

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

FILING DETAILS

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**YIM TITH'S REQUEST TO THE CO-INVESTIGATING JUDGES TO
IMMEDIATELY TERMINATE, SEAL AND ARCHIVE CASE 004**

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INTRODUCTION

Mr YIM Tith, through his Co-Lawyers ('the Defence'), pursuant to Rules 21 and 69(2)(b) of the Internal Rules ('Rules'), hereby submits his *Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004* ('Request'). The Request is made necessary by the unanimous finding of the Pre-Trial Chamber ('PTC') that no legal basis exists for the Co-Investigating Judges ('CIJs') to issue two Closing Orders in Case 004, thereby establishing that the Closing Orders issued by the National Co-Investigating Judge ('NCIJ') and the International Co-Investigating Judge ('ICIJ') are null and void. Since there is no valid indictment in Case 004 and all legal avenues are exhausted, the current procedural situation means the CIJs are seised of Case 004 and they have a positive duty to exercise their exclusive jurisdiction over the case and to terminate, seal, and archive it. Failure to do so will cause further and irremediable damage to Mr YIM Tith's fair trial rights to a speedy determination of the proceedings against him, to equal treatment, and to legal certainty. The Defence requests to file this Request in English with the Khmer translation to follow.¹

PROCEDURAL HISTORY

1. On 17 September 2021, the PTC issued its *Considerations on Appeals Against Closing Orders* in Case 004.²
2. On 23 September 2021, the International Co-Prosecutor ('ICP') transmitted a request to the Supreme Court Chamber ('SCC') – by email – requesting an extension of a time limit to file submissions to the SCC, in relation to which the ICP asserted that '[n]ormally this submission would be expected to be filed [...] within 30 days of the Case 004 Considerations.'³
3. On 23 September 2021, the Defence responded by email, refuting the ICP's assertion that the PTC Considerations is a decision subject to appeal to the SCC, and that it was necessary to hear first from the Defence before deciding on the matter.⁴

¹ See Email from the Interpretation and Translation Unit to Defence, 'Translation of Motion', 18 October 2021.

² *Considerations on Appeals Against Closing Orders*, 17 September 2021, D381/45 and D382/43 ('Case 004 Considerations').

³ Email from the International Co-Prosecutor, 'ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

⁴ Email from the Defence, 'RE: ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

4. On 4 October 2021, the SCC issued its *Decision on International Co-Prosecutor's request for Extension of Time to File Her Submission Concerning the Pre-Trial Chamber's Closing Order Considerations in Case 004*.⁵ The SCC found it was unable to examine the ICP's request for extension of time and recalled that the ICP was permitted to file any application to the Chamber.⁶ The SCC noted that the Defence 'raised objections,' without stating what those objections were, or attaching the Defence's email,⁷ or taking in account the Defence's submissions.⁸

APPLICABLE LAW

5. Rule 21 of the Rules states in relevant 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;
- b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;
- c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and
- d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.

[...]

4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time

6. Rule 69(2) of the Rules states:

⁵ *Decision on International Co-Prosecutor's request for extension of time to file her submission concerning the pre-trial chamber's closing order considerations in case 004*, 4 October 2021, Doc. No. 2/2.

⁶ *Ibid*, para. 11.

⁷ *Ibid*, para. 5.

⁸ *Ibid*, Section entitled 'Submissions', para. 6.

2. Where no appeal is filed against a Closing Order, the Co-Investigating Judges shall seal the case file, and:

a) If an Indictment is issued, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Trial Chamber to allow a date for trial to be set; or

b) If a Dismissal Order is issued, the case file shall be archived after the expiry of the time limit for appeal.

ARGUMENT

PART I: THE CIJS' EXCLUSIVE JURISDICTION OVER CASE 004

7. The CIJs are seised of Case 004 and are responsible for finally determining its outcome. As they recently declared in Case 003, the CIJs would consider their duty to terminate the case under their residual jurisdiction if no other judicial body in the Court was 'willing to take up the baton' and bring the case to a conclusion.⁹ The procedural impasse in Case 004 makes clear that the baton must not be passed any further – the actions of the PTC, Trial Chamber ('TC') and SCC have demonstrated that it now falls to the CIJs to take action in Case 004.
8. The PTC in Case 004 unanimously 'DECLARE[D] that the Co-Investigating Judges' issuance of Two Closing Orders was illegal, violating the legal framework of the ECCC.'¹⁰ Unanimously, the PTC held that the CIJs 'have a judicial duty to decide on matters in dispute of which they are seised,' which means that '[w]hen their disagreement prevents them from arriving at a common determination of such matters, they must still discharge this joint duty by following the procedures available in the ECCC legal system to make sure that a conclusive determination on the matters within their jurisdiction is attained.'¹¹ The legal effect of these unanimous Considerations was clarified in Case 003, where the PTC held that upon notification 'of the operative part of the Pre-Trial Chamber's considerations' the CIJs 'are responsible for processing the case.'¹²

⁹ Case 003, *Order to File Submissions on Residual Jurisdiction to Terminate Case 003*, 16 September 2021, D273 ('Order to File Submissions on Residual Jurisdiction to Terminate'), paras 5 and 6.

¹⁰ Case 004 Considerations, p. 49.

¹¹ Case 004 Considerations, para. 111.

¹² Case 003, *Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for MEAS Muth Concerning the Proceedings in Case 003*, 8 September 2021, D271/5 and D272/3, ('Case 003 Consolidated Decision'), para. 72.

9. In this situation of procedural illegality caused by the unlawfully issued two Closing Orders, there is an obvious and immediate risk to Mr YIM Tith's fair trial right to a speedy final determination of the case. After been seised of Case 004 by virtue of the PTC's Considerations,¹³ the CIJs' inherent jurisdiction to terminate Case 004 is 'rendered necessary by the imperative need to ensure a good and fair administration of justice,'¹⁴ i.e., to ensure Mr YIM Tith's fair trial rights to a speedy determination of his case.¹⁵ This right 'is designed to avoid keeping anyone charged with a criminal offence too long in a state of uncertainty about their fate'¹⁶ and includes 'the right to have a final determination on a matter submitted to a court.'¹⁷ For example, the European Court of Human Rights has found a violation of the right to a speedy final determination in a legal system where 'a tied vote [...] results in a decision which does not formally determine the issue under appeal.'¹⁸
10. In Case 003, the PTC found that the reinstatement of the CIJs 'puts the Office of the Co-Investigating Judges in a position to carry out its duty, unlike after the Considerations in Case 004/2 were issued.'¹⁹ Indeed, it is clear that the same level of immediacy was not present in Case 004/2, where the ICIJ was not reinstated until 125 days after the PTC

¹³ Case 003 Consolidated Decision, para. 72.

