BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO YIM TITH'S APPEAL AGAINST THE ISSUANCE OF TWO CLOSING ORDERS IN CASE 004

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I. INTRODUCTION

1. On 28 June 2019, the National Co-Investigating Judge ("NCIJ") issued a Closing Order ("Dismissal Order"), dismissing the charges against Yim Tith on the grounds that "[t]he ECCC has no personal jurisdiction over Yim Tith".[1] On the same day, the International Co-Investigating Judge ("ICIJ") issued a Closing Order ("Indictment"), indicting Yim Tith for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code and committing him for trial.[2] The Co-Investigating Judges ("CIJs") issued a joint Order terminating the remainder of Case 004.[3]

2. Yim Tith filed two appeals. The first seeks the dismissal of both Closing Orders — the Dismissal Order and the Indictment — on the basis that the CIJs were not permitted to issue two conflicting Closing Orders in Case 004 ("Two Closing Orders Appeal").[4] The second, against the Indictment only, makes allegations of factual and legal errors, as well as abuses of discretion, which Yim Tith asserts require the dismissal of the Indictment.[5]

3. For the reasons set forth below, the Two Closing Orders Appeal should be dismissed, as the remedies requested are contrary to the plain language of the ECCC Agreement,[6] ECCC Law,[7] and Internal Rules,[8] as well as the ECCC's consistent jurisprudence.

II. PROCEDURAL HISTORY

4. On 5 September 2017, in Case 004/2, the CIJs issued a joint decision on Ao An's Request for Clarification, holding that the Co-Prosecutors were entitled to issue two separate and contradictory final submissions and were not required to use the full complement of settlement measures under Internal Rule 71.[9] This was followed on 18 September 2017 by

1 **D381** Order Dismissing the Case Against Yim Tith, 28 June 2019 ("Dismissal Order"), para. 686.
2 **D382** Closing Order, 28 June 2019 ("Indictment"), EN 01620059-71.
3 **D385** Order Terminating the Remainder of the Investigation in Case 004, 28 June 2019.
4 **D381/18** & **D382/21** Yim Tith's Appeal of the Issuance of Two Closing Orders in Case 004, 2 December 2019 ("Two Closing Orders Appeal").
5 **D382/22** Yim Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004, 2 December 2019 ("Yim Tith's Appeal of the Indictment").
6 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, 6 June 2003 ("ECCC Agreement").
7 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").
8 Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Revision 9, 16 January 2015 ("Internal Rule(s)", "Rule(s)" or "IR(s)").
9 Case 004/2-**D353/1** Decision on Ao An's Request for Clarification, 5 September 2017, paras 27, 37, 42. For the reasoning, *see* paras 20-37.

another joint decision that the CIJs "consider[ed] separate and opposing closing orders as generally permitted under the applicable law, for very much the same reasons which [they] found regarding opposing final submissions."[10] The CIJs maintained this position in Case 004,[11] and on 21 January 2019, they registered a disagreement in Case 004 regarding the issuance of separate and opposing closing orders.[12]

5. On 19 December 2019, the Pre-Trial Chamber ("PTC") issued its Considerations in Case 004/2.[13]

6. For the remainder of the procedural history, the International Co-Prosecutor ("ICP") incorporates by reference the procedural history set out in Annex I to her appeal of the Dismissal Order.[14]

7. The Khmer translation of Yim Tith's Two Closing Orders Appeal was notified on 7 February 2020,[15] making this Response due on 17 February 2020.

III. APPLICABLE LAW

8. The ICP sets out here the key provisions relevant to the resolution of Yim Tith's Two Closing Orders Appeal. The remaining applicable law is set out in the relevant sections below.

Admissibility

9. Pursuant to Internal Rule 74(3), a charged person may appeal against a number of enumerated orders or decisions of the CIJs, including decisions "confirming the jurisdiction of the ECCC".[16]

10. The PTC has previously held[17] that in rare instances where the facts of a case raise issues of fundamental rights or serious issues of procedural fairness, a liberal interpretation of the

[10] Case 004/2-**D355/1** Decision on Ao An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, para. 14.
[11] *See e.g.* **D382** Indictment, para. 13.
[12] **D382** Indictment, para. 21. *See further* **D381** Dismissal Order, para. 13.
[13] Case 004/2-**D359/24** & **D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 ("*Ao An* PTC Closing Order Considerations").
[14] **D381/19.2** Annex I: Procedural History, 2 December 2019.
[15] *See* Notification email from the Case File Officer, 7 February 2020 at 10.34am.
[16] Internal Rule 74(3)(a).
[17] *See e.g.* Case 003-**D128/1/9** Considerations on [Redacted] Appeal Against Co-Investigating Judge Harmon's Decision to Charge [Redacted] *In Absentia*, 30 March 2016 ("Case 003 Charging Appeal Considerations"), para. 20 and citations therein; Case 002-**D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011 ("Decision on Ieng Sary's Closing Order Appeal"), para. 49 and citations therein; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 146 (unanimous).

right to appeal in Rule 74(3) may be warranted to ensure that the proceedings are fair and adversarial, consistent with the fundamental principles stated in Rule 21. These principles reflect the fair trial requirements that the ECCC is duty-bound to apply pursuant to article 13(1) of the ECCC Agreement, articles 33 new and 35 new of the ECCC Law, and article 14(3) of the International Covenant on Civil and Political Rights.[18] However, the PTC has frequently recalled that Rule 21 does not provide an automatic avenue for appeal, even where an appeal raises fair trial issues,[19] and that each case must be assessed to determine whether, on balance, the facts and circumstances warrant a broader interpretation of the right to appeal.[20]

11. For the PTC to entertain an appeal under a broad interpretation of Rule 74(3) in light of Rule 21, the appellant must demonstrate that the situation at issue is unforeseen by the applicable law, and that the particular circumstances of the case require the Chamber's intervention at the stage when the appeal was filed to avoid *irremediable* damage to the fairness of the proceedings or to the appellant's fundamental rights.[21] Specifically, where appeals filed against an indictment under Rule 74 raise matters which cannot be rectified by the Trial Chamber ("TC"), causing irreparable harm to the fair trial rights of the accused, Rule 21 may warrant application to broaden the scope of Rule 74.[22]

12. In its Case 004/2 Considerations, the PTC unanimously found Ao An's appeal ground contesting the issuance of two Closing Orders admissible under a broad interpretation of Rule 74(3)(a) in light of Rule 21. It did so on the basis that the issuance of two closing orders is a novel situation before the ECCC which is unforeseen in the Internal Rules and may require a resolution prior to trial to prevent irremediable impact on Ao An's fair trial rights, including his ability to prepare for, and the overarching fairness of, trial proceedings.[23]

[18] International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171.

[19] *See e.g.* Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 147 (unanimous); Case 003-**D128/1/9** Case 003 Charging Appeal Considerations, para. 20; **D208/1/1/2** Decision on Ta An's Appeal Against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 January 2015 ("Decision on Ao An's Disagreement Appeal"), para. 8; Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, para. 49.

[20] Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, para. 49 and citations therein. *See also* Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 147 (unanimous).

[21] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 146-147 (unanimous); Case 003-**D128/1/9** Case 003 Charging Appeal Considerations, para. 20; **D208/1/1/2** Decision on Ao An's Disagreement Appeal, para. 8.

