

Annex A: Proposed Filing

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No.:** 004/2/07-09-2009-ECCC-TC/SC**Party Filing:** Co-Lawyers for Civil Parties**Filed to:** Supreme Court Chamber**Original Language:** English**Date of Document:** [DATE PENDING] 2020**CLASSIFICATION****Classification of the Document****Suggested by the Filing Party:** Public**Classification by PTC:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**[PROPOSED FILING]
CIVIL PARTIES' SUBMISSIONS ON THE STATUS OF CASE 004/2 AND THE
RIGHTS OF VICTIMS IN THESE PROCEEDINGS**

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Before:**Supreme Court Chamber**

Judge KONG Srim, President
Judge C. N. JAYSASINGHE
Judge SOM Sereyvuth
Judge MONG Monichariya
Judge Maureen HARDING CLARK
Judge YA Narin

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I. INTRODUCTION

1. Co-Lawyers for Civil Parties (“Co-Lawyers”) respectfully request that the Supreme Court Chamber (“SCC”) take the views and rights of the Civil Parties into full account in connection with the pending appeal. Specifically, the Co-Lawyers submit that, pursuant to the ECCC legal framework, the SCC should find that the Trial Chamber (“TC”) is seized of Case 004/2 and that all corresponding administrative steps should be taken to facilitate the proceedings and ensure an expeditious trial. The Co-Lawyers also call upon the chamber to acknowledge the grave and continued violations of the rights of Civil Parties and victims in the Case 004/2 proceedings.
2. The Co-Lawyers’ submissions are justified by compelling arguments anchored in the ECCC’s legal framework. Indeed, any reasonable interpretation of the ECCC’s own legal framework requires that Case 004/2 move forward to trial, based on the International Co-Investigating Judge’s (“ICIJ’s”) Closing Order in this case. The TC erred in law in concluding that it was not seized of the Case 004/2 Case File. A plain reading of the Agreement establishing the ECCC, interpreted in light of its object and purpose as required by the Vienna Convention on the Law of Treaties, (“VCLT”), renders evident that an investigation “shall proceed” unless a supermajority explicitly decides otherwise. Cambodian law, including the international treaty obligations it directly incorporates, likewise counsels for AO An’s indictment to advance to trial in these circumstances.
3. The ECCC’s legal framework similarly establishes the Civil Parties and victims’ rights to be heard, to legal certainty, and to the transparency and publicity of these proceedings – all of which have repeatedly been violated as Case 004/2 remains in procedural limbo. The Co-Lawyers call upon the SCC to acknowledge and redress these violations and, in so doing, take steps to guarantee the dignity and well-being of the victims participating in the Case 004/2 proceedings.
4. In accordance with the SCC’s ruling of [DATE PENDING] 2020, Co-Lawyers for Civil Parties hereby respectfully submit their views on the status of proceedings in Case 004/2 and the measures required to safeguard the rights of Civil Parties and victims in these proceedings. In the interest of expedience, Co-Lawyers file the instant submission in English with Khmer translation to soon follow.¹

¹ Email from Mr. Panhean REATH, Translator, Interpretation and Translation Unit, Subject: Estimated Timeline for Translation, 22 June 2020 (estimating that, if submitted for translation on 25 June 2020, the present submission would be completed by 3 July 2020 before close of business).

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II. PROCEDURAL HISTORY

5. On 16 August 2018, the Co-Investigating Judges (“CIJs”) issued two separate Closing Orders in Case 004/2.² The National CIJ held that Ao An did not fall under the ECCC’s personal jurisdiction as either a senior leader or as most responsible and dismissed the case against Ao An (“Dismissal Order”).³ Conversely, the International CIJ held that the ECCC did have jurisdiction over Ao An and indicted him on numerous charges (“Indictment”).⁴ In conjunction with the Indictment, the International CIJ rendered substantive admissibility decisions in a separate order, in which he rejected a number of Civil Party applications in Case 004/2.⁵ On 29 November 2018, the CPLs filed their submissions on appeal against the *Order on Admissibility of Civil Party Applicants* (“Civil Party Admissibility Appeal”).⁶
6. On 19 December 2019, the PTC issued its *Considerations on Appeals Against Closing Orders* (“Considerations”) but failed to reach a supermajority decision on whether to uphold the Indictment or the Dismissal Order.⁷ The PTC has yet to issue a decision on the Civil Party Admissibility Appeal.
7. On 26 December 2019, the International Co-Prosecutor (“ICP”) sent a letter to the TC requesting an extension on the 15-day deadline to submit her list of witnesses and requesting that the TC convene a trial management meeting.⁸ On 30 December 2019, Ao An sent a letter to the TC requesting that the TC confirm it was not seized of Case 004/2 or, alternatively, that the TC provide guidance as to the filing of preliminary objections.⁹ Neither the CPLs nor the CPLCLs were copied on either of these communications. To the best of the CPLs’ knowledge, the TC did not convene a trial management meeting or provide guidance as to the filing of preliminary objections.

² Case File No. 004/2/07-09-2009-ECCC (“Case 004/2”), **D360**, International Co-Investigating Judge’s Closing Order, 16 August 2018; Case 004/2, **D359**, National Co-Investigating Judge’s Closing Order, 16 August 2018.

³ Case 004/2, **D359**, National Co-Investigating Judge’s Closing Order, 16 August 2018.

⁴ Case 004/2, **D360**, International Co-Investigating Judge’s Closing Order, 16 August 2018.

⁵ Case 004/2, **D362**, International Co-Investigating Judge’s Order on Admissibility of Civil Party Applicants, 16 August 2018.

⁶ Case 004/2, **D362/5**, Appeal Against Order on the Admissibility of Civil Party Applications, 29 November 2018.

⁷ Case 004/2, **D359/24 & D360/33**, Considerations on Appeals Against Closing Orders, 19 December 2019.

⁸ Case 004/2, **E004/2/1.2.18**, International Co-Prosecutor’s Request for Extension to File her Witness and Expert List, filed 26 December 2019.

⁹ Case 004/2, **D359/27.1.1**, Request for confirmation 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.

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8. In January and February of 2020, the ICP and Ao An Defense made at least five filings to the TC in hard copy through the Court Management Section.¹⁰ Although these filings purport to be distributed to “All Civil Party Lawyers in Case 004/2,” the filings were not posted to Zylab or formally notified in any way¹¹ and the CPLs did not receive copies. The CPLs only learned of the filings through the CPLCLs, who were sent informal “courtesy copies” by the ICP and Ao An’s defense counsel.¹² The CPLs have no means of confirming that no other filings were made by the parties in Case 004/2.
9. On 21 January 2020, the Greffier of the TC sent an e-mail informing the PTC judges, the Office of Administration, Ao An, and the Co-Prosecutors that, although they were aware of the considerations, neither the Case 004/2 Indictment nor the underlying case file had been administratively transferred to the TC and, therefore, they were not able to take action on the case.¹³ On 10 February 2020, the Greffier of the TC sent an email to the co-prosecutors and Ao An defense, reiterating that “[t]he *Trial Chamber* has still not been *formally notified* by the Pre-Trial Chamber of the Considerations. The case file has not been forwarded. It is up to the Pre-Trial Chamber to initiate both actions.”¹⁴ Once again, neither the CPLs nor the CPLCLs were copied on these communications. The CPLs have had no means of verifying whether they have been omitted from the list of recipients to other Case 004/2 communications from the TC Greffier or other ECCC officials.
10. On 3 March 2020, the TC Greffier sent an e-mail to the PTC judges, the Office of Administration, Ao An, the Co-Prosecutors, and the CPLs, referring the parties to the

¹⁰ Case 004/2, **E004/2/1.2.20**, International Co-Prosecutor’s Response to Ao An’s Request Regarding the Seizure of Case 004/2, filed 6 January 2020; Case 004/2, **E004/2/1.2.21**, International Co-Prosecutor’s Rule 80 Witness and Expert List, filed 13 January 2020; Case 004/2, **E004/2/1.2.22**, Summary of AO An’s Preliminary Objections under IR 89(1), filed 20 January 2020; Case 004/2, **E004/2/1.2.23**, AO An’s Rule 80 Witness and Expert List Submission with Confidential Annex 1 and his Response to the International Co-Prosecutor’s Rule 80 Witness and Expert List Submission, filed 28 January 2020; Case 004/2, **E004/2/1.2.24**, International Co-Prosecutor’s Request that the Trial Chamber Take Action to Obtain Access to the Case 004/02 AO An Indictment and Case File, filed