



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D158/1

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

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC27)

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

Date: 28 April 2016

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DECISION ON [REDACTED] REQUEST FOR THE PRE-TRIAL CHAMBER TO TAKE A BROAD INTERPRETATION OF THE PERMISSIBLE SCOPE OF APPEALS AGAINST THE CLOSING ORDER & TO CLARIFY THE PROCEDURE FOR ANNULING THE CLOSING ORDER, OR PORTIONS THEREOF, IF NECESSARY

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “██████████ Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order & to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary”, filed by ██████████ Co-Lawyers (the “Defence”) on 5 October 2015 (the “Request”).¹

I. PROCEDURAL HISTORY

1. On 7 September 2009, the Acting International Co-Prosecutor filed before the Office of the Co-Investigating Judges the Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, dated 20 November 2008, which indicated the existence of reasons to believe that crimes within the jurisdiction of the ECCC had been committed by, amongst others, ██████████.² Further allegations against ██████████ were submitted in a Supplementary Submission, filed on 31 October 2014.³ Judicial investigations in Case 003 are ongoing.
2. On 5 October 2015 the Defence filed the Request. No responses were filed within the deadline.

II. THE REQUEST

3. The Defence asks the Pre-Trial Chamber to provide relief by:
 - A. ADOPT[ING] a broad interpretation of the scope of appeals permitted against the Closing Order;
 - B. CLARIFY[ING] that requests to annul the Closing Order or portions thereof are admissible; and
 - C. CLARIFY[ING] the procedure to request such annulments.⁴

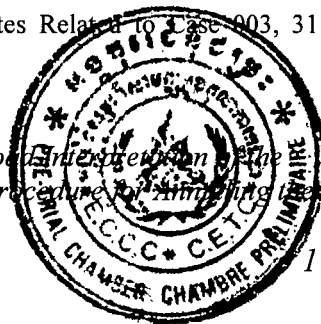
¹ 003/07-09-2009-ECCC-OCIJ(PTC27), ██████████ Request For the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order & to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 5 October 2015, D158.

² Second Introductory Submission regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1; See also Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, D1/1, 7 September 2009.

³ International Co-prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003, 31 October 2014, D120.

⁴ Request, page. 14.

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4. The Defence submits that the Pre-Trial Chamber has inherent jurisdiction⁵ to admit the Request because: i) inherent jurisdiction can be used “to determine incidental issues which arise as a direct consequence of the procedures of which [a court is] seized by reason of the matter falling under [its] primary jurisdiction”;⁶ ii) the Pre-Trial Chamber has as primary jurisdiction over appeals against the Closing Order and over annulments;⁷ and iii) the “Request seeks clarification of the scope of Rule 74(3) appeals and Rule 76 annulments”.⁸
5. According to the Defence, although the Pre-Trial Chamber is not yet seized with any appeal against a Closing Order, or request for annulment of a Closing Order (or portions thereof), nothing prevents it from providing the sought clarification *at this stage* because doing so: i) “will not prejudice any party”; and ii) will ensure efficiency of proceedings, by assisting parties in planning their future submissions against a possible Closing Order, by clarifying what types of issues may be raised within the 30 day time-limit for filing submissions against Closing Orders, which deadline is short given the large size and legally complicated Closing Orders issued in the past before the ECCC.⁹
6. The Defence submits that the “Pre-Trial Chamber should adopt a broad interpretation [for] the scope of appeals against the Closing Order, in light of Rule 74(3) in light of Rule 21, and should clarify the procedure for requesting the annulment of the Closing Order or a portion thereof.”¹⁰ According to the Defence, “[redacted] ‘rights to be tried in accordance with the law’ will be violated if all defects in the Closing Order are not cured through the appeal and/or annulment process” by the Pre-Trial Chamber, because the Trial Chamber has “refused to address such issues at trial”.¹¹

⁵ Request, para. 1 referring to “Order Suspending the Enforcement of the Order on International Co-Prosecutor’s Public Statement Regarding Case File 003”, 13 June 2011, D14/1/2, para. 4, quoting Special Tribunal for Lebanon, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order on Jurisdiction and Standing, Appeals Chamber, 10 November 2010, para. 45 (the “Order Suspending Public Statement”).

⁶ Request, para. 1 referring to Order Suspending Public Statement.

⁷ Request, para. 2 making reference to Internal Rules 73, 74 and 76.