[22] Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, para. 48.

[23] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 133, 149 (unanimous).

Standard of Review

13. The PTC has held that:

> A discretionary decision may be reversed where it was: (1) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; (2) based on a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion and to force the conclusion that they failed to exercise their discretion judiciously. In other words, it must be established that there was an error or abuse which was fundamentally determinative of the Co-Investigating Judges' exercise of discretion.[24]

14. In the context of discretionary decisions, the PTC may remit the decision back to the CIJs for reconsideration, and will substitute its decision only in exceptional circumstances. In the specific case of appeals against closing orders, the PTC held that Rule 79(1) suggests that the PTC has the power to issue a new or revised closing order that will serve as a basis for the trial.[25]

15. The PTC has also confirmed that its role is not limited to considering the merits of the parties' submissions on appeal.[26] In its recent Considerations in Case 004/2, the PTC held that it "forms a final jurisdiction over the pre-trial stage at the ECCC,"[27] and "exercises the ultimate authority over the investigation phase."[28] As such, it is responsible for ensuring, at the investigation stage, that the fundamental principles underlying the criminal procedure applicable before the ECCC are respected.[29] It considered that its review power as an Investigation Chamber[30] is intended, first and foremost, to ensure that the conditions for the issuance of the closing order and the preparatory investigation are in accordance with Rules 21 and 76, and article 261 of the Cambodian Code of Criminal Procedure.[31]

[24] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 28-29 (unanimous); Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018 ("*Im Chaem* PTC Closing Order Considerations"), paras 20-21 (unanimous).

[25] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 30 (unanimous); Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, para. 22 (unanimous).

[26] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 50 (unanimous).

[27] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 41 (unanimous).

[28] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 49 (unanimous).

[29] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 52 (unanimous).

[30] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 44 (unanimous).

[31] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 50 (unanimous). *See further* paras 47-48, 51, 89 (unanimous).

Merits

16. Article 5 of the ECCC Agreement states:

> 1. There shall be one Cambodian and one international investigating judge serving as [CIJs]. They shall be responsible for the conduct of the investigations. […]
>
> 4. The [CIJs] shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

17. Article 7 of the ECCC Agreement states:

> 1. In case the [CIJs] or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be […]
>
> 2. The difference shall be settled forthwith by a [PTC] of five judges […]
>
> 4. A decision of the [PTC], against which there is no appeal, requires the affirmative vote of at least four judges. […] [The CIJs or co-prosecutors] shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.

18. Article 23 new of the ECCC Law provides in relevant part:

> All investigations shall be the joint responsibility of two investigating judges […]
>
> In the event of disagreement between the [CIJs] the following shall apply:
>
> The investigation shall proceed unless the [CIJs] or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions. […]
>
> A decision of the [PTC], against which there is no appeal, requires the affirmative vote of at least four judges. […] [The CIJs] shall immediately proceed in accordance with the decision of the [PTC]. If there is no majority as required for a decision, the investigation shall proceed.

19. Internal Rule 1(2) states that "unless otherwise specified, a reference in these IRs to the [CIJs] includes both of them acting jointly and each of them acting individually, whether

directly or through delegation".

20. Internal Rule 21 provides in part:

> 1. 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. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication; [...]
>
> d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established.

21. Internal Rule 67(1) states, in relevant part: "The [CIJs] shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case."

22. Internal Rule 77(13) provides:

> A decision of the [PTC] requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, then 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 [CIJs], that the [TC] be seised on the basis of the Closing Order of the [CIJs].

23. Internal Rule 79(1) mandates that "[t]he [TC] shall be seised by an Indictment from the [CIJs] or the [PTC]."

IV. SUBMISSIONS

Admissibility

24. Following the PTC's unanimous decision in Case 004/2 that an appeal contesting the legality of the issuance of two separate closing orders is admissible pursuant to Rule

74(3)(a) when interpreted in light of Rule 21,[32] the ICP does not contest the admissibility of the Two Closing Orders Appeal.

Merits

25. It has been the consistent position of this ICP and her predecessor[33] that the CIJs may validly issue two conflicting closing orders. The ICPs held the view that this is the most natural interpretation of Rule 67(1),[34] when read in light of Rule 1(2), which provides that, throughout the Internal Rules, "*unless otherwise specified*, a reference in these IRs to the [CIJs] includes both of them acting jointly *and each of them acting individually*, whether *directly* or through delegation".[35] The ICPs' view was also informed by their concern that the disadvantages of requiring one closing order are significant when faced with two diametrically opposed positions on whether it is appropriate to indict an individual. These disadvantages include (i) the danger of violating the principle of judicial independence guaranteed by the ECCC legal framework[36] and Cambodian Constitution[37] should either judge be required to forego their independent right and obligation to conclude the investigation in the manner they determine is required by the law and the facts of which they are seised; and/or (ii) undermining transparency, as the formal disagreement mechanism could render confidential the conflicting views represented by the proposed closing orders, and potentially the PTC's resolution of the CIJs' disagreement.[38] After this

[32] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 133, 149 (unanimous).

[33] *See e.g.* Case 004/2-**D360/9** International Co-Prosecutor's Response to Ao An's Appeal of the Case 004/2 Indictment, 22 February 2019; Case 004/2-**D359/9.1** Transcript, 20 June 2019, 13.27.29-13.36.37.

[34] Internal Rule 67(1) ("The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.").

[35] Emphasis added.

[36] ECCC Agreement, arts 3(3) ("The judges shall be persons of high moral character, impartiality and integrity […] They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."), 5(2) ("The co-investigating judges shall be persons of high moral character, impartiality and integrity"), 5(3) ("The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."); ECCC Law, arts 10 new ("Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source."), 12 ("All judges under this law shall enjoy equal status"), 25 ("The Co-Investigating Judges […] shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.").

[37] Cambodian Constitution, arts 51 ("[t]he legislative, executive, and judicial powers shall be separate."), 128 ("[t]he judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens"), 129 ("[o]nly judges shall have the right to adjudicate"), 130 ("[j]udicial power shall not be granted to the legislative or executive branches.").

[38] Internal Rules 72(2) ("The written statement of the facts and reasons for the disagreement shall not be placed in the case file, except in cases referred to in sub-rule 4(b) below."), 72(4) ("The Chamber shall settle the disagreement forthwith, as follows: a) The hearing shall be held and the judgment handed down *in camera*. b) Where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs: […] iv) the Chamber *may*, on the motion of any judge or party,

process, only the closing order accepted by the PTC, or the one rendered valid by the default position that the "investigation shall proceed", would be published.[39]

26. However, the ICP is cognisant of the PTC's recent unanimous declaration in Case 004/2, in circumstances procedurally identical to Case 004, that the CIJs' *issuance* of two conflicting closing orders was "illegal, violating the legal framework of the ECCC".[40] It held that only two avenues were legally available to the CIJs regarding their disagreement: (i) reaching a tacit or express consensus on a single Closing Order; or (ii) referring the disagreement to the PTC under the formal disagreement mechanism in article 5(4) of the ECCC Agreement, article 23 new of the ECCC Law, and Internal Rule 72.[41] By agreeing to issue contradictory closing orders, it found that the CIJs committed an error of law and failed to judiciously employ the procedures necessary to resolve their disagreement.[42]