¹⁴ Case 002, *Decision on Co-Prosecutor's Request for Clarification*, 26 June 2013, E286/2/1/2, para. 12;. See also Case 002, *Decision on KHIEU Samphan's Urgent Appeal against the Summary of Judgment Pronounced on 16 November 2018*, 13 February 2019, E463/1/3, para. 17.

¹⁵ Rule 21(4). See also Case 003, *Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber*, 20 May 2021, D270/7 ('CIJs' Decision on Forwarding Case File 003'), para. 26, citing Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) ('Establishment Law'), Articles 33 new, 35 new(c); Constitution of the Kingdom of Cambodia, Article 31 referring to Article 14(3)(c) of the International Covenant on Civil and Political Rights. See also *Marini v. Albania*, ECtHR, Application No. 3738/02, Judgment, 18 December 2007, paras 120-123 (finding that the tied voting arrangements in the Albanian legal system, which results in the Constitutional Court not formally determining the issues on appeal, 'do[es] not serve the interests of legal certainty and are capable of depriving an applicant of an effective right to have his constitutional appeal finally determined'); *Frydlender v. France*, ECtHR Application No. 30979/96, Judgment, 27 June 2000, para. 45 (finding that Contracting States 'must organise their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of his civil rights and obligations'). *Multiplex v. Croatia*, ECtHR Application No. 58112/00, 10 July 2003, para. 45 (considering that the 'right of access to a court does not only include the right to institute proceedings, but also the right to obtain a "determination" of the dispute by a court').

¹⁶ CIJs' Decision on Forwarding Case File 003, para. 42, quoting Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020), p. 405.

¹⁷ *Marini v. Albania*, ECtHR, Application No. 3738/02, Judgment, 18 December 2007, para. 120; *Multiplex v. Croatia*, ECtHR Application No. 58112/00, 10 July 2003, para. 45.

¹⁸ *Marini v. Albania*, ECtHR, Application No. 3738/02, Judgment, 18 December 2007, para. 123.

¹⁹ Case 003 Consolidated Decision, para. 72.

Considerations in Case 004/2²⁰ and just 12 days before the ICP filed her Immediate Appeal of the Trial Chamber's effective termination of Case 004/2.²¹ Furthermore, in terminating Case 004/2, the SCC did not have the benefit of the PTC's clarification in Case 003 that following its unanimous declaration that the Closing Orders were illegally issued, the case reverts to the CIJs.²² The SCC has previously, in finding on its own inherent jurisdiction, indicated that this can be implicated when it is 'incidental' to a Chamber's primary jurisdiction,²³ meaning '*as a direct consequence of the procedures of which [it is] seized.*'²⁴ In the present circumstances, the CIJs are seised of Case 004 and the matter at hand is one on which the CIJs can act, and must act, without first requiring the SCC to exercise its jurisdiction or make any determination in Case 004 of the matter.

11. The CIJs have previously held that they have inherent power to order the effective termination of a case through a permanent stay of proceedings when the 'situation and outlook going forward [...] become incompatible with the basic principles of fair trial[...].'²⁵ When the ECCC's budgetary situation reached a crisis point and it became unclear whether they could complete their mandate in a timely and efficient manner or whether there would be funding for appellate review of the Closing Orders, trials, and appeals,²⁶ the CIJs 'conducted an extensive study of the law relating to a stay of proceedings, both nationally and internationally,' and were 'confident that both Cambodian and international law foresee scenarios where such an order would be appropriate.'²⁷ Although the CIJs 'cho[se] to employ the term 'stay with full prejudice'

²⁰ See Case 004 Considerations. See also Press Release by the Co-Investigating Judges regarding the Re-instatement of the Co-Investigating Judges, 24 April 2020.

²¹ Case 004/2, *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 4 May 2020, E004/2/1.

²² See Case 004/2, *Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 10 August 2020, E004/2/1/1/2 ('SCC Decision in Case 004/2').

²³ See *Decision on Co-Prosecutor's Request for Clarification*, 26 June 2013, E286/2/1/2, para. 12. See also Case 002, *Decision on KHIEU Samphan's Urgent Appeal against the Summary of Judgment Pronounced on 16 November 2018*, 13 February 2019, E463/1/3, para. 17: 'The Chamber also recalls that its inherent jurisdiction is implicated in circumstances in which there is an imperative need to ensure good and fair administration of justice and then only when it is incidental to its primary jurisdiction.'

²⁴ Case 002, *Decision on Co-Prosecutor's Request for Clarification*, 26 June 2013, E286/2/1/2, para. 12 (emphasis added).

²⁵ *Combined Decision on the Impact of the Budgetary Situation of the ECCC on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith*, 5 May 2017, D355/6, para. 16.

²⁶ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 75 and 79.

²⁷ *Combined Decision on the Impact of the Budgetary Situation of the ECCC on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith*, 5 May 2017, D355/6, para. 16.

rather than ‘dismissal,’ they considered ‘the use of a different term is just that – a matter of terminology.’²⁸

12. The CIJs have also previously recognised the imperative for them to exercise this inherent power ‘after all other jurisdictions have run their course’ when they requested arguments in Case 003 on whether they have residual jurisdiction to ‘terminate the case [...] in order to give effect to the higher-order fair trial principles of providing for an orderly disposal of the case’ and ‘of safeguarding the right to a speedy final determination.’²⁹ All other jurisdictions have run their course in Case 004 since no ECCC Chamber other than the CIJs has jurisdiction following the PTC Considerations, in which the PTC failed to exercise its function as the highest appellate chamber at the pre-trial stage of proceedings to provide a definite conclusion to the case.

PART II: REQUEST TO TERMINATE, SEAL AND ARCHIVE CASE 004

13. The Closing Orders in Case 004 are null and void, and without legal effect,³⁰ meaning that there is no valid indictment in Case 004. All legal avenues are exhausted in Case 004 because the ICP has no other legally feasible route through which to take Case 004 to trial. None of the CIJs, the PTC, the TC, or the SCC is going to render any decision that would lead to Case 004 proceeding to trial. Other than the question of which ECCC Chamber will put an end to Case 004, there are no further factual or legal issues in dispute at this stage of proceedings. To protect Mr YIM Tith’s fair trial rights to a speedy final determination of his case, his right to equal treatment with other ECCC Charged Persons at the pre-trial stage, and his right to legal certainty, it is imperative that the CIJs act immediately to order the termination of Case 004 and to seal and archive the case file.

i. There is No Valid Indictment in Case 004

14. The PTC unanimously considered that the Closing Orders in Case 004 were the results of unlawful and illegal actions.³¹ There is no question over whether the ‘effect’ or ‘consequence’ of the PTC’s unanimous finding is to render the Closing Orders null and void, because the PTC’s unanimous finding is itself *a finding that no valid indictment on*

²⁸ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 80.

²⁹ CIJs’ Decision on Forwarding Case File 003, para. 42.

³⁰ SCC Decision in Case 004/2, para. 68.

³¹ Case 004 PTC Considerations, p. 49.

which to proceed to trial exists. Any attempt by the ICP to make a distinction between, on the one hand, the unlawfulness of the issuance of the two Closing Orders and, on the other, the null and void status of the two Closing Orders is destined to fail because it is inherently illogical. Indeed, all the SCC judges and both CIJs have recognised the trite point of law: a judicial order with no legal basis is a nullity, meaning, in other words, that to all intents and purposes it no longer exists.³²

15. The SCC unanimously held that ‘in light of the Pre-Trial Chamber’s finding in Case 004/2 that the actions of the Co-Investigating Judges were illegal, it flowed that neither Closing Order was valid’ and consequently, ‘in the absence of a definite and enforceable indictment,’ the case must be terminated before the ECCC.³³ It considered that the PTC Judges’ discussion of the merits of the Closing Orders in their separate opinions was ‘irrelevant’ and a ‘redundant exercise’ given the illegality of the issuance of two Closing Orders.³⁴ ‘A void act cannot create a lawful consequence or result’ and ‘[i]t therefore logically follows that the source action - each Closing Order - was of no legal effect.’³⁵ The SCC specifically found that the argument proposed by the ICP that a ‘default position’ applies to progress the case in the absence of a supermajority in favour of dismissal ‘sidesteps or ignores the consequences of the *unanimous* finding of the Pre-Trial Chamber that the Closing Orders were the results of *unlaw and illegal actions*.’³⁶
16. The CIJs have accepted the SCC’s reasoning that the PTC’s unanimous declaration that the Closing Orders were a result of ‘unlawful and illegal’ actions means that both orders are null and void. In Case 003, the CIJs considered that ‘only the joint part of the PTC’s Considerations can have any binding effect,’ that ‘[t]he COs should ideally have *both* been immediately and unanimously quashed for serious procedural error without the PTC spending any time on discussing the merits,’ and that ‘a procedural error of such an order of magnitude in any decision during the investigations would have inevitably led to its annulment and its being struck from the case file as void.’³⁷
17. The SCC’s reasoning in Case 004/2 and the CIJs’ reasoning in Case 003 must be equally applied to Case 004. Rule 21 mandates equal treatment and legal certainty in ECCC

³² SCC Decision in Case 004/2, paras 54 and 67.

³³ SCC Decision in Case 004/2, para. 71(v).

³⁴ SCC Decision in Case 004/2, para. 53.

³⁵ SCC Decision in Case 004/2, para. 67.

³⁶ SCC Decision in Case 004/2, para. 67 (emphasis in original).

³⁷ CIJs’ Decision on Forwarding Case File 003, para. 21.

proceedings.³⁸ The same CIJs are hearing submissions in Case 004 on the identical procedural situation of the opposing Closing Orders in Cases 004/2 and 003. It is now beyond dispute that there is no valid indictment in Case 004.

ii. All Legal Avenues are Exhausted

18. In Case 004/2, the jurisdictions of the PTC, TC and SCC all ran their course, their judges did not seal and archive the case file. Eventually it fell to the CIJs to do so. Case 003 has thus far followed the same trajectory.
19. In Case 004/2, after the PTC declared the issuance of two Closing Orders to be illegal under the ECCC framework, the ICP and National Co-Prosecutor ('NCP') issued a press release expressing their opposing interpretations of the Considerations. The ICP insisted that when read together, Rules 1(2) and 77(13)(b) provide that where an indictment issued by one CIJ is not overturned by four PTC Judges, the case is sent to trial.³⁹ Conversely, the NCP was of the view that the indictment 'is illegal based on the effect of the Pre-Trial Chamber's decision,' noting that the PTC did not order its Greffiers to forward the Considerations or the case file to the TC in accordance with its prior practice.⁴⁰
20. Shortly thereafter, the Defence for AO An sent a letter to the TC requesting confirmation that it has not been lawfully seised of Case 004/2, and in the alternative, sought an extension of time and guidance to file preliminary objections.⁴¹ In response, the Greffier

³⁸ Rule 21(1)(b) mandates that 'Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules.' The PTC considered that it is 'required to ensure that "[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations [are] interpreted so as to safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of the proceedings" throughout the pre-trial stage.' Case 004/2 Considerations, para. 51 quoting Rule 21. 'One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.' ECtHR, *Brumărescu v. Romania*, Application No. 28342/95, Judgment, 28 October 1999, para. 61; ECtHR, *Kehaya and Others v. Bulgaria*, Application Nos. 47797/99 and 68698/01, Judgment, 12 January 2006, para. 61; ECtHR, *Ryabykh v. Russia*, Application No. 52854/99, Judgment, 24 July 2003, para. 51. '[W]here there are divergences in the application of substantively similar legal provisions to persons in near identical groups, a problem with legal certainty does arise.' ECtHR, *Ștefănică and Others v. Romania*, Application No. 38155/02, Judgment, 2 November 2010, para. 37. (internal citations omitted). Inconsistent adjudication of claims brought by persons in similar situations leads to a state of uncertainty, which reduces the public's confidence in the judiciary and deprives individuals of the right to a fair trial. See *id.*, para. 38.

³⁹ *Press Release by the International Co-Prosecutor regarding Case 004/2*, 24 December 2019, <https://www.eccc.gov.kh/cn/articles/international-and-national-ocps-press-release-case-00402> (emphasis in original).

⁴⁰ *Ibid.*

⁴¹ See Case 004/2, *Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case 004/2*, 24 February 2020, D359/27, para. 6, citing *AO An Defence Team Request for confirmation*

of the TC informed the parties and PTC Judges that the Considerations had not been notified to the TC and neither the indictment nor case file had been forwarded.⁴² This prompted contradictory instructions from the PTC's National and International components to the Court Management Section ('CMS'): the International Judges instructed one Greffier to direct the CMS to formally notify the TC Judges, while the National Judges, through another Greffier, directed the CMS *not* to notify the TC and to archive the case file.⁴³

21. The PTC National and International Judges then went on to issue contradictory memoranda expressing their discordant views on the legal effect of their Considerations.⁴⁴ The President of the PTC, Judge PRAK Kimsan, insisted that only the unanimous portion of the PTC's considerations have legal effect and that notifying the Considerations to the TC 'violat[es] the unanimous decision of [the] PTC.'⁴⁵ The International PTC Judges responded the same day that the President of the PTC has no authority to instruct the CMS, that the indictment seises the TC under Rule 77(13)(b) since it was not reversed by supermajority,⁴⁶ and that while the duty to transfer the case to the TC would have rested on the CIJs, it 'is recommended that the TC is notified of the Pre-Trial Chamber's considerations' given the 'vacuum of the Office of the Co-Investigating Judges.'⁴⁷
22. Following the PTC Judges' contradictory memoranda, the ICP simultaneously requested the TC to take all necessary administrative actions to transfer the Case 004/2 indictment and case file and requested the PTC to direct the CMS to transfer the indictment and case file to the TC.⁴⁸ Contrary to the ICP, the Defence for AO An requested the PTC to 'confirm that all administrative actions have been taken to archive Case File 004/2

that the Trial Chamber has not been lawfully seized of Case 004/02; in the alternative request for time extension and guidance for filing preliminary objections under Internal Rule 89, 30 December 2019.

⁴² See PTC Memorandum entitled 'Notification of the PTC's Considerations in Case 004/2,' 29 January 2020, D359/35, p. 4, quoting Email from Suy Hong Lim Greffier of the Trial Chamber entitled 'Information' dated 21 January 2020, 01:00PM.

⁴³ PTC Memorandum entitled 'Notification of the PTC's Considerations in Case 004/2,' 29 January 2020, D359/35, pp. 4-5.

⁴⁴ Case 004/2, PTC Memorandum entitled 'Clarification of the decision in the case 004/2,' 29 January 2020, D359/34, p. 2; Case 004/2, PTC Memorandum entitled 'Notification of the PTC's Considerations in Case 004/2,' 29 January 2020, D359/35, p. 5.

⁴⁵ PTC Memorandum entitled 'Clarification of the decision in the case 004/2,' 29 January 2020, D359/34, p. 2.

⁴⁶ PTC Memorandum entitled 'Notification of the PTC's Considerations in Case 004/2,' 29 January 2020, D359/35, p. 5.

⁴⁷ *Ibid*, p. 4-6.

⁴⁸ Case 004/2, International Co-Prosecutor's Request that the Trial Chamber Take Action to Obtain Access to the Case 004/2 (AO An) Indictment and Case File, 4 February 2020, D363/1.1.8; Case 004/2, International Co-Prosecutor's Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber, 4 February 2020, D359/25.

pursuant to IR 69(2)(b).'⁴⁹ The TC Greffier once again informed that it had not been notified formally of the PTC Considerations, the case file was not forwarded to it, and that 'it is up to the Pre-Trial Chamber to initiate both actions,'⁵⁰ whereas the PTC Judges maintained their respective positions on the legal consequences of their considerations.⁵¹

23. When the ICP renewed her request to the TC to progress Case 004/2, the TC issued a press release stating that 'it had no access to the case file and cannot have access to it, unless and until there is proper notification and transfer of the case file,' and that issuing a formal decision was thus 'not possible,' noting that the press release bore 'no legal force.'⁵² Whilst the International TC Judges explained that 'an argument could be made that under the circumstances of the case the Chamber has *inherent authority* to address some of the preliminary issues raised by the parties,' the National Judges declared that 'there will be no trial of AO An now or in the future.'⁵³

24. Claiming that the TC's inaction and press release constituted a 'decision' effectively terminating Case 004/2, the ICP subsequently appealed to the SCC.⁵⁴ She argued that the TC effectively terminated Case 004/2 on impermissible grounds by failing to give effect to the 'default position' in the ECCC framework that progresses the case to trial, failing to exercise its inherent jurisdiction to decide on justiciable issues before it, and imposing additional administrative steps to effectuate formal notification of the PTC Considerations.⁵⁵ The Defence for AO An responded by letter that the appeal is inadmissible and that the TC's alleged failure to progress the case to trial could not have effectively terminated Case 004/2, since this was done by the PTC Considerations.⁵⁶ The

⁴⁹ Case 004/2, *Request for Confirmation that All Administrative Actions Have Been Taken to Archive Case File 004/02*, 24 February 2020, D359/27, para. 14.

⁵⁰ See Case 004/2, *PTC Memorandum entitled 'Transfer of Case File 004/2'*, 12 March 2020, D359/36, para. 16.

⁵¹ *Ibid*, para. 37; Case 004/2, *PTC Memorandum entitled 'Re-Confirmation of the Decision on Case File 004/2'*, 16 March 2020, D359/37, p. 2.

⁵² *Press Release by the Judges of the Trial Chamber of the ECCC regarding Case 004/2 involving AO An*, 3 April 2020, <https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-cccc-regarding-case-0042-involving-ao>.

⁵³ *Id.*

⁵⁴ Case 004/2, *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 4 May 2020, E004/2/1.

⁵⁵ *Id.*, paras 50-76.

⁵⁶ Case 004/2, *Response to International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 14 May 2020, E004/2/1/1.

Defence teams for Mr YIM Tith and MEAS Muth also sought leave to intervene and make submissions on why the SCC lacked jurisdiction to hear the ICP's immediate appeal.⁵⁷

25. The SCC ultimately terminated Case 004/2 considering that there 'was no agreement after thirteen years of investigation that AO An was within the jurisdiction of the Court' and that there was no 'valid and enforceable indictment' against him.⁵⁸ The SCC gave weight to the facts that the 'irreconcilable differences of the Co-Investigating Judges on whether AO An should be investigated *at all* led them to formally register several fundamental disagreements and inevitably to the issuance of two separate and conflicting Closing Orders,' that '[t]hese seemingly rigid and strongly held differences have led to the current impasse in Case 004/2,' and that the NCP's lack of support and opposition to the ICP 'magnifies the legal impasse which has dogged every step of the investigatory process of Case 004/2 [...]'.⁵⁹
26. Immediately after the SCC's decision, the CIJs sealed and archived Case 004/2, applying Rule 69(2)(b) *mutatis mutandis* since the SCC 'did not itself formally order the case file to be sealed and archived' and since its 'termination decision is strictly speaking not covered by the plain meaning of Internal Rule 67(3)'.⁶⁰
27. In Case 003, the PTC again unanimously declared the issuance of two Closing Orders to be illegal, adopting and incorporating much of its reasoning from its Considerations in Case 004/2.⁶¹ However, the PTC did not follow the SCC's instructions in Case 004/2 that 'having *unanimously* declared that "the Co-Investigating Judges' issuance of the Two Closing Orders was illegal, violating the legal framework of the ECCC", should have gone a step further and provided an actual ruling'.⁶² Instead, as they did in Case 004/2, the PTC Judges split into their respective National and International sides and issued contradictory separate opinions on the legal effect of their Considerations.⁶³ The National PTC Judges considered that case file 003 'should be held at the ECCC archives' since

⁵⁷ *YIM Tith's Request for Leave to Intervene in Case 004/02 on the Jurisdiction of the Supreme Court Chamber*, 3 June 2020, E004/2/3; *Case 003, MEAS Muth's Request for Leave to Intervene and Respond to the International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 29 May 2020, E004/2/2.

⁵⁸ SCC Decision in Case 004/2, para. 69.

⁵⁹ SCC Decision in Case 004/2, paras 62 and 64.

⁶⁰ Case 004/2, *Order Sealing and Archiving Case File 004/2*, 14 August 2020, D363/3, paras 7 and 9.

⁶¹ Compare Case 003, *Considerations on Appeals Against Closing Orders*, 7 April 2021, D266/27 and D267/35 ('Case 003 PTC Considerations'), paras 78-109 with Case 004/2 Considerations, paras 91-124.

⁶² SCC Decision in Case 004/2, para. 61.

⁶³ Case 003 PTC Considerations, paras 111-18; 119-358.

both Closing Orders ‘are of the same value and stand valid,’⁶⁴ whereas the International PTC Judges declared that the ICIJ’s indictment was valid and that the NCIJ’s dismissal order was *ultra vires*.⁶⁵

28. Following the PTC Considerations in Case 003, the ICP requested the CIJs, jointly or individually, to forward the Considerations, the indictment, and the case file to the TC.⁶⁶ She argued that all five PTC Judges concluded that the indictment is valid, that the TC ‘automatically became seised of Case 003 upon issuance of those Considerations’ under Rules 77(13) and 79(1),⁶⁷ and therefore, the CIJs ‘can and must therefore apply IR 69(2)(a) *mutatis mutandis* to direct CMS to forward the (publicly available) Considerations and the upheld Indictment to the Greffier of the TC, and allow the TC to access the remaining case file electronically.’⁶⁸ Two days after filing her request with the CIJs, the ICP also requested an extension of time to file her Rule 80 list of witnesses and experts with the TC,⁶⁹ which, as in Case 004/2, the TC ‘rejected [...] by email of its greffier of 27 April 2021, citing the reason that it had not been formally notified of the indictment.’⁷⁰

29. The CIJs rejected the ICP’s request to forward Case 003 as ill-founded.⁷¹ In their decision, the CIJs explained why they did not seise the PTC of a disagreement and issued two Closing Orders, their understanding of the soundness and impact of the SCC’s decision in Case 004/2, their understanding of the remedies available to the PTC in resolving the procedural deadlock, and their inclination to terminate the case.⁷²

30. Firstly, the CIJs explained that there was ‘no point whatsoever in triggering the disagreement procedure over jurisdiction before the PTC, because the result was a foregone conclusion.’⁷³ Noting that ‘[t]he PTC’s NJs had on multiple occasions in Cases 003, 004/2, as well as 004/1 and 004 expressed their view that they did not accept that the ECCC had jurisdiction over any of the remaining charged persons after cases 001 and 002,

⁶⁴ Case 003 PTC Considerations, para. 118.

⁶⁵ Case 003 PTC Considerations, para. 259.

⁶⁶ Case 003, *International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021, D270.

⁶⁷ *Ibid*, para. 12.

⁶⁸ *Ibid*, para. 13.

⁶⁹ See CIJs’ Decision on Forwarding Case File 003, para. 5.

⁷⁰ CIJs’ Decision on Forwarding Case File 003, para. 5.

⁷¹ CIJs’ Decision on Forwarding Case File 003, para. 28.

⁷² CIJs’ Decision on Forwarding Case File 003, paras 15-25.

⁷³ CIJs’ Decision on Forwarding Case File 003, para. 15.

long before the closure of the investigations in any of the remaining cases,' the CIJs understood that '[t]hese judges were still the same at the time of our COs and there was no reason to think they would miraculously change their mind in the context of the COs.'⁷⁴ Hence the CIJs considered that seising the PTC with a disagreement over whether to issue an indictment or dismissal order 'would have meant needless delay and a useless waste of time and resources' since 'we would simply have been back at the start months later.'⁷⁵

31. Secondly, the CIJs explained how they were, 'much like the SCC – at a loss as to how the PTC's judges could say *per curiam* in case 004/2 that split COs are manifestly illegal and a violation of the very framework of the ECCC, only for the NJs and IJs to proceed to discuss the merits and to split themselves in upholding the CO the result of which appealed to them.'⁷⁶ They found that '[t]he surprising stance taken by the IJs in the Case 003 Considerations that this error did not make the COs void in itself is difficult to comprehend' in light of the SCC's termination order in Case 004/2.⁷⁷

32. Thirdly, the CIJs found that the PTC 'twice had the opportunity to break the deadlock itself in three different manners,' echoing the remedies argued by this Defence in YIM Tith's Two Closing Order Appeal:

- either unanimously remanding the case back to us for serious procedural error – and without engaging with the merits – with instructions to issue one joint CO,
- or doing so itself by unanimously applying its own alleged default rule and sending the case for trial,
- or, given the remaining disagreement in the PTC evident from both Considerations, terminating the case, as the SCC had to do ultimately in case 004/2.⁷⁸

33. The CIJs lamented that 'the PTC – now in the face of a contrary ruling by the SCC – chose to do none of the above, [...] creating the current situation with no clear direction and raising serious doubts about the actual meaning of the default rule, thus in effect again

⁷⁴ CIJs' Decision on Forwarding Case File 003, para. 15.

⁷⁵ CIJs' Decision on Forwarding Case File 003, para. 15.

⁷⁶ CIJs' Decision on Forwarding Case File 003, para. 21.

⁷⁷ CIJs' Decision on Forwarding Case File 003, para. 21.

⁷⁸ *YIM Tith's Appeal of the Issuance of Two Closing Orders in Case 004*, 2 December 2019, D381/18 and D382/21, paras 37-40; CIJs' Decision on Forwarding Case File 003, para. 25.

abdicating responsibility for the proper resolution of the case with grave consequences for the fair trial rights of the Defence [...]’.⁷⁹

34. Finally, the CIJs declared that if ‘no other judicial body in this Court be willing to take it upon itself,’ they would ‘as an *ultima ratio* and after all other jurisdictions have run their course, be open to receiving or requesting arguments about whether [they] have an exceptional residual jurisdiction of last resort to terminate the case [...] in order to give effect to the higher-order fair trial principles of providing for an orderly disposal of the case and of safeguarding Meas Muth’s right to a speedy final determination of the case against him.’⁸⁰ They considered that ‘the proceedings against Meas Muth would remain pending forever if the situation after the 003 Considerations outlined above were to be the end state.’⁸¹ Noting that the NCIJ ‘does not consider himself bound by’ any ‘alleged default rule,’ the ICIJ considered that ‘the only kind of joint CO available to both CIJs’ is ‘termination of the case on fair trial grounds [...] or alternatively, for lack of a valid indictment as held by the SCC in case 004/2.’⁸²

35. Against this background, the CIJs declared ‘neither of us will forward the case file alone.’⁸³ The CIJs considered that this ‘solution’ proposed by the International PTC Judges and ICP ‘is in substance no different than having two split COs again,’ since ‘[j]ust as well as the ICIJ forwarding the case to the TC, the NCIJ could order the file sealed and archived – the PTC’s indecision is authority for both or neither.’⁸⁴ Nonetheless, the CIJs considered that they lacked jurisdiction to decide the fate of Case 003 since it was still with the PTC to determine Civil Party admissibility and the TC’s rejection of the ICP’s extension request ‘might ultimately open a path to another SCC ruling as in case 004/2.’⁸⁵ Accordingly, they expressly encouraged the ICP to appeal their decision to the PTC ‘to allow it to reconsider or at least clarify its view on the essence, unanimous acceptance by all PTC judges and binding effect of the default rule, the comparative severity of breaching it, the effect of non-compliance on the fair trial aspects of the case, and to bring this case to a proper conclusion under the powers which it has itself declared are available to it.’⁸⁶

⁷⁹ CIJs’ Decision on Forwarding Case File 003, para. 25.

⁸⁰ CIJs’ Decision on Forwarding Case File 003, para. 42.

⁸¹ CIJs’ Decision on Forwarding Case File 003, para. 25.

⁸² CIJs’ Decision on Forwarding Case File 003, para. 36.

⁸³ CIJs’ Decision on Forwarding Case File 003, para. 37.

⁸⁴ CIJs’ Decision on Forwarding Case File 003, para. 37.

⁸⁵ CIJs’ Decision on Forwarding Case File 003, para. 40.

⁸⁶ CIJs’ Decision on Forwarding Case File 003, para. 43.

36. The ICP chose not to appeal the CIJs' decision and instead filed a submission to the PTC requesting it to conclude the pre-trial stage of the Case 003 proceedings.⁸⁷ The ICP submitted that this would be consistent with the PTC's 'unanimous' finding regarding the indictment in Case 003 and the 'default position' in the ECCC legal framework, which she claimed mandates that the case proceed to trial.⁸⁸ Simultaneously, the Defence for MEAS Muth requested the PTC to terminate, seal, and archive Case 003 to ensure MEAS Muth's right to have proceedings against him brought to a conclusion within a reasonable time.⁸⁹
37. The PTC denied both requests finding that it had 'already ruled on the points raised by the Requests in the disposition of its Considerations in Case 003.'⁹⁰ Unanimously, the PTC found that there is no obligation for it to reach a unanimous decision, that the CIJs 'are responsible for processing the case in accordance with Internal Rules 77(13) and (14),' and that the reinstatement of the CIJs 'puts the Office of the Co-Investigating Judges in a position to carry out its duty, unlike after the Considerations in Case 004/2 were issued.'⁹¹ It also recalled that it may reject motions that are 'unnecessary' and 'create a potential for endless litigation,' such as 'when the motion challenges an issue, which is essentially the same (in fact and in law) as a question already considered by the Chamber in respect of the same party, on which it could not reach a supermajority of four votes to render a decision, and over which judges may be expected to maintain similar views.'⁹² Categorically, the PTC 'refus[ed] to be associated, through the actions of confused Co-Investigating Judges or requests that have already been granted, with malpractices that provoked such a failure that it now seems insurmountable to those who have caused it.'⁹³
38. Thereafter, acting *proprio motu*, the CIJs informed the parties that '[t]hat time has now come,' reminding the parties of their intent to request submissions on their residual jurisdiction to terminate the case.⁹⁴ The CIJs considered that 'the only issue that remains to be determined is whether [the CIJs] have residual jurisdiction to terminate the case' since '[t]he case has now come before the PTC twice and all relevant legal issues have

⁸⁷ Case 003, *International Co-Prosecutor's Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings*, 21 June 2021, D271/1.

⁸⁸ *Ibid*, D271/1.

⁸⁹ Case 003, *MEAS Muth's Request to Terminate, Seal, and Archive Case 003*, 22 June 2021, D272, paras 47-73.

⁹⁰ Case 003 Consolidated Decision.

⁹¹ Case 003 Consolidated Decision, paras 68, 72, 77.

⁹² Case 003 Consolidated Decision, para. 77.

⁹³ Case 003 Consolidated Decision, para. 76.

⁹⁴ Order to File Submissions on Residual Jurisdiction to Terminate, para. 6.

been debated at length by the parties; there is no new aspect likely to arise.’⁹⁵ Noting ‘the possibility that the ICP might wish to seize the SCC with a request for termination in Case 004/2,’ the CIJs ordered her to declare whether she intends to seize the SCC with the case, and if not, ordered the parties ‘to submit any comments they may have on the sole issue of jurisdiction[...].’⁹⁶ The ICP subsequently ‘gave notice that she is appealing the case to the SCC.’⁹⁷

39. It is now beyond dispute that there are no new legal issues in Case 004. All relevant issues have been debated by the parties and have gone through the CIJs, the PTC, and the SCC:
- a. *Whether the ECCC framework permits the issuance of two Closing Orders:* The ‘issuance of two Closing Orders is illegal, violating the legal framework of the ECCC.’⁹⁸
 - b. *Whether either or both Closing Orders in Case 004 stand once declared illegal:* Neither Closing Order can stand since both Closing Orders are null, void, and of no legal effect.⁹⁹
 - c. *Whether the separate opinions of the National and International PTC Judges in Case 004 have any legal effect.* The separate opinions are ‘irrelevant’ and only the unanimous PTC Considerations have legal effect.¹⁰⁰
 - d. *Whether the TC is automatically seised upon issuance of the 004 Considerations pursuant to Rules 77(13) and 79(1).* In light of the PTC’s ‘unanimous declaration that the actions of the Co-Investigating Judges in producing two separate and conflicting orders was a nullity,’ the TC cannot be seised and ‘is in no position to authorise and/or notify electronic filings.’¹⁰¹
 - e. *Whether any ‘default position’ can apply in Case 004 to progress the case to trial once the Closing Orders were declared illegal.* Even if the objective of the disagreement settlement mechanism is to prevent a deadlock from derailing the

⁹⁵ Order to File Submissions on Residual Jurisdiction to Terminate, para. 6.

⁹⁶ Order to File Submissions on Residual Jurisdiction to Terminate, para. 7, p. 3.

⁹⁷ Case 003, *International Co-Prosecutor’s Response to the Co-Investigating Judges’ Request to Declare Whether She Intends to Seize the Supreme Court Chamber*, 16 September 2021, D273/1, para. 2.

⁹⁸ Case 004 Considerations, p. 49.

⁹⁹ SCC Decision in Case 004/2, para. 67; CIJs’ Decision on Forwarding Case File 003, para. 21.

¹⁰⁰ SCC Decision in Case 004/2, para. 53; CIJs’ Decision on Forwarding Case File 003, para. 23.

¹⁰¹ SCC Decision in Case 004/2, paras 53-54.

proceeding from moving to trial, a case cannot go to trial in the absence of a valid Closing Order.¹⁰²

- f. *Which ECCC organ is responsible for processing the case following the PTC Considerations.* The PTC, as the highest appellate chamber at the pre-trial stage of the proceedings, clarified that the CIJs are responsible for processing the case following the PTC's Considerations.¹⁰³
- g. *Whether one CIJ can forward the case file.* The CIJs have jointly declared that 'neither of [them] will forward the case file alone.'¹⁰⁴
- h. *Who is seized of the case after PTC unanimously found in its Considerations that both Closing Orders are illegal?* Unanimously, the PTC found that there is no obligation for it to reach a unanimous decision, that the CIJs 'are responsible for processing the case in accordance with Internal Rules 77(13) and (14),' and that the reinstatement of the CIJs 'puts the Office of the Co-Investigating Judges in a position to carry out its duty, unlike after the Considerations in Case 004/2 were issued.'¹⁰⁵

iii. The CIJs Must Terminate Case 004 To Ensure Mr YIM Tith's Fair Trial Rights

40. The imperative for the CIJs to act was recognised by their request for submissions on residual jurisdiction in Case 003 where they 'had put the parties on notice [...] that if no other judicial body in the Court was willing to take up the baton and bring the case to a conclusion [they] would entertain or request submissions on our residual jurisdiction to terminate the case.'¹⁰⁶ Due to the immediate risk of violating Mr YIM Tith's rights, notably his rights to a speedy determination of the case against him, to equal treatment, and to legal certainty, the CIJs must exercise their residual jurisdiction in Case 004 immediately.
41. The disagreements that have plagued the national and international components of the ECCC over whether Mr YIM Tith falls within the Court's jurisdiction have left proceedings remaining precariously pending against him in violation of his right to a

¹⁰² SCC Decision in Case 004/2, para. 68; CIJs' Decision on Forwarding Case File 003, para. 36.

¹⁰³ Case 003 Consolidated Decision, para. 72.

¹⁰⁴ CIJs' Decision on Forwarding Case File 003, para. 37.

¹⁰⁵ CIJs' Decision on Forwarding Case File 003, para. 37.

¹⁰⁶ CIJs' Decision on Forwarding Case File 003, para. 42.

speedy final determination against him.¹⁰⁷ It has been over 15 years since the preliminary investigation against Mr YIM Tith was opened on 10 July 2006¹⁰⁸ with no conclusion to the pre-trial proceedings following the PTC's disposal of the appeals against the Closing Orders on 17 September 2021.¹⁰⁹ Failing to terminate Case 004 in the face of such woeful and unjustifiable delays violates Mr YIM Tith's fundamental right to a speedy final determination of his case, which is unequivocally enshrined in Cambodian, ECCC, and international law.¹¹⁰ Any hesitancy by the CIJs to perform their duty to terminate, seal and archive the case immediately will cause further irremediable and unnecessary delay to the Case 004 proceedings in violation of Rule 21. The procedural impasse in Case 004 makes clear that the baton must not be passed any further – the actions of the PTC, TC and SCC have demonstrated that it now falls to the CIJs to take action in Case 004.

42. As to equal treatment, the Defence notes that in terminating Case 004/2, the SCC considered that there was no valid indictment and 'no agreement after thirteen years of investigation that AO An was within the jurisdiction of the Court.'¹¹¹ This reasoning must apply to Mr YIM Tith to avoid a violation of his rights to equal treatment and legal certainty.¹¹² The European Court of Human Rights has held that 'one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.'¹¹³ In another decision, it held that inconsistent adjudication of claims brought by persons in similar situations leads to a state of uncertainty, which reduces the public's

¹⁰⁷ CIJs' Decision on Forwarding Case File 003, paras 26 and 42. The Defence also incorporates by reference arguments made in *YIM Tith's Appeal of the International Co-Investigating Judge's Indictment*, 2 December 2019, D382/22, paras 37-53.

¹⁰⁸ Case 004/1, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

¹⁰⁹ Case 004 Considerations.

¹¹⁰ 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, Articles 12(2) and 13(1); Establishment Law, Articles 33 *new* and 35 *new*; Rule 21(4); ICCPR, Article 14(3)(c). *See also*: European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 6(1); American Convention on Human Rights, 'Pact of San Jose,' Costa Rica, ETS 5, 22 November 1969, Article 8(2)(1); African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 7(1)(d); Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 ('Rome Statute'), Article 67(1)(c); Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 as updated ('ICTY Statute'), Articles 20(1) and 21(4)(c); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 as amended ('ICTR Statute'), Articles 19(1) and 20(4)(c); Statute of the Special Court for Sierra Leone, 16 January 2002, Article 17(4)(c); Statute of the Special Tribunal for Lebanon, 10 June 2007, Article 16(4)(c).

¹¹¹ SCC Decision in Case 004/2, para. 69.

¹¹² *See supra* fn. 38.

¹¹³ ECtHR, *Brumărescu v. Romania*, Application No. 28342/95, Judgment, 28 October 1999, para. 61.

confidence in the judiciary and deprives individuals of the right to a fair trial.¹¹⁴ Should the CIJs now apply different reasoning to Mr YIM Tith and find that his case should not be terminated for lack of a valid indictment, he would be treated according to different rules than AO An, leading to a state of uncertainty as to the procedure that would govern the outcome of his case.

43. A refusal to dispose of Case 004 immediately would be tantamount to accepting to treat it unequally to Case 004/2, which was archived by the CIJs as soon as they were unavoidably aware that all other procedural avenues had been exhausted. To deny Mr YIM Tith equal treatment to Mr AO An would constitute a clear violation of Article 31 of the Cambodian Constitution and Article 3 of the Cambodian Criminal Procedure Code.¹¹⁵
44. The principle of legal certainty necessitates that courts make decisions clearly and consistently, so that the same legal rules are applied to persons in near identical groups in the same way, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.¹¹⁶ The inconsistent adjudication of Case 004 in a different manner to Case 004/2 (both of which involve(d) a determination of the same procedural situation) violates Mr YIM Tith's right to legal certainty, and furthermore reduces the Cambodian and international public's confidence in the ECCC judiciary.¹¹⁷
45. The CIJs must therefore act to avoid a scenario of uncertainty in Case 004 as to the procedures that govern the outcome of cases at the pre-trial stage of ECCC proceedings. Case 004 has suffered irremediable procedural damage such that it is now impossible to hold a fair trial and the continuation of the proceedings would constitute abuse of process. In such circumstances, it would be offensive to notions of justice and propriety to try Mr

¹¹⁴ ECtHR, *Ștefănică and Others v. Romania*, Application No. 38155/02, Judgment, 2 November 2010, paras 37 and 38.

¹¹⁵ Constitution of the Kingdom of Cambodia, Article 31: 'Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations.' Code of Criminal Procedure of The Kingdom of Cambodia, Article 3: 'Criminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex, language, creed, religion, political tendency, national origin, social status, resources or other situations.' (emphasis added).

¹¹⁶ See *supra* fn. 38.

¹¹⁷ ECtHR, *Ștefănică and Others v. Romania*, Application No. 38155/02, Judgment, 2 November 2010, para. 37. (internal citations omitted). Inconsistent adjudication of claims brought by persons in similar situations leads to a state of uncertainty, which reduces the public's confidence in the judiciary and deprives individuals of the right to a fair trial. See *id.*, para. 38.

YIM Tith¹¹⁸ and ‘odious’ or ‘repugnant’ to the administration of justice to allow the proceedings to continue.¹¹⁹ The principle that a court is obliged to discontinue irretrievably vitiated proceedings before a final determination of a case has been resoundingly recognised in Cambodian law, by international tribunals, and the ECCC, including these very CIJs.¹²⁰

PART III: CONCLUSION

46. After some 15 years of prolonged investigation, and after all legal avenues have been exhausted, no valid indictment has been produced in Case 004.
47. It is clear that the CIJs have exclusive jurisdiction and authority to bring Case 004 to an end, and they must immediately terminate Case 004 in order to avoid causing further and irreparable damage to Mr YIM Tith’s fair trial rights to a speedy determination of the proceedings against him, to equal treatment, and to legal certainty.
48. In Case 004/2, the CIJs sealed and archived the case based on the SCC’s termination and through the application of Rule 69(2)(b) *mutatis mutandis*.¹²¹ They must now achieve the same finality in Case 004 without delay.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that, in the exercise of their discretion and in the interests of justice, the Co-Investigating Judges:

¹¹⁸ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2*, 5 May 2017, D355, para. 39; UK, *R v. Horseferry Road Magistrates’ Court* [1994] 1 A.C. 42 H.L.(E) 74G. See also: ICTR Appeals Chamber, *Barayagwiza v. The Prosecutor* (ICTR-97-19-AR72), ‘Decision,’ 3 November 1999, paras 74-75, 77.


¹¹⁹ ICC Appeals Chamber, *Prosecutor v. Lubanga*, ‘Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, paras 20, 30, and 37.


¹²⁰ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 16; Case 002, *Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002*, 25 November 2013, E284/4/8, para. 75. See for example: ICC Appeals Chamber, *Prosecutor v. Lubanga*, ‘Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, paras 26-39; ICTY Appeals Chamber, *Prosecutor v. Tadić* (IT-94-1-A), ‘Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin,’ 31 January 2000, para. 13; ICTY Appeals Chamber, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-A), ‘Decision on Mićo Stanišić’s Motion Requesting a Declaration of Mistrial and Stojan Župljanin’s Motion to Vacate Trial Judgement,’ 2 April 2014, para. 35; ICTY Appeals Chamber, *Prosecutor v. Karadžić* (IT-95-5/18-AR-73-4), ‘Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement,’ 12 October 2009, para. 45; ICTY Appeals Chamber, *Prosecutor v. Bobetko* (IT-02-62-AR54bis), ‘Decision on Challenge by Croatia to Decision and Orders of Confirming Judge,’ 29 November 2002, para. 15; ICTR Appeals Chamber, *Barayagwiza v. The Prosecutor* (ICTR-97-19-AR72), ‘Decision,’ 3 November 1999, paras 73 to 77. See also CIJs’ Decision on Forwarding Case 003, paras 26 and 42.

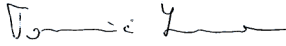
¹²¹ Order Sealing and Archiving Case File 004/2, 14 August 2020, D363/3, para. 9.

- (1) **GRANT** the Request to terminate, seal and archive Case 004 with immediate effect.

Respectfully submitted,


SO Mosseny




Suzana TOMANOVIĆ

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 18th day of October 2021.