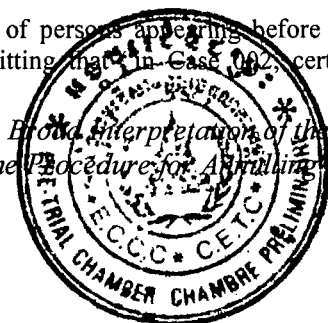
⁸ Request, para. 3. See also Request, para. 1: “the Pre-Trial Chamber’s past interpretation of Rules 21 and 74(3)(a) is too narrow to permit many defects to be addressed through appeals against the Closing Order. While the annulment procedure may fill this gap (if the permissible scope of appeals is not interpreted more broadly), the Rules are not clear as to the procedure for requesting annulment of the Closing Order (or portions thereof).”

⁹ Request, paras. 4-5.

¹⁰ Request, paras. 1, 17-18, 24, 32.

¹¹ Request, para. 17 making reference to applicable law on fair trial rights of persons appearing before the ECCC. See also Request, paras. 6-16 “Background from Case 002” submitting that “In Case 002, certain

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7. The Defence submits that the requested relief is necessary because, while “some defects in the judicial investigation may become apparent to the Defence during the course of the investigation[, o]ther defects [...] will become apparent only once the Closing Order is issued and the Defense is able to ascertain how the Co-Investigating Judges have defined and applied the law, as well as whether they will send ██████████ to [t]rial only on the basis of facts set out in the Introductory Submission and any valid Supplementary Submission.”¹² To cure such defects, in light of the Charged Person’s rights, the Defence suggests two approaches to the Pre-Trial Chamber:
8. Defence suggestion “A”: “The Pre-Trial Chamber should expand its interpretation of the permissible scope of appeals against the Closing Order *to also admit appeals relating to the definition of crimes and forms of liability in 1975-79*”.¹³ More concretely, the Defence suggests that defects in the Closing Order “previously referred to by the Pre-Trial Chamber as the *contours of the crime or form of liability*”¹⁴ must be appealable through a broad interpretation of Internal Rule 74(3)(a) in light of Internal Rule 21. The defence submits that the Co-Investigating Judges may fail to set out, in a future Closing Order, all the material elements of the crimes if, for instance, they do not “find a *state policy* [...] [as] a necessary *element of [crimes against humanity]*”,¹⁵ as they were defined in 1975-79. The Defence suggests, if the Pre-Trial Chamber will not address such issues, the “Trial Chamber *may not be able to address [them] at trial [either]*” because it is unlikely that “it would find preliminary objections concerning definition of crimes [...]

challenges against the Closing Order made through an appeal against the Closing Order were found inadmissible. Yet, the Trial Chamber refused to address defects in the Closing Order at trial, considering they should have been resolved during the pre-trial stage.”

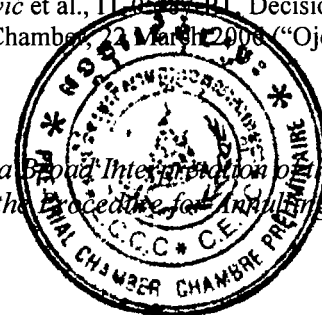
¹² Request, para. 31.

¹³ Request, paras. 18-24.

¹⁴ Request, para. 18 *referring to* PTC38, para. 23: “challenges relating to the specific contours of a substantive crime, or to a form of responsibility, are matters to be addressed at trial” *which makes reference to* Cf. *Prosecutor v. Delalic, Mucić, Delić, and Landžo*, IT-96-21-AR72.5, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Appeals Chamber, 6 December 1996, para. 27 (holding that any dispute as to the substance of the crimes enumerated in Articles 2, 3, 4, and 5 of the Statute “is a matter for trial, not for pre trial objections”); *Prosecutor v. Furundžija*, Case No. IT-05-17/1-T, Judgement, Trial Chamber, 10 December 1998, paras 172–186, *Prosecutor v. Kunarac, Kovač, and Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001 (“Kunarac Trial Judgement”), paras 436–460 (Trial Judgements ascertaining the contours of rape as a crime against humanity under Article 5(g) of the Statute) *and to* Cf. *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004 (“Blaškić Appeal Judgement”), paras 32–42 (Appeal Judgement ascertaining the contours of the mental element of “ordering” under Article 7(1) of the Statute). See also *Prosecutor v. Milutinović et al.*, IT-05-07-BT, Decision on Ojdanić’s Motion Challenging Jurisdiction – Indirect Co-Perpetration, Trial Chamber, 24 March 2006 (“Ojdanić Co-Perpetration Decision”), para. 23.