27. In light of that unequivocal holding, the ICP does not contest this aspect of the Two Closing Orders Appeal,[43] but responds to Yim Tith's submissions regarding the impact of this error on the legal status of each closing order. For the reasons set out below, Yim Tith misrepresents these consequences.

decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or requests concerning jurisdiction or bars to jurisdiction, *if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court.* [...] e) All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. The Greffier of the Chamber shall forward such decisions to the Director of the Office of Administration, who shall notify the Co-Investigating Judges."), 78 ("All decisions and default decisions of the Chamber, including any dissenting opinions, shall be published in full, *except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.*" (emphasis added)). *See also* Internal Rule 56(1) ("In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality."). *See further* **D1/1.3** Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009 ("PTC Considerations on Co-Prosecutors' Disagreement"), paras 46 ("In accordance with [Internal Rules 71(2) and 56(1)] all the documents related to the Disagreement have been classified by the [PTC] as 'strictly confidential'"), 52-53 (recommending publication of a redacted version of the Considerations in light of the prior press releases issued by the Co-Prosecutors, but noting that "the publication of the PTC Considerations is at the discretion of the Director of the Office of Administration.").

39 ECCC Agreement, art. 7(4); ECCC Law, art. 23 new; Internal Rule 72(4)(d). *See further* **D1/1.3** PTC Considerations on Co-Prosecutors' Disagreement, para. 53.

40 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, Disposition, EN 01634239 (unanimous). *See further* Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 54, 89, 102, 120-124 (unanimous).

41 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 103-124, especially para. 120 (unanimous).

42 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 54, 88-124 (unanimous).

43 **D381/18** & **D382/21** Two Closing Orders Appeal, paras 21-36.

A. The PTC is not required to dismiss both Closing Orders

28. Yim Tith's proposed remedies requiring dismissal of both Closing Orders[44] are without merit, and it remains open to the PTC to dismiss only one Closing Order. This is demonstrated first and foremost by the PTC's Considerations in Case 004/2. After determining unanimously that the *issuance* of two conflicting Closing Orders was illegal,[45] the judges did not then dismiss both Case 004/2 Closing Orders. Rather, they considered the legality of *each* Closing Order, arriving at differing conclusions on the individual legal status of those orders.[46]

29. Indeed, Yim Tith's underlying contention that the CIJs were required to issue a joint closing order and were not permitted to act individually,[47] overlooks that the PTC has repeatedly and unanimously confirmed that the CIJs are not required to issue joint decisions. This Chamber has recognised that, as a matter of principle, one CIJ can validly act alone, especially where his colleague has retreated from continuing the investigation.[48] It has held that "[t]he Agreement, the ECCC Law and the Internal Rules provide that one [CIJ] can validly act alone if the requirements of the disagreement procedure have been complied with",[49] adding that the "[ECCC] framework contains sufficient checks and balances to ensure that unilateral actions are taken in accordance with the law."[50]

B. Only the Indictment may be upheld under the ECCC's legal framework

30. Under the ECCC's legal framework, as recently elucidated in the Case 004/2 Considerations, the Case 004 Indictment and Dismissal Order are not equal in their

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44 **D381/18** & **D382/21** Two Closing Orders Appeal, paras 1, 37-40, and EN 01631777-8 (Remedy).

45 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 54, 89, 98, 102, 124, Disposition, EN 01634239 (unanimous).

46 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 89, 124 (unanimous), paras 170-302 (National Judges' Opinion), paras 304-329, 681 (International Judges' Opinion).

47 **D381/18** & **D382/21** Two Closing Orders Appeal, paras 25-26, 28, 34, 38-40.

48 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 105 (unanimous) *citing* **D236/1/1/8** Decision on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision on her Motion to Reconsider and Vacate her Summons Dated 29 July 2014, 9 December 2015 ("Decision on Im Chaem Summons Appeal"), para. 30; **A122/6.1/3** Decision on Im Chaem's Urgent Request to Stay the Execution of her Summons to an Initial Appearance, 15 August 2014 ("Decision on Request to Stay Im Chaem Summons"), para. 14.

49 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 105 (unanimous) *citing* **D208/1/1/2** Decision on Ao An's Disagreement Appeal, para. 11; **A122/6.1/3** Decision on Request to Stay Im Chaem Summons, para. 14; **D236/1/1/8** Decision on Im Chaem Summons Appeal, para. 24; Case 003-**D128/1/9** Case 003 Charging Appeal Considerations, para. 34.

50 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 105 (unanimous) *citing* **D236/1/1/8** Decision on Im Chaem Summons Appeal, para. 31; Case 003-**D128/1/9** Case 003 Charging Appeal Considerations, para. 34.

conformity with the applicable procedural law. This is because, whilst the CIJs did not comply with either of the two options the PTC confirms were available to them when they could not agree whether to indict,[51] only the Indictment was issued in accordance with the "fundamental and determinative" default position set out in the ECCC Agreement and ECCC Law that the "investigation shall proceed".[52] This default position applies unless the judges, or one of them, requests, within 30 days of registering a disagreement, that the difference be settled by the PTC.[53] In this case, neither CIJ referred the matter to the PTC within 30 days of the 21 January 2019 disagreement.[54]

31. In this specific situation, where one of the CIJs proposes to issue an indictment and the other CIJ disagrees, the plainest meaning of the "investigation shall proceed" is that the indictment must be issued as proposed, thereby seising the TC.[55] No reasonable interpretation of the requirement that the "investigation shall proceed" could include the issuance of a dismissal order in place of an indictment. Contrary to the default position, a dismissal order prevents the investigation from proceeding. An indictment, on the other hand, allows the judicial process to progress to the next stage of proceedings, that is, to trial. This interpretation is supported by the PTC's unanimous holding in Case 002.

32. In Case 002, the CIJs could not agree on the indictment of the four charged persons for national crimes under the 1956 Cambodian Penal Code. Finding themselves in a "procedural stalemate", but concerned that sending the disagreement to the PTC under Rule 72 would cause undue delay,[56] the two CIJs together ordered that the Charged Persons be *indicted* and sent before the TC on those charges.[57] Upon review, the PTC held that the default position that the "investigation shall proceed" is "coherent with the approach taken by the [CIJs] in the current case."[58] The PTC confirmed this holding unanimously in its recent Case 004/2 Considerations.[59] This means that where there are disagreements

51 *See supra*, para. 26.
52 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 106-107, 111-112, 116-117 (unanimous).
53 ECCC Agreement, art. 5(4); ECCC Law, art. 23 new; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 106-107, 111-112, 116-117 (unanimous).
54 *See* **D382** Indictment, para. 21. *See further* **D381** Dismissal Order, para. 13.
55 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 322-323 (International Judges' Opinion).
56 Case 002-**D427** Closing Order, 15 September 2010 ("Case 002 Closing Order"), para. 1574.
57 Case 002-**D427** Case 002 Closing Order, para. 1576.
58 Case 002-**D427/1/30** Ieng Sary Closing Order Appeal Decision, para. 274 (emphasis added).
59 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 106 (unanimous). *See also*, paras 114-115.

between CIJs, only a decision to indict and send the matter to trial is coherent with the default position that the "investigation shall proceed".

33. Similarly, in the Case 001 Appeal Judgment, the Supreme Court Chamber ("SCC") held:

> If, for example, the [PTC] decides that neither [CIJ] 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 [PTC] is unable to achieve a supermajority on the consequence of such a scenario, 'the investigation shall proceed.'[60]

The only reasonable interpretation of this holding is that the indictment issued by a single CIJ would proceed to trial—there is no other sense in which anything could "proceed" at the stage that the SCC is discussing *i.e.*, when the issuance of either an indictment or dismissal order is being proposed. Given that the Internal Rules define the "Trial stage" as "refer[ring] to the date from which the [TC] is seised of a case",[61] the SCC also appears to consider the "investigation" as continuing until the moment the indictment becomes final, whereupon the "Trial stage" begins.

34. Moreover, only this interpretation conforms with Cambodian and international law applicable to the ECCC, which require that the efforts to investigate and prosecute crimes within its jurisdiction be genuine, and that ECCC organs ensure the effective investigation and prosecution of crimes.[62] The conclusion is further supported by the object and purpose of the ECCC Agreement and ECCC Law,[63] which is to "[*bring*] *to trial* senior leaders of Democratic Kampuchea and those who were most responsible for the crimes".[64] It is also

60 Case 001-**F28** Appeal Judgement, 3 February 2012 ("*Duch* AJ"), para. 65 *citing* ECCC Law, art. 23 new; ECCC Agreement, art. 7(4); Internal Rule 72(4)(d).

61 Internal Rules, p. 85.

62 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 110-111 (unanimous).

63 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). *See also e.g. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, 8 June 1960, ICJ Reports 1960, p. 150, at 158 ("The word obtains its meaning from the context in which it is used."); *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 1951, p. 15, at 24; *Rights of Nationals of the United States of America in Morocco (France v. United States)*, Judgment, 27 August 1952, ICJ Reports 1952, p. 176, at 196. *See further e.g. Corfu Channel Case (United Kingdom v. Albania)*, Judgment, 9 April 1949, ICJ Reports 1949, p. 4, at 24 ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect."); *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 11 April 1949, ICJ Reports 1949, p. 174, at 179 *et seq.* (Inferring a certain status and capacity of the UN Organisation from the fact that without them, it could not discharge the functions it was clearly intended to have.); *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, ICJ Reports 2011, p. 70, paras 133-134.

64 ECCC Agreement, art. 1 (emphasis added); ECCC Law, art. 1 (emphasis added).

compatible with the objective of the disagreement settlement mechanism, which is to "prevent a deadlock from derailing the proceedings from moving to trial".[65]

35. Indeed, in just the same way, the PTC confirmed unanimously in its Considerations regarding the disagreement between the Co-Prosecutors on whether to seise the CIJs with Cases 003 and 004, that the phrase "the prosecution shall proceed"[66] meant that the Introductory Submissions — the documents which triggered this very investigation and defined its scope[67] — should be forwarded to the CIJs.[68] The Chamber noted that, coherent with this default position, "the [ICP] could have forwarded the New Introductory Submissions after having given thirty days notice to the National Co-Prosecutor, if no disagreement had been put before the [PTC]".[69] In its recent Case 004/2 Considerations, this Chamber highlighted the parallels between this decision and the default position applicable to disagreements between the CIJs.[70]

36. Therefore, the ICIJ's issuance of the Indictment, which progresses Case 004 to trial, accorded fully with the fundamental and determinative default position, and his failure to seise the PTC under the formal disagreement mechanism does not render the Indictment invalid.

37. Conversely, the NCIJ's proposed issuance of the Dismissal Order — otherwise characterised as a disagreement with the ICIJ's Indictment[71] — triggered his obligation to refer the matter to the PTC if he was unwilling to agree to a course of action that was "coherent" with the default position intrinsic to the ECCC legal framework.[72] The PTC has explained that when the disagreement is so critical that one of the CIJs wishes to halt the implementation of his colleague's decision, that CIJ's only available legal recourse is to

65 *See* Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 323 (International Judges' Opinion) and the citations therein.
66 ECCC Agreement, arts 6(4), 7(4); ECCC Law, art. 20 new.
67 Internal Rules 53, 55(2).
68 **D1/1.3** PTC Considerations on Co-Prosecutors' Disagreement, paras 17, 45 (as corrected in **D1/1.2** Corrigendum to the Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule and Annex II, 31 August 2009).
69 **D1/1.3** PTC Considerations on Co-Prosecutors' Disagreement, para. 27.
70 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, fn. 188 (unanimous).
71 *See* Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 323 (International Judges' Opinion). *See also* **D1/1.3** PTC Considerations on Co-Prosecutors' Disagreement, para. 27 ("It was thus unexpected that the Disagreement was brought by the [ICP], who explained his understanding of the reasons why the National Co-Prosecutor objects to his decision to file the New Submissions. […] [T]he proper procedure would have been for the National Co-Prosecutor, who raises objections to forwarding the New Submissions, to file her Written Statement first").
72 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 106, 114-116 (unanimous); Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, para. 274.

bring the disagreement before the PTC.[73] Yet, the NCIJ failed to take this mandatory step required to legally contest the issuance of the Indictment, and the Dismissal Order was therefore issued without legal basis.

38. The ICP submits that, within this legal framework, the ICIJ's issuance of the Indictment conformed with the applicable procedural law and must be upheld.[74] In contrast, the NCIJ's Dismissal Order was not validly issued and should be overturned on this basis alone.[75]

Neither the presumption of innocence nor the in dubio pro reo *principle prevent the PTC from upholding only the Indictment*

39. Yim Tith fails to show that upholding an indictment issued by one CIJ violates his right to be presumed innocent.[76] This presumption ensures that before criminal sanctions can be imposed, the burden is on the prosecution to prove the accused's guilt beyond reasonable doubt *at trial.*[77] It remains undisturbed unless and until Yim Tith is convicted by a supermajority of the TC judges.[78] Therefore, the CIJs' mandate under Rule 55(5) to conduct an impartial investigation to ascertain the truth, and the fact that the proceedings are still in the pre-trial stage, without any determination of guilt or innocence, militate against Yim Tith's argument.[79]

40. Moreover, Yim Tith's contention that, faced with a disagreement on whether the charged person falls within the ECCC's personal jurisdiction (and thus whether to indict), the CIJs were required to either come to an agreement on the facts or apply the *in dubio pro reo* principle to dismiss the case,[80] overlooks both the applicable law and the nature of the CIJs' decisions.

[73] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 117, 119-120, 122 (unanimous).

[74] For the reasons set out in the ICP's Response to **D382/22** Yim Tith's Appeal of the Indictment, Yim Tith's assertions of substantive errors of fact and law, as well as his allegations of abuse of the ICIJ's discretion in issuing the Indictment, are unfounded and/or not fundamentally determinative of his exercise of discretion in determining that Yim Tith falls within the ECCC's personal jurisdiction. *See* **D382/27** International Co-Prosecutor's Response to Yim Tith's Appeal of the Case 004 Indictment, 14 February 2020.

[75] For the reasons set out in her Appeal of the Dismissal Order, the Dismissal Order also contained a range of factual and legal errors which were fundamentally determinative of the NCIJ's exercise of his discretion regarding personal jurisdiction, requiring its reversal. *See* **D381/19** International Co-Prosecutor's Appeal of the Order Dismissing the Case against Yim Tith (D381), 2 December 2019 ("ICP Appeal Against the Dismissal Order").

[76] **D381/18** & **D382/21** Two Closing Orders Appeal, paras 16, 34.

[77] *Kayishema & Ruzindana*, ICTR-95-1-A, Appeals Chamber, Judgment (Reasons), 1 June 2001, para. 107; Internal Rule 21; Case 001-**F28** *Duch* AJ, para. 33; ECCC Law, art. 35 new. *See further infra*, para. 43.

[78] Internal Rule 98(4); Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 163 (unanimous).

[79] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 163 (unanimous).

[80] **D381/18** & **D382/21** Two Closing Orders Appeal, paras 16, 31-34, 36.

41. First, for the reasons set out above,[81] the ECCC's legal framework provides that, in the case of such a disagreement between the CIJs, an indictment issued by a single judge prevails in the absence of an agreement between the CIJs that is coherent with the default position that the "investigation shall proceed", or a referral of that disagreement to the PTC under the formal disagreement mechanism. The very existence of the default position flatly contradicts the assertion that such a disagreement must always be resolved in the charged person's favour through dismissal.

42. Yim Tith also overlooks that requiring CIJs to agree on irreconcilable factual findings would fundamentally undermine judicial independence,[82] and he misunderstands the nature of the personal jurisdiction determination. That the CIJs made factual findings while coming to their determination on personal jurisdiction does not render that determination factual. Similarly, the fact that the CIJs differed in their personal jurisdiction assessment does not *in itself* cast doubt on either their underlying factual findings or the personal jurisdiction determination itself.[83]

43. This is because the CIJs' determination of personal jurisdiction was a multi-phase process, with each stage being of a different nature. First, the CIJs both made a series of factual determinations about Yim Tith's role in the crimes committed during the period of Democratic Kampuchea ("DK"). Only then and on the basis of those factual findings (as legally characterised), were the CIJs required to exercise their individual and independent *discretion* regarding whether Yim Tith falls within the ECCC's personal jurisdiction.[84] Just as majority and minority opinions in a judgment do not cast factual doubt on those opinions or the judgment, the fact that one CIJ exercises his discretion on the question of personal jurisdiction in favour of dismissal, and the other CIJ in favour of indictment does not *in itself* create any factual, or indeed any, doubt about either the underlying factual findings or the issue of personal jurisdiction. This is precisely why one possible result of a formal disagreement coming before the PTC is that this Chamber could decide that neither judge erred in proposing to issue an indictment or dismissal order, exactly as the SCC foresaw in

81 *See supra*, paras 29-38.
82 *See supra*, fn. 36.
83 *Contra* **D381/18** & **D382/21** Two Closing Orders Appeal, paras 16, 31. The ICP separately alleges errors of fact (and law) which she submits had a determinative impact on the Dismissal Order's personal jurisdiction determination. *See* **D381/19** ICP Appeal Against the Dismissal Order.
84 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 28 (unanimous); Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, para. 20 (unanimous); Case 001-**F28** *Duch* AJ, paras 62-74. *See also* Case 004/1-**D308/3** Closing Order (Reasons), 10 July 2017 ("Case 004/1 Closing Order"), para. 9.

Case 001.[85]

44. In any event, *in dubio pro reo* does not, as Yim Tith asserts,[86] apply to factual findings at the pre-trial stage. Rather, as Yim Tith recognises,[87] *in dubio pro reo* is a corollary of the presumption of innocence, and it is one aspect of the requirement that guilt must be found *at trial* beyond reasonable doubt.[88] This is not the standard of proof applicable pre-trial. The PTC has consistently held that, in accordance with Rule 67(3), the standard to be met for issuing an indictment is "sufficient evidence" of the charges.[89] This Chamber has established "sufficient evidence" to mean a "probability" or "plausibility" of guilt,[90] a standard that is less than "beyond reasonable doubt"[91] because a determination at "the pre-trial stage [...] does not involve any determination of guilt or innocence."[92]

45. Indeed, none of the sources cited by Yim Tith support his assertion. Two relate to the application of *in dubio pro reo* at the trial stage.[93] Two pertain to substantive legal findings

85 Case 001-**F28** *Duch* AJ, para. 65.

86 **D381/18** & **D382/21** Two Closing Orders Appeal, paras 31-36, especially para. 33.

87 **D381/18** & **D382/21** Two Closing Orders Appeal, para. 33.

88 Case 002-**E50/3/1/4** Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011 ("Khieu Samphan SCC Release Decision"), para. 31 ("The [SCC] must stress that the *in dubio pro reo* rule, which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia..."); *Limaj et al.*, IT-03-66-A, Appeals Chamber, Judgement, 27 September 2007, para. 21 ("The Appeals Chamber is satisfied that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged. [...] the principle is essentially just one aspect of the requirement that guilt must be found beyond a reasonable doubt."); *Renzaho,* ICTR-97-31-A, Appeals Chamber, Judgement, 1 April 2011, para. 474 ("The principle of *in dubio pro reo* provides that any doubt should be resolved in favour of the accused. The Appeals Chamber recalls that, as a corollary of the presumption of innocence and the burden of proof beyond reasonable doubt, the principle of *in dubio pro reo* applies to findings required for conviction, such as those which make up the elements of the crime charged." (internal citations omitted)). *See also Delalić et al.,* IT-96-21-T, Trial Chamber, Judgement, 16 November 1998 ("*Čelebići* TJ"), para. 601 ("the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.").

89 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 84; Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, para. 61 (unanimous).

90 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 84-85 (unanimous) *and citations therein*; Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, paras 61-62 (unanimous).

91 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 84-85 (unanimous); Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, paras 61-62 (unanimous); Case 002-**D427** Case 002 Closing Order, para. 1323.

92 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 163 (unanimous). *See also* Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 85 (unanimous); Case 002-**D427** Case 002 Closing Order, para. 1323.

93 **D381/18** & **D382/21** Two Closing Orders Appeal, fn. 32 *citing* Case 002-**E465** Case 002/02 Judgement, 16 November 2018, paras 21, 3014; Case 002-**E313** Case 002/01 Judgement, 7 August 2004, para. 22.

by the PTC,[94] which were in any event reversed by the TC.[95] The SCC jurisprudence he cites[96] concentrates on the distinction between the application of *in dubio pro reo* to issues of fact rather than law, without specifying the relevant stage(s) of proceedings. In any event, the SCC did not apply the principle at all in that instance. Finally, the International Criminal Court ("ICC") Pre-Trial Chamber jurisprudence that Yim Tith cites is inapposite.[97] At the confirmation stage, the ICC Pre-Trial Chamber must determine "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[98] In the very same decision that Yim Tith cites, the ICC Pre-Trial Chamber confirmed that the evidentiary threshold applicable for the confirmation of charges at the pre-trial stage is lower than the "beyond reasonable doubt" standard applicable at trial.[99]

46. Yim Tith's further arguments regarding his right to legal certainty,[100] alleged confusion regarding the basis of the charges,[101] and alleged violation of his right to be tried expeditiously,[102] pertain solely to the legality of the issuance of two Closing Orders. In light of the PTC's unanimous confirmation that the issuance of two Closing Orders was unlawful, and of the legal certainty derived from its endorsement of the default position

94 **D381/18** & **D382/21** Two Closing Orders Appeal, fn. 34 *citing* Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, para. 310; Case 002-**D427/2/15** Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, para. 144. Both decisions concern whether crimes against humanity require a nexus to an armed conflict under customary international law.

95 Case 002-**E95/8** Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, para. 33.

96 **D381/18** & **D382/21** Two Closing Orders Appeal, fns 32-33 *citing* Case 002-**E50/3/1/4** Decision on Khieu Samphan Application for Release, para. 31.

97 **D381/18** & **D382/21** Two Closing Orders Appeal, fn. 34 *citing Prosecutor v. Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 ("*Bemba* Confirmation of Charges Decision"), para. 31.

98 Rome Statute of the International Criminal Court, 17 July 1998 ("Rome Statute"), 2187 UNTS 90, art. 61(7).

99 *Bemba* Confirmation of Charges Decision, paras 27-28 (internal references omitted) ("[t]he drafters of the Statute established three different, progressively higher evidentiary thresholds for each stage of the proceedings under articles 58(1), 61(7) and 66(3) of the Statute. The nature of these evidentiary thresholds depends on the different stages of the proceedings and is also consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged. At the present stage of the proceedings, the Chamber shall apply the evidentiary threshold set out in article 61(7) of the Statute, namely 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'."); Rome Statute, art. 66(3) ("In order to convict the accused, the court must be convinced of the guilt of the accused beyond reasonable doubt."). *See also Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 37; *Muthaura, Kenyatta and Ali*, ICC-01/09-02/11-382-Red, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 52.

100 **D381/18** & **D382/21** Two Closing Orders Appeal, paras 16, 35.

101 **D381/18** & **D382/21** Two Closing Orders Appeal, para. 16.

102 **D381/18** & **D382/21** Two Closing Orders Appeal, para. 16.

that the "investigation shall proceed", these arguments are moot.

C. If the PTC fails to reach a supermajority decision to overturn the Indictment, that Indictment seises the Trial Chamber

47. In any event, after the Case 004 appeals process has been completed, unless the PTC reaches the necessary supermajority to overturn the Indictment, the "fundamental and determinative" default position that the "investigation shall proceed",[103] set out in the ECCC Agreement, ECCC Law and Internal Rules, requires the case to proceed to trial on the basis of the Indictment. This result is mandated even where the PTC, as in Case 004/2, also fails to reach a supermajority decision on the validity of the Dismissal Order.

48. This is because the default position must be respected throughout ECCC proceedings, including after the completion of the appeals process before the PTC. In this respect, this Chamber stressed unanimously in Case 004/2 that:

> a principle as fundamental and determinative as the 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. Concluding otherwise would lead to a manifestly unreasonable legal result, violating both Cambodian law and international law.[104]

49. As the PTC explained,[105] this default position derives from articles 5(4) and 7(4) of the ECCC Agreement,[106] accepted by both the RGC and the UN, and reflected in article 23 new of the ECCC Law.[107] These provisions demonstrate the clear policy decision that, in the event of a disagreement, the CIJs and Co-Prosecutors can act independently to advance proceedings, which can *only* be halted by a supermajority of the PTC judges. This interpretation is fully supported by the evidence of the expressed intentions of the UN and

[103] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 106-107, 111-112, 116-117 (unanimous).

[104] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 112 (unanimous). *See also* para. 111, explaining that the purpose of the default position was to "secure[] effective justice" and to "avoid procedural stalemates that would, *inter alia*, hamper the effectiveness of proceedings".

[105] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 93, 107, 111, 116-117 (unanimous).

[106] ECCC Agreement, art. 5(4) (requiring that the investigation *shall* proceed unless Article 7 is invoked. (emphasis added); art. 7(4) (requiring that if the PTC is unable to resolve the disagreement by a supermajority, the investigation or prosecution *shall* proceed (emphasis added)).

[107] ECCC Law, art. 23 new, which requires that, in case of disagreement between CIJs, absent a PTC supermajority blocking its progress, the investigation *shall* proceed (emphasis added).

RGC at the time they concluded the ECCC Agreement.[108] It has been also been consistently applied unanimously by the SCC and PTC judges.[109] In particular, the PTC recently confirmed that:

> In cases where the [PTC] cannot achieve the supermajority vote to conclusively settle the disagreement, the ECCC legal framework provides that the matter is then resolved by the default position stipulating that the investigation must proceed.[110]

50. Thus, if the PTC fails to overturn the Indictment by supermajority, the TC must be seised under Rules 77(13)(b) and 79(1),[111] and the case brought to trial, even where the Dismissal Order has not been reversed. In line with the default position, Rule 77(13)(b) is *lex specialis* relating to indictments and thereby prevails over the general terms of Rule 77(13)(a). "Dismissal Order" and "Closing Order", like "Indictment", are defined terms in the Rules.[112] Had the drafters of the Rules wished to specifically address the effect of the failure of the PTC to overturn a dismissal order, they clearly could have done so. Rather, Rule 77(13)(b) reflects the intent to implement the clear mandate of the ECCC Agreement and

[108] **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 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 (Hans Corell confirmed this position in March 2003 after the ECCC Agreement, containing the wording, was agreed requiring a supermajority to stop an investigation or prosecution: "There would be two co-investigating judges and two co-prosecutors. In both cases there would be one Cambodian and one international official. In case they differed on whether to proceed with an investigation or a prosecution, that difference would be settled by a Pre-Trial Chamber consisting of three (3) Cambodian and two (2) international judges. In this Chamber at least four (4) judges would have to agree in order to *stop* an investigation or a prosecution. If this majority was not achieved the investigation or prosecution *would proceed*." (emphasis added)). *See also* **D381/19.1.114** David Scheffer in M. Cherif Bassiouni (ed), "The Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law*, Third Edition, Vol III, 2008, p. 246 (wherein David Scheffer, United States Ambassador at Large for War Crimes Issues and heavily involved in the negotiations, 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)).

[109] *See supra*, paras 29, 32-33, 35.

[110] Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 117 (unanimous).

[111] Internal Rule 77(13)(b), which establishes that the default position where an appeal against an indictment is not upheld on appeal shall be that the TC be seised on the basis of the Closing Order (Indictment); Internal Rule 79(1) providing that the TC shall be seised by an Indictment from the CIJs or the PTC, in conjunction with Internal Rule 1(2) defining CIJs as both acting jointly or one acting individually.

[112] *See* Internal Rules, pp. 83-84.

ECCC Law where the Co-Prosecutors or CIJs disagree on a case progressing: absent a supermajority of the PTC overturning an indictment, the case moves on to the next stage of proceedings.

The in dubio pro reo *principle does not require that Case 004 be dismissed where neither Closing Order is overturned by a PTC supermajority*

51. Therefore, the relevant provisions of the Internal Rules, ECCC Law, ECCC Agreement, and SCC and PTC jurisprudence, *all* mandate that the case *must* proceed to trial on the basis of the Indictment in the absence of a PTC supermajority reversing it. The way forward is clear and cannot be overridden by Yim Tith's invocation of the *in dubio pro reo* principle, since there is no "doubt" to resolve.[113]

52. In any event, just as the *in dubio pro reo* principle did not require the CIJs to dismiss Case 004 when they could not come to an agreement on whether Yim Tith falls within the ECCC's personal jurisdiction, it is also inapplicable to questions of procedure such as this, to determine whether the relevant texts should be interpreted so as to send a charged person to trial. As already discussed, *in dubio pro reo* is a corollary of the presumption of innocence, and one aspect of the requirement that guilt must be found at trial beyond reasonable doubt.[114] Its primary function is thus to address questions of fact and denotes a default finding in the event that factual doubts are not removed by the evidence.[115] Put another way, it is mainly a rule of proof and not one of legal interpretation.

53. Even in the rare event that it applies to questions of law, as a principle pertaining to the presumption of innocence, *in dubio pro reo* deals primarily with doubt regarding *substantive* criminal law. It is this, not procedure, that determines the accused's ultimate guilt.[116] The question here does not concern Yim Tith's innocence or guilt for the crimes

[113] **D381/18** & **D382/21** Two Closing Orders Appeal, para. 40.

[114] *See supra,* para. 44.

[115] *See e.g.* Case 002-**E50/3/1/4** Khieu Samphan SCC Release Decision, para. 31; **D378/2.1.7** Decision on [Redacted] Appeal Against the International Co-Investigating Judge's Decision on [Redacted] Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 10 April 2017, para. 65; *Stakić*, IT-97-24-T, Trial Chamber II, Judgement, 31 July 2003, para. 416 (*In dubio pro reo* "is applicable to findings of fact and not law").

[116] *See e.g.* Rome Statute, art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."). *See further Gbagbo & Goudé,* ICC-02/11-01/15-744, Appeals Chamber, Judgment on the Appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé Against the Decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3)", 1 November 2016, para. 83 ("The Appeals Chamber notes that the priniciple *in dubio pro reo* is encapsulated in article 22(2) of the Statute as a general principle of criminal law to be employed, where ambiguity arises, in the interpretation of the definition of a crime.").

charged at all. Rather, it asks whether he will be tried for them. As noted above,[117] all suspects, charged persons, and accused persons, including Yim Tith, enjoy the presumption of innocence unless and until they are convicted by a supermajority of the TC judges.

54. In any event, its narrow applicability to dilemmas of law is limited to doubts that remain after *interpretation* using the civil law rules of interpretation, that is, upon taking into account the language of the provision, its place in the system (including its relation to the main underlying principles), and its objective.[118] Every legal text is subject to interpretation and the fact that a particular scenario might not be expressly covered by it does not raise "doubt" from which a defendant will always profit. As the SCC held, "*in dubio pro reo* will therefore be unnecessary when addressing legal *lacunae*".[119]

55. The SCC also confirmed that the interpretive direction of Rule 21 "does not [...] mean that Internal Rules are to be construed so as to automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules"—the relevant consideration is that the interpretation does not infringe any fundamental rights of the accused.[120] Indeed, read in its entirety, Rule 21 requires that the ECCC Law and Internal Rules be interpreted so as to always safeguard the interests not only of the suspects, charged persons, and accused, but also victims, and that ECCC proceedings must "preserve a balance between the rights of the parties". It is a fundamental tenet of the law of the ECCC[121] and international tribunals,[122] as well as the French and Cambodian legal

[117] *See supra*, para. 39.

[118] Case 002-**E50/3/1/4** Khieu Samphan SCC Release Decision, para. 31 (Explaining further that the civil law rules of interpretation of the law take into account "the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective"); *Čelebići* TJ, para. 413 ("The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning *which the canons of construction fail to solve*, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*." (emphasis added)).

[119] Case 002-**E50/3/1/4** Khieu Samphan SCC Release Decision, para. 31; Case 004/1-**D308/3** Case 004/1 Closing Order, 10 July 2017, para. 2.

[120] *See e.g.* Case 002-**E50/2/1/4** Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release, 3 June 2011, para. 39; Case 002-**E50/3/1/4** Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, para. 30 (*see also* para. 31); Case 002-**E154/1/1/4** Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex-Parte Communications, 25 April 2012, para. 14.

[121] Internal Rule 21(1). *See further* **D384/5.1.1** United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 of 29 November 1985, Principle 4 ("Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered.").

[122] *Aleksovski*, IT-95-14/1, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 25 ("This application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the

processes,[123] that, pursuant to the principle of equality, fair trial rights not only belong to the defence, but to all parties to the proceedings, including the victims *and* the prosecution who act on behalf of and in the interests of Cambodian society and all of humanity. To always defer to the accused on procedural matters would have a chilling effect on the administration of justice.[124]

interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law or Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections."). *See also Zigiranyirazo*, ICTR-2001-73-T, Trial Chamber III, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, 16 November 2006, para. 18 ("Protecting the integrity of the proceedings means ensuring fairness in the conduct of the case as far as *both* Parties are concerned."]; *Karemera et al.,* ICTR-98-44-PT, Trial Chamber III, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004, para. 26 ("The Chamber recalls that the right to a fair trial applies both to the Defence and the Prosecution. The Chamber shall ensure the respect of the interests of justice."); *Situation in the Democratic Republic of the Congo*, ICC-01/04-135-tEN, Pre-Trial Chamber I, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, para. 38 ("The term 'fairness' (*equité*), from the Latin '*equus*', means equilibrium, or balance. As a legal concept, equity, or fairness, 'is a direct emanation of the idea of justice'. Equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings)."); *Situation in Uganda*, ICC-02/04-112, Pre-Trial Chamber II, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 December 2007, para. 27 ("It is commonly understood that the right to a fair trial in criminal proceedings mainly ensues to the benefit of the defendant or the defence. Yet, fairness also extends to other parties in proceedings such as the Prosecution.").

[123] France: French Code of Criminal Procedure ("FCCP"), Article préliminaire ("La procédure pénale doit être équitable et contradictoire et préserver l'équilibre des droits des parties. [...] L'authorité judiciaire veille [...] à la garantie des droits des victimes au cours de toute procédure pénale." Unofficial translation: "Criminal proceedings must be equitable and adversarial and preserve the balance between the rights of the parties. [...] The judicial authorities shall ensure victims' rights throughout criminal proceedings"); Conseil Constitutionnel, No. 95-360, 2 February 1995, para. 5 ("Considérant [...] que le principe du respect des droits de la défense constitue un des principes fondamentaux reconnus par les lois de la République [...]; qu'il implique, notamment en matière pénale, l'existence d'une procédure juste et équitable garantissant l'équilibre des droits des parties". Unofficial translation: "Considering [...] that the principle of respect for the rights of the defence constitutes one of the fundamental principles recognised by the law [of France]; that it implies, in criminal matters, the existence of a just and equitable procedure which guarantees a balance between the rights of the parties"]. *See also* Pradel, *Manuel de Procédure Pénale* (14th edition), 1 July 2008, p. 141 ["le parquet est une *partie originale* à ce procès, une partie différente des autres, car il défend les intérêts de la société." Unofficial translation: "The prosecutor is an original party to this process, a party different from the others, because he defends the interests of society."]. Cambodia: Cambodian Code of Criminal Procedure ("CCCP"), art. 4 ("Criminal actions are brought by Prosecutors for the general interests of the society.").

[124] *Boddaert v. Belgium*, No. 12919/87, Judgment, 12 October 1992, para. 39 ("Article 6 (art. 6) commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice. In the circumstances of the case, the conduct of the authorities was consistent with the fair balance which has to be struck between the various aspects of this fundamental requirement."); *Neumeister v. Austria*, No. 1936/63, Judgment, 27 June 1968, para. 21. *See also* Case 002-**E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, para. 74 ("These provisions regulating the role of judges at the ECCC have been interpreted so as to

56. This is entirely consistent with Internal Rule 2:

> Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or 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.[125]

In short, this Rule provides that where a specific scenario is not covered by the Rules, the decision-making bodies *must* interpret the relevant provisions with regard to Cambodian law and relevant international procedural rules, and with respect for the rights of *all* parties. Nowhere does it provide for an automatic default finding in favour of the suspect, charged person, or accused. In fact, Rule 2 states that where a question arises that is not addressed by the Rules, it should be resolved in accordance with, among other provisions, article 23 new of the ECCC Law, mandating that the "investigation shall proceed".

57. If all procedural uncertainty were to be permitted to automatically benefit the charged person to the point of terminating proceedings, this would violate Cambodian (and French) procedural law. In Cambodian procedure, the causes of extinction of criminal action are explicitly listed in article 7 of the Cambodian Code of Criminal Procedure and are limited to the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*.[126] Jurisprudence at the international level[127] also establishes an extremely high threshold for the termination or stay of proceedings.[128]

ensure the best administration of justice"); CCCP, art. 2 ("The purpose of a criminal action is to examine the existence of a criminal offense, to prove the guilt of an offender, and to punish this person according to the law.").

125 Emphasis added.

126 Cambodia: CCCP, art. 7, entitled "Extinction of Criminal Actions" ("The reasons for dropping a charge in a criminal action are as follows: (1) The death of an accused person; (2) The expiration of the statute of limitations; (3) A general grant of amnesty; (4) Abrogation of the criminal law; or (5) The res judicata. When a criminal action is extinguished a criminal charge can no longer be pursued or must be terminated."). *See further*, with regard to French procedural law, art. 6, FCCP ("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.").

127 ECCC Law, art. 33 new.

128 Terminations or stays of proceedings have occasionally been granted by other international 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 otherwise imperative in the interests of justice. S*ee e.g. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Motion for Stay of Proceedings, 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); *Lubanga Dyilo*, ICC-01/04-01/06-772, Appeals Chamber, Judgement 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, 14

The SCC and TC have both held that it follows that the ECCC has no authority to order termination for other reasons.[129] Indeed, under Internal Rule 67(3), there is no provision to dismiss a case at the closing order stage for procedural considerations.

58. The ECCC Agreement provides in its preamble that: " [General Assembly Resolution 57/228] recognized the legitimate concern of the Government and the people of Cambodia in the *pursuit of justice and national reconciliation*, stability, peace and security".[130] This requires the ECCC judges and Chambers both to seek the truth about what happened in Cambodia[131] and to ensure a meaningful participation for the victims of the crimes committed as part of the pursuit of national reconciliation.[132] The PTC has previously determined that "the inclusion of civil parties in proceedings is in recognition of the stated pursuit of national reconciliation".[133] Yet, dismissing Case 004 at this stage would violate the specific rights afforded to the civil parties within the ECCC framework, including the right to participate in court proceedings, to have their stories heard, and to seek

December 2006, para. 30.

129 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.).

130 Emphasis added.

131 *See e.g.* Internal Rule 55(5) ("In the conduct of judicial investigations, the [CIJs] may take any investigative action conducive to ascertaining the truth."), 87(4) ("the [Trial] Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth."); Case 002-**D164/3/6** Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, para. 35 ("the [CIJs] first have to conclude their investigation, which means that they have accomplished all the acts they deem necessary to ascertaining the truth in relation to the facts set out in the Introductory and Supplementary Submissions"); Case 003-**D120/3/1/8** Considerations on [Redacted] Appeal Against The International Co-Investigating Judge's Re-Issued Decision on [Redacted] Motion To Strike The International Co-Prosecutor's Supplementary Submission, 26 April 2016, para. 36 (on p. 25) (Judges Beauvallet and Baik) (confirming "the need to ascertain the truth about the crimes with which the accused has been charged"); Cass. Crim., 6 July 1966, No. 66-90.134 ("alors que la juridiction de renvoi est sur le point d'être saisie et que l'interêt de la manifestation de la verité continue, jusqu'au jugement à intervenir". Unofficial translation: "while the trial court is on the verge of being seised and the interest in ascertaining the truth continues until such time as a [trial] judgment is rendered"); Cass. Crim, 19 June 1979, No. 78-92.277 ("Attendu [...] qu'il appartient aux juges correctionnels d'ordonner les mesures d'information qu'ils constatent avoir été omises et qu'ils déclarent utiles à la manifestation de la vérité". Unofficial translation: "Whereas it behoves the trial judges to order investigative measures that they find have been omitted and determine to be useful for the ascertainment of the truth"). *See further Karadžić & Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 3 ("[i]nternational criminal justice [...] must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility").

132 Case 002-**D411/3/6** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, paras 64-65.

133 Case 002-**C11/53** Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, para. 37.

reparations.[134] It would also constitute an affront to the many men and women who came forward to provide evidence to the CIJs, and amount to a failure to deliver any measure of justice to tens of thousands of victims who have waited over four decades for accountability.

V. CONCLUSION

59. Whilst the PTC held in its Case 004/2 Considerations that the CIJs' *issuance* of conflicting closing orders was not permitted under the ECCC's legal framework, this does not warrant the dismissal of both Closing Orders. Rather, the ICP submits that the PTC must now, as it did in Case 004/2, consider the legal status of each Closing Order to determine whether either (or both) is so procedurally or substantively flawed as to require overturning.

60. The ICP submits that, for the reasons set out above,[135] and in her Response to Yim Tith's Appeal of the Indictment,[136] the Indictment should be upheld. In contrast, the PTC's recent elucidation of the applicable law in Case 004/2 demonstrates that the Dismissal Order is void and without legal effect.[137] With regard to its substantive merits, as set out in detail in the ICP's Appeal,[138] the Dismissal Order also contains multiple errors of fact and law which undermine the NCIJ's exercise of discretion in determining that Yim Tith was not one of those "most responsible" for the crimes committed during the DK regime.

61. In any event, should the PTC fail to reach a supermajority decision overturning the Indictment, that Indictment must seise the Trial Chamber in accordance with the clear terms of Rules 77(13)(b) and 79(1).

[134] Internal Rules 23(1), 80(2).
[135] *See supra*, paras 28-36, 38-46.
[136] **D382/27** International Co-Prosecutor's Response to Yim Tith's Appeal of the Case 004 Indictment, 14 February 2020.
[137] *See supra*, paras 28-38.
[138] **D381/19** ICP Appeal Against the Dismissal Order.

VI. RELIEF REQUESTED

62. For the foregoing reasons, the International Co-Prosecutor respectfully requests the Pre-Trial Chamber to:

i. dismiss Yim Tith's Appeal of the Issuance of Two Closing Orders in Case 004;

ii. overturn the Dismissal Order;

iii. uphold the Indictment; and

iv. send Case 004 to trial on the basis of the Indictment.

Respectfully submitted,

Date	Name	Place	Signature
17 February 2020	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh	