as in case 004/2, the PTC again – now even in the face of a contrary ruling by the SCC – chose to do none of the above, instead preferring to pontificate again at length about our questionable moral character and legal incompetence, creating the current situation with no clear direction and raising serious doubts about the actual meaning of the default rule, thus in effect again abdicating responsibility for the proper resolution of the case with grave consequences for the fair trial rights of the Defence, as we will now explain.

3. Fair trial right to speedy final determination of the case

[50] **Case File No. 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 August 2020, paras. 69, 71(vi).

26. The proceedings against Meas Muth would remain pending forever without resolution if the situation after the 003 Considerations outlined above were to be the end state. Meas Muth has a fair trial right to a final and speedy determination of the case against him.[51] This right is enshrined in Art. 14(3)(c) ICCPR which "is designed to avoid keeping anyone charged with a criminal offence too long in a state of uncertainty about their fate".[52] The ECtHR case of *Marini*[53] from 2007 – as persuasive authority based on the fair trial rights provision of Art. 6(1) ECHR – is representative of the long-standing case law of that Court.[54] In *Marini*, i.e., even in the case of a system that links a tied vote to a

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[51] See e.g. Arts. 33new, 35new(c) of the Law on the ECCC; Art. 31 of the Constitution of the Kingdom of Cambodia, referring to Art. 14(3)(c) ICCPR; see also as persuasive authority Art. 6(1) ECHR and ECtHR, *Marini v Albania* (ECtHR, Fourth Section, Application No. 3738/02, Judgment of 18 December 2007) paras. 120 et seq. The Albanian law at the time in effect caused an adjournment *sine die* of a constitutional appeal in the case of a tied vote: The formal dismissal mandated by a tied vote did not prevent the applicant from resubmitting the identical appeal until the reasons causing the tied vote ceased to exist, i.e. a majority was attained (at paras. 72, 76). Of particular relevance in the context of the current case is para. 123: "… [T]he Court would … observe, … that the approach adopted in Albania in the event of a tied vote would appear to differ significantly from that adopted in the legal systems of other Contracting Parties…. In contrast to other legal systems, which either preclude a tied vote or provide different alternatives to enable a final decision to be reached in the event of such a vote, in the Albanian legal system a tied vote in the Constitutional Court results in a decision which does not formally determine the issue under appeal. Moreover, no reasons are given for dismissing the appeal in such an eventuality other than that the vote was tied. Having regard to its above considerations, the Court can only conclude that the tied vote arrangements … do not serve the interests of legal certainty and are capable of depriving an applicant of an effective right to have his constitutional appeal finally determined".

[52] Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020) p. 405.

[53] *Marini v Albania* (ECtHR, Fourth Section, Application No. 3738/02, Judgment of 18 December 2007) para. 120.

[54] *Garcia Manibardo v Spain* (ECtHR, Fourth Section, Application No. 38695/97, Judgment of 15 February 2000) para. 43; *Frydlender v France* (ECtHR, Grand Chamber, Application No. 30979/96, Judgment of 27 June 2000) para. 45 citing *Caillot v France* (ECtHR, Third Section, Application No. 36932/97, Judgment of 4 June 1999) para. 27; *Kutic v Croatia* (ECtHR, First Section, Application No. 48778/99, Judgment of 1 March 2002) para. 25; *Multiplex v Croatia* (ECtHR, First Section, Application No. 58112/00, Judgment of 10 July 2003) para. 45; *Dubinskaya v Russia* (ECtHR, First Section, Application No. 4856/03, Judgment of 13 July 2006) para. 41 citing *Sukhorubchenko v Russia* (ECtHR, First Section, Application No. 69315/01, Judgment of 10 February 2005) para. 53; *Kabkov v Russia* (ECtHR, First Section, Application No. 12377/03, Judgment of 17 July 2008) para. 42; *Kostadin Mihaylov v Bulgaria* (ECtHR, Fifth Section, Application No. 17868/07, Judgment of 27 March 2008) para. 38; *Bulanov v Ukraine* (ECtHR, Fifth Section, Application No. 7714/06, Judgment of 9 December 2010) para. 36; *Menshakova v Ukraine* (ECtHR, Fifth Section, Application No. 377/02, Judgment of 8 April 2010) para. 52; *Chuykina v Ukraine* (ECtHR, Fifth Section, Application No. 28924/04, Judgment of 13 January 2011) para. 50; *Muscat v Malta* (ECtHR, Fourth Section, Application No. 24197/10, Judgment of 17 July 2012) para. 45; *Camovski v Croatia* (ECtHR, First Section, Application No. 38280/10, Judgment of 23 October 2012) para. 39; *Deguara Caruana Gatto and others v Malta* (ECtHR, Fourth Section, Application No. 14796/11, Judgment of 9 July 2013) para. 88; *Perusko v Croatia* (ECtHR, First Section, Application No. 36998/09, Judgment of 15 January 2013) para. 48; *Avdic and others v Bosnia and Herzegovina* (ECtHR, Fourth Section, Application Nos. 28357/11, 31549/11, 39295/11, Judgment of 19 November 2013) para. 37; *Patrinjei v Romania* (ECtHR, Third Section, Application No. 54950/07, Judgment of 28 January 2014) para. 33; *Falie v Romania* (ECtHR, Third Section, Application No. 23257/04, Judgment of 19 May 2015) paras. 22, 24; *Kardos v Croatia* (ECtHR, Second Section, Application No. 25782/11, Judgment of 26 April 2016) para. 48; *Lupeni Greek Catholic Parish and others v Romania* (ECtHR, Grand Chamber, Application No. 76943/11, Judgment of 29 November 2016) para. 86; *Leuska and others v Estonia* (ECtHR, Second Section, Application No. 64734/11, Judgment of 7 November 2017) para. 67; *Muic v Croatia* (ECtHR, Second Section, Application No. 79653/12, Judgment of 30 May 2017) para. 44; *Centre for the Development of*

formal dismissal of an application but leaves the case open *in favour of the applicant* for resubmission at a later date, the ECtHR saw a violation of Art. 6(1) ECHR. Case law and provisions from other international/ised courts and tribunals on stalemates in votes, deliberations etc.,[55] provide no guidance in our unique context, where the stalemate within a Chamber is combined with a stalemate across different tiers of the court hierarchy. The present situation was always an imaginable consequence of the unique hybrid character of the ECCC; the PTC's ostentatious lament that never in the history of national or international criminal justice was there an instance of two conflicting decisions emanating from one judicial office[56] is therefore clearly misplaced and could in any event also be levelled against itself, as the SCC has in effect held.

27. The case must therefore not remain in limbo, bearing in mind that even a royal pardon as a potential pragmatic solution is excluded under Art. 11(1) of the ECCC Agreement and Art. 40 *new* of the Law on the ECCC.

B. Merits

1. *Forwarding*[57] *the case file to the Trial Chamber*

Analytical Psychology v The Former Yugoslav Republic of Macedonia (ECtHR, First Section, Application No. 29545/10, Judgment of 15 June 2017) para. 45; *Regner v The Czech Republic* (ECtHR, Grand Chamber, Application No. 35289/11, Judgment of 19 September 2017) para. 99–112; *Tordaj v Serbia* (ECtHR, Third Section, Application No. 19728/08, Judgment of 19 September 2017) para. 17; *Lesciukaitis v Lithuania* (ECtHR, Fourth Section, Application No. 72253/11, Judgment of 28 March 2017) para. 37; *Kamenova v Bulgaria* (ECtHR, Fifth Section, Application No. 62784/09, Judgment of 12 July 2018) para. 41; *Kristiana Ltd v Lithuania* (ECtHR, Fourth Section, Application No. 36184/13, Judgment of 6 February 2018) para. 122; *Brajovic and others v Montenegro* (ECtHR, Second Section, Application No. 52529/12, Judgment of 30 January 2018) para. 48; *Kandarakis v Greece* (ECtHR, First Section, Application Nos. 48345/12, 48348/12, 67463/12, Judgment of 11 June 2020) para. 46; *Kocaman v Turkey* (ECtHR, Second Section, Application No. 77043/12, Judgment of 24 November 2020).

[55] Compare *Prosecutor v. Samil Jamil Ayyash*, Decision on "Appeal against Decision of President Convening Trial Chamber II", STL Appeals Chamber (STL-18-10/MISC.2/AC, F0006), 13 December 2019, paras. 11, 16–24; Residual Special Court for Sierra Leone, *Rules of Procedure and Evidence* (as amended 29 May 2004), (entered into force 12 April 2002) r 16(B)(ii); Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") (8 August 1945) ('*Charter of the Nuremberg Tribunal*') art 2.

[56] 003 Considerations para. 109.

[57] We take some issue with the ICP's language that we have a "duty" to forward the case file "to ensure compliance with the 'overriding principle that ECCC proceedings must comply with the legality, fairness and effectiveness requirements under the ECCC legal framework' to achieve 'effective criminal justice'" – *Request*,

28. The Request is ill-founded.

29. The question of whether the indictment is valid and the case file can be forwarded at all is one of the merits of the Request, not its admissibility.

30. The ICP's argument, based on the PTC's IJs' opinion about the existence of an allegedly unanimous finding by all five judges that the indictment is valid, is taking the NJs' words out of context, both within the 003 Considerations themselves and compared with the 004/2 Considerations which were after all handed down almost immediately *after* the hearings in case 003.

31. In both cases, the very same NJs who had after all previously and throughout all the investigations consistently denied the existence of personal jurisdiction, clearly expressed their view in both Considerations that they did *not* wish the indictment to proceed to trial. The situation in this case is in fact no different from the one in case 004/2.

32. Our conclusion derives from two simple premises: Firstly, from the principle that like cases must be treated alike. Cases 004/2 and 003 are entirely identical on the crucial issues of personal jurisdiction and the matter of split COs.

33. Secondly, the presumption is that the same judges will decide an identical legal issue in the same manner, unless a) their views have changed and they *clearly* state that they wish to depart from their previous opinion, or b) that the law has changed and the new law demands a different outcome. Neither is the case here. It would seem an especially baffling assertion to imply that the NJs should have changed their views for case 003 after hearing arguments in case 003 which they could – and should – already have taken into account in case 004/2.

34. It is not for us to try to decipher the reasons which have brought the NJs to using a different approach and language in case 003, and what their exact intentions were. We are, however, entirely satisfied that by saying both COs are valid they did certainly *not*

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at paras. 2 and 15. There seems to be a rather one-sided interpretation of the term "justice" underlying this terminology.

mean to consent to the indictment being forwarded to the TC, because they themselves ordered the case file to be archived. Everything else is sophistry.

35. There is neither unanimity nor a super-majority among the PTC judges for either CO in case 003. The alleged default rule was again not followed by all of the very judges pronouncing it, casting serious doubt on its actual unanimous acceptance by all PTC judges, its meaning and binding effect. Be that as it may, the TC has in any event not been seised of the case. We are in full agreement that we cannot forward the case file to the TC on that basis.

36. The NCIJ wishes to add that precisely because of the lack of compliance by the NJs with the alleged default rule, he does not consider himself bound by it and maintains his view on personal jurisdiction in this case. The ICIJ takes note of this view and its consequences for the only kind of joint CO still available to both CIJs, i.e. termination of the case on fair trial grounds as set out above, or alternatively for lack of a valid indictment as held by the SCC in case 004/2.

37. Against this background, neither of us will forward the case file alone, either: This "solution" proposed by the IJs and the ICP is in substance no different than having two split COs again. Just as well as the ICIJ forwarding the case to the TC, the NCIJ could order the file sealed and archived – the PTC's indecision is authority for both or neither.

2. Administrative instructions

38. As an *obiter dictum*, because the decision no longer depends on this matter, we are also perfectly satisfied that the PTC could have given the administrative instructions about the fate of the case file itself, as is evidenced by the fact that the NJs actually chose to do so in this case, and by the flurry of related memoranda from the PTC to the Office of Administration ("OA") in case 004/2. Despite the fact that in the 003 Considerations the IJs state that immediately following the issuance of a closing order the Office of the Co-Investigating Judges ("OCIJ") is *functus officio*, with the exception of "administrative functions",[58] the President of the PTC as well as the IJs themselves had previously issued contradictory instructions via their greffiers to the OA's Records and Archives Unit

[58] 003 Considerations, Opinions of Judge Olivier Beauvallet, and Judge Kang Jin Baik, para. 132.

("RAU") to either archive Case File 004/2 or forward it to the TC.[59] They would not have done so had they been of the view that only we could.

39. To refer the matter to us now for the "administrative" resolution of the deadlock in the face of the PTC's own continuing indecision would thus seem rather disingenuous.

3. Final disposition of the case

40. Obviously, we do not currently have jurisdiction to decide the fate of case 003 as such because the case is still pending with the PTC for the civil party application admissibility issue, and the ICP's IR 80(1) extension request to the TC with its rejection by the TC might ultimately open a path to another SCC ruling as in case 004/2.

41. We see no reason, however, to wait with our decision on the matter before us as we did in case 004/2. The Request is ripe for a ruling – indeed the ruling may help force the resolution of the case's destiny.

42. Nonetheless, we wish to advise the parties that, should no other path be found to progress this case either to trial or to a termination as in case 004/2 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 receiving or requesting arguments about whether we have an exceptional residual jurisdiction of last resort to terminate the case ourselves in order to give effect to the higher-order fair trial principles of providing for an orderly disposal of the case and of safeguarding Meas Muth's right to a speedy final determination of the case against him. We would much prefer not to be put in that position but consider it necessary to emphasise that the rule of law has costs and the case must not remain in limbo.

43. We are aware that this is an unusual step to take, but we also expressly encourage the ICP to appeal this decision to the PTC to allow it to reconsider or at least clarify its view on the essence, unanimous acceptance by all PTC judges and binding effect of the default

[59] **Case File No. 004/2-D359/34** & **D360/44**, *President's Memo concerning Notification of Pre-Trial Chamber's Considerations in Case 004/2*, 29 January 2020; **Case File No. 004/2-D359/35** & **D360/44**, *Pre-Trial Chamber International Judges' Memorandum concerning Notification of the Pre-Trial Chamber's Considerations in Case 004/2*, 29 January 2020; **Case File No. 004/2-D359/36** & **D360/45**, *International Judges' Memorandum concerning Transfer of Case File 004/2*, 12 March 2020; **Case File No. 004/2-D359/37** & **D360/46**, *President's Memorandum dated 16 March 2020*, 16 March 2020.

rule, the comparative severity of breaching it, the effect of non-compliance on the fair trial aspects of this case, and to bring this case to a proper conclusion under the powers which it has itself declared are available to it.

FOR THESE REASONS, we[60] **DENY THE REQUEST.**

Phnom Penh, 20 May 2021

សហចៅក្រមស៊ើបអង្កេត

Co-Investigating Judges
Co-juges d'instruction

YOU Bunleng Michael Bohlander

[60] While the CIJs are issuing this decision jointly, the NCIJ notes, for the record, that documents placed on the case file should be numbered sequentially from the last documents placed before the resignation of Judge Siegfried Blunk, without including in the count orders and decisions issued by Reserve CIJ Laurent Kasper-Ansermet.