¹⁵ Request, para. 18. *See also* Request, paras. 19-20.

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admissible” or because “the legal re-characterization of crimes is not permitted at trial if *new* constitutive elements are introduced.”¹⁶ According to the Defence, to leave such issues unresolved at the pre-trial stage, due to adopting the ICTY approach, “is not appropriate” because the ECCC is “procedurally unlike the ICTY”, because at the ECCC defects in the Closing Order may not be raised at trial.¹⁷ The Pre-Trial Chamber must, instead, follow its other jurisprudence.¹⁸

9. Defence suggestion “B”: “The Pre-Trial Chamber should clarify that the Closing Order, or portions thereof, may be annulled if necessary to address other defects that cannot be cured through appeals, and should clarify the procedure for such annulments”.¹⁹ Noting that the Closing Order is appealable and that according to Article 253 of the Cambodian Code of Criminal Procedure (the “CPC”) “an order against which an appeal may be made cannot be subject to a request for annulment”, the Defence argues that an exception to this rule must be made, to allow requests for annulment of Closing Orders at the ECCC where such orders are large and complex.²⁰ According to the Defence, the lack of guidance in the rules for annulment of Closing Orders (or parts thereof) does not indicate that annulment of Closing Orders is not allowed. Provisions for nullity of Closing Orders under Rule 67(2) suggest that Closing Orders can be annulled, although there is no procedure in place through which a party can request such annulment.²¹ The Pre-Trial Chamber has “indicated that a Closing Order may be defective where it lacks sufficient specificity” which may raise issues relating to Charged Persons’ rights for notice of charges.²² Other defects that become apparent only once a Closing Order is issued include

¹⁶ Request, paras. 20 and 24. See also Request, footnote 39 referring to Internal Rule 98(2).

¹⁷ Request, paras. 21-22.

¹⁸ Request, para. 23 referring to Decision on IENG sary’s appeal against the closing order, D427/1/30, 11 April 2011 (the “Decision on 002/PTC75”), para. 48: “where appeals filed against an Indictment under Internal Rule 74 raise matters which cannot be rectified by the Trial Chamber, and not allowing the possibility to appeal at this stage would irreparably harm the fair trial rights of the accused, Internal Rule 21 may, on a case by case basis, warrant application to broaden the scope of Internal Rule 74. It will not otherwise be applied.”

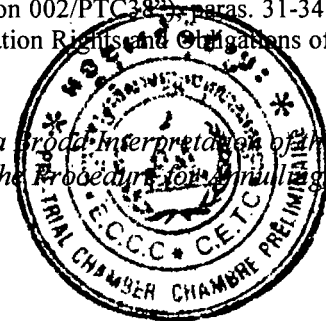
¹⁹ Request, paras. 25-30.

²⁰ Request, para. 27.

²¹ Request, para. 28 referring to Internal Rule 67(2): “The Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterization by the Co-Investigating Judges, including the relevant criminal provisions and the nature of criminal responsibility”.

²² Request, paras. 29-30 making reference to Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), D97/15/9, 20 May 2010, (the “Decision on 002/PTC38”), paras. 31-34 and 92 and to Decision on Ieng Sary’s Appeal against the OCIJ’s Order on Translation Rights and Obligations of the Parties, A190/II/9, 20 February 2009, 002/PTC1[2], para. 28.

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instances when people are sent to trial on the basis of facts that were not “set out in the Introductory Submission and [in] any valid Supplementary Submission”.²³

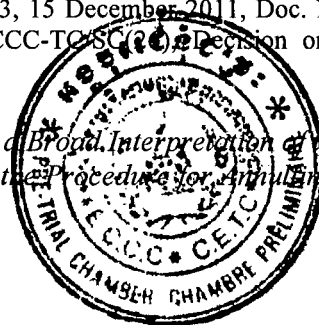
III. ADMISSIBILITY

10. The Defence submits that, despite a lack of guidance in the Internal Rules, in order to safeguard [REDACTED] fair trial rights, the Pre-Trial Chamber can exercise inherent jurisdiction to clarify the scope of Internal Rules 74(3)(a) and 76 - with particular regard to Closing Orders - by providing a broad interpretation of these Rules, in light of Internal Rule 21. According to the Defence, because Rules 74(3) and 76 vest the Pre-Trial Chamber with primary jurisdiction, the sought interpretation of such Rules is an incidental issue relating to that primary jurisdiction.
11. The Pre-Trial Chamber has previously found that, in instances where statutory provisions do not expressly or by necessary implication contemplate its power to pronounce on a matter, it has inherent jurisdiction ‘to determine *incidental issues which arise as a direct consequence of the procedures of which [it is] seized.*’²⁴ According to the Request, the “incidental issue” at hand is: how to deal with defects in possible future Closing Orders. Presently, the Pre-Trial Chamber is not yet seised with any Closing Order in Case 003. Accordingly, the clarification sought does not fall within the purview of the Pre-Trial Chamber’s inherent jurisdiction. This notwithstanding, the Defence submits that, nothing prevents the Pre-Trial Chamber from issuing the sought clarification, *in advance of it being seised* with any Closing Orders, because doing so: i) “will not prejudice any party”; and ii) will ensure efficiency of proceedings.
12. In the past, the Pre-Trial Chamber has used inherent jurisdiction to review matters relating to “*upcoming appeals*” in circumstances where it was seised of allegations that non-observance of “*specific rights*” of the parties may render their *statutory appeal rights*

²³ Request, para. 31.

²⁴ Decision on Co-Lawyers’ Request to Stay the Order For Assignment of Privilisional Counsel to [REDACTED], 11 February 2014, D56/19/14, (003/PTC11) para. 16, *referring to* Order Suspending Public Statement, para. 4 *referring to* STL, Decision on Appeal of Pre-Trial Judge’s Order on Jurisdiction and Standing, Case No. CH/AC/2010/02, Appeals Chamber, 10 November 2010 (“STL Appeal Decision”), para 45. *See also* Decision on Defence Support Section Request for stay in Case 003 proceedings before the Pre-Trial Chamber and for measures pertaining to the Effective Representation of Suspects in Case 003, 15 December 2011, Doc. No. 3, 003/Application PTC 01, paras. 8 and 9; and Case 002/19-09-2007-ECCC-TC-SC(2012) Decision on Co-Prosecutors’ Request for Clarification, 26 June 2013, E284/2/1/2, para. 12.

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ineffective.²⁵ As such, conditions for use of inherent jurisdiction, in advance of any primary jurisdiction materializing, include: i) a *statutory appellate right* must exist; and ii) enjoyment of such statutory appellate right *may become ineffective due to infringement of specific fundamental rights*.

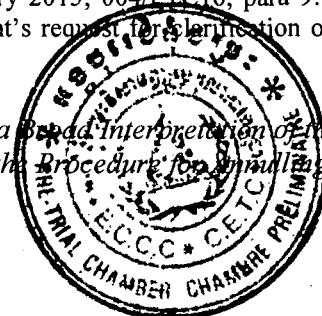
13. Under these circumstances, the Pre-Trial Chamber shall, first, examine whether a broad interpretation of the scope of appeals against Closing Orders is warranted, *at this stage and as requested*. According to the Pre-Trial Chamber, the Defence has been granted some appellate rights against Closing Orders, specifically when appeals raise jurisdictional challenges as those falling within the ambit of Internal Rule 74(3)(a).²⁶
14. As far as any request for a broad interpretation of Internal Rule 74(3)(a), *without reference made to the infringement of any specific fundamental right*, is concerned, the Pre-Trial Chamber has found that it has no jurisdiction to entertain requests for clarification of the Internal Rules *in general*.²⁷ Where scenarios envisaged in parties' motions are *hypothetical* or, even if such scenarios were to materialise, but it is *unclear what prejudice the requesting party would concretely suffer*, "[t]he rights to legal certainty and transparency of proceedings do not require that judicial bodies settle legal issues before they actually arise, out of their factual and contextual background. The Pre-

²⁵ Decision on Requests for Interim Measures, D56/19/8, 31 January 2014, 003/PTC11, paras. 15-16: "The Pre-Trial Chamber considers that it is of *fundamental importance* for ██████████ to be able to communicate with the lawyers of his choice in order to get the information and advice *necessary to decide whether he wants to pursue the Appeal*. [...] The Pre-Trial Chamber finds it necessary, in order to ensure fairness of the proceedings and respect of ██████████ fundamental right to communicate with counsel of his own choosing, to *use its inherent jurisdiction to lift, in part, the Order Suspending Communications* and to allow communications between the Co-Lawyers and ██████████ for the purpose of the appellate proceedings against the Impugned Decision. 16. The Co-Lawyers' Request to Lift the Order Suspending Communication is therefore granted in part." See also Decision on Co-Lawyers' Request to Stay the Order for Assignment of Provisional Counsel to ██████████, D56/19/14, 11 February 2014, 003/PTC11, para. 16: "the Pre-Trial Chamber suspended the effects of orders issued by the Co-Investigating Judges, using its inherent jurisdiction, to ensure that their execution does not render a right to appeal ineffective or affect the fairness of the appellate process."

²⁶ In Case 002, for instance, the Pre-Trial Chamber allowed Defence appeals against the Closing Order (See appeals PTC75, PTC145 and PTC146) although only with respect to jurisdictional challenges.

²⁷ Decision on ██████████ Appeal Against the Decision Rejecting His Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013, D208/1/1/2; 22 January 2015; 004/PTC16, para 9: "the Pre-Trial Chamber finds that it has no jurisdiction to entertain the Appellant's request for clarification of the disagreement process under Internal Rule 72."

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Trial Chamber has no jurisdiction to deal with hypothetical matters or provide advisory opinions.”²⁸

15. With regards to the particular example brought in the Request, to demonstrate a possible challenge that may be raised,²⁹ and to the claim that such challenge may remain unaddressed at trial, the Pre-Trial Chamber first notes that paragraph 19 of the Request³⁰ does not support Defence’s contention that such lack of specificity in the Closing Order harms ██████████ interests. Second, with respect to the claim that such challenges may remain unaddressed at trial, the Pre-Trial Chamber notes the Trial Chamber’s finding that:

“While the existence of a *policy or plan* may be evidentially relevant in establishing the widespread or systematic nature of the attack, it *does not constitute an independent legal element of the crime.*”³¹

16. Although this finding of the Trial Chamber was not challenged on appeal in Case 001,³² its existence in the Judgment is sufficient indication that such type of issues have been touched upon at the trial stage. Furthermore, had the Defence appealed such finding in Case 001, as indicated in the Supreme Court Chamber’s assertion in the Appeal Judgment in Case 001, “careful reviews” of challenges that the parties may bring as pertaining to *elements of crimes* are “obligatory” for all “Chambers in this Tribunal”.³³ Therefore, the Pre-Trial Chamber finds, the Defence contention that such type of issues may remain unaddressed at trial are not substantiated. The Pre-Trial Chamber does not find cause to

²⁸ Decision on ██████████ Appeal Against the Decision Denying His Request for Clarification, D205/1/1/2, 13 November 2014, 004/PTC11, para. 8. *See also* ICTR, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, para 23: “Unlike the International Court of Justice or certain municipal courts, the Appeals Chamber of the Tribunal does not have advisory power.”

²⁹ Request, para. 18 submitting that if a possible Closing Order in Case 003 does not set out state policy as a material element of the crimes against humanity, the Closing Order will be defective.

³⁰ Request, para. 19: “It is also necessary for the parties to know exactly how crimes and forms of liability are defined in order to properly prepare for trial. For example, if at trial the Trial Chamber were to find that crimes against humanity did indeed require a State policy, *the Co-Prosecutors will not have prepared evidence of this policy, not having known in advance that this element was required.*”

³¹ Case001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, E188, (the “TC Judgment in Case 001”), para. 301 referring to the Kunarac Appeal Judgment, footnote 114 which, in turn, *makes reference to sources of law such as: “the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1946, in particular, pp 84, 254, 304 (Streicher) and 318-319 (von Schirach); Article II(1)(c) of Control Council Law No 10; In re Ahlbrecht, ILR 16/1949, 396”.*

³² *See* Appeal Brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgment on 26 July 2010, 18 November 2010, F14. *See also* Defence Reply F14/4/2.

³³ Case001/18-07-2007/ECCC/SC, Appeal Judgment, 3 February 2012, F28 (the “Appeal Judgment in Case 001”), para. 97. *See also* para. 116.

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disturb its previous findings³⁴ relating to challenges made to the specific definition and application of elements of crimes in an indictment. For this reason, the Defence's invitation in the Request for the Pre-Trial Chamber to take note of dissimilarities in ECCC's and ICTY's *procedural* rules is not convincing. Therefore, the Pre-Trial Chamber does not find cause to make a broad interpretation of Internal Rule 74(3)(a), *as requested*.

17. Secondly, the Pre-Trial Chamber shall examine whether, in the absence of statutory rights for parties to request annulment of Closing Orders,³⁵ it may have to use its inherent jurisdiction to provide the sought clarification in order to protect [REDACTED] rights, *as requested*.

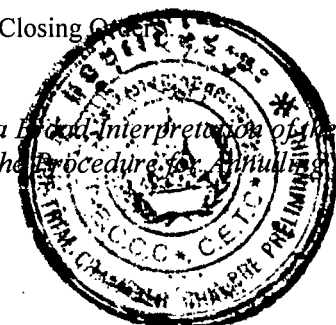
18. The Pre-Trial Chamber observes that Internal Rule 76 gives a number of indications that applications for annulment of the Closing Order are not prescribed under this Rule. Firstly, as the Defence also notes,³⁶ Internal Rule 76(2) excludes instances for filing of annulment applications, or for the Co-Investigating Judges deciding on annulment applications, after the issuance of Closing Orders. Hence, procedurally speaking, annulment applications after the Closing Order are not prescribed by the Rules. Furthermore, even in the absence of the provision in Rule 76(2), according to Internal Rule 76(4) the Pre-Trial Chamber may not admit annulment applications that "relate to an order that is open to appeal." All these notwithstanding, the Defence submits, an exception to these rules is warranted because Closing Orders before the ECCC are complex and especially in instances of lack of "sufficient specificity" in the Closing Orders and of defects which "become apparent only once the Closing Order is issued and the Defence is able to ascertain how the Co-Investigating Judges have *defined and*

³⁴ See also Decision on 002/PTC75, para. 46: "The Pre-Trial Chamber notes that "*challenges relating to the specific contours of a substantive crime [. . .] are matters to be addressed at trial.*" For instance, *challenges to the specific definition and application of elements of crimes* charged are inadmissible at the pre-trial phase. Furthermore, challenges as to whether the elements of a charged crime actually existed in reality as opposed to legally at the time of the alleged criminal conduct are inadmissible. *This is because such challenges often involve factual or mixed questions of law and fact determinations to be made at trial upon hearing and weighing the relevant evidence*".

³⁵ The Internal Rules do not provide for parties rights to request annulment of Closing Orders.

³⁶ Request, para 25 and footnote 48.

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applied the law, as well as whether they will send ██████████ to trial *only on the basis of facts set out in the Introductory or Supplementary Submission[s]*.”³⁷

19. The Pre-Trial Chamber first observes that the “*complexity of Closing Orders*” argument, in and of itself, is too general and vague to warrant any examination by this Chamber. With regards to the *particular contentions of the Defence in the Request, relating to lack of specificity in the indictment*, the Pre-Trial Chamber has observed that in general “there is a right in international law to an *effective* remedy for violations of the [fundamental] rights of an accused, as reflected in article 2(3)(a) ICCPR”.³⁸ In the past, the Pre-Trial Chamber has adhered to this standard by also finding that “considering that both international standards and Article 35(new) of the *ECCC Law require specificity in the indictment*, the Pre-Trial Chamber is of the view that it is in the interest of fairness to declare admissible the grounds of appeal that *raise the issue of notice of the charges*”,³⁹ in terms of the “*nature*”⁴⁰ of charges. In Case 002, the Pre-Trial Chamber, not only found challenges – “relating to the definition of crimes and forms of liability in 1975-79” - admissible under Internal Rule 74(3)(a),⁴¹ it also went to the extent of adding in the Closing Order the “*nexus with armed conflict*” as a chapeau element of the crimes against humanity - as they were defined prior to 1975-79.⁴² The Pre-Trial Chamber finds that the sought clarification is not warranted since grounds of appeal alleging lack of specificity in

³⁷ Request, para. 31.

³⁸ Decision on Appeal against Order refusing Request for Annulment, D55/I/8, 26 August 2008, 002/PTC06, (the “Nuon Chea Decision on Annulment”), paras. 38-39.

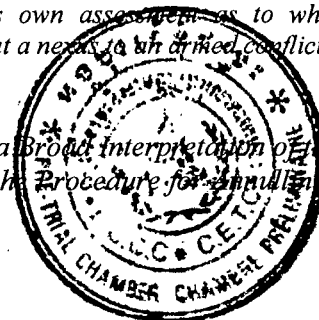
³⁹ Decision on 002/PTC38, para. 34. In that case the Pre-Trial Chamber implied that it may review Closing Orders if allegations that Accused’s right to be informed of charges was infringed were brought before it.

⁴⁰ *Ibid*, paras. 32 and 34 referring to “modes of liability alleged.” See also European Court of Human Rights (ECtHR), *Pélissier and Sassi v. France*, Application no. 25444/94, Judgement, 25 March 1999, at para. 51 according to which the term “nature” of the accusation refers to the “legal characterisation given to those acts.”

⁴¹ Decision on 002/PTC75, para 46: “appeals only raise admissible subject matter jurisdiction challenges where there is a challenge to the very existence in law of a crime and its elements at the time relevant to the indictment, which if applied would result in a violation of the principle of legality.” See also PTC75, Disposition and para. 300 “[t]he Co-Lawyers for Ieng Sary assert in their Appeal that the Co-Investigating Judges erred by failing to explain “that a nexus between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC.” They suggest that “a nexus with international armed conflict must be included in the applicable definition of crimes against humanity so as not to violate the principle of legality” because, as they argue, “a nexus between the underlying acts and international armed conflict was a requirement of crimes against humanity in customary international law in 1975-79” and para. 305. “Having reviewed the arguments of the parties on this issue, *agreeing with the Co-Lawyers that this issue relates to the standard of the principle of legality applied before the ECCC*, having seriously considered the impact it may have on the case and having reviewed the relevant sources in law, the *Pre-Trial Chamber makes its own assessment as to whether international customary law at the relevant time encompassed conduct without a nexus to an armed conflict.*”

⁴² Decision on 002/PTC75, Disposition and paras. 300-313.

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Closing Orders have already been found admissible, as relating to the standard of the principle of legality applied before the ECCC.

20. With regards to the Defence contention that they may not be able to know prior to the issuance of a Closing Order, whether ██████████ shall be sent – if an Indictment is issued – to trial on the basis of facts that were not set out in the introductory Submission, the Pre-Trial Chamber notes that ██████████ has access to the Case File of the investigation. As such, the Defence has ample opportunity to detect, before the issuance of Closing Orders, any irregularities occurring during the investigative proceedings and also have explicit procedural rights to request annulment of such irregularities. Furthermore, having regard of the fundamental rights of parties in the proceedings, the Pre-Trial Chamber has also gone to the extent of interpreting the Internal Rules broadly to allow for the Defence to file submissions, in response to the Final Submission of the Co-Prosecutors, before the Co-Investigating Judges.⁴³ Lastly, the Pre-Trial Chamber notes that the Trial Chamber also, has found it reasonable to consider “specific and reasoned procedural challenges related to irregularities occurring during the pre-trial phase,⁴⁴ which fails Defence’s claim that they may not have an effective remedy later at the trial stage.
21. Therefore, the Pre-Trial Chamber does not find persuasive the Defence request for a clarification that “requests to annul the Closing Order or portions thereof are admissible” either.
22. For all these reasons, the Pre-Trial Chamber finds that the Request does not represent a scenario where an enjoyment of procedural rights may become ineffective or affect ██████████ fundamental rights. The Pre-Trial Chamber, therefore, finds the Request inadmissible.

⁴³ Decision on Ieng Sary's appeal against OCIJ decision refusing to accept the filing of Ieng Sary's response to the Co-Prosecutors' rule 66 final submission and additional observations and request for stay of the proceedings, D390/1/2/4, 20 September 2010, 002/PTC71.

⁴⁴ Case 002/19-09-2007/ECCC/TC, Decision on Defence Preliminary Objection regarding Jurisdiction over the Crime against Humanity of Deportation, E306/5, 29 September 2014, paras 6-10: “the Chamber has, in very limited circumstances, considered specific and reasoned procedural challenges related to alleged irregularities occurring during the pre-trial phase where the parties can demonstrate that they did not have an opportunity to detect, before the opening of the trial.”



THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DENIES the Request in its totality.

In accordance with Internal Rule 77(13), there is no possibility to appeal.

Phnom Penh, 28 April 2016



Pre-Trial Chamber

AK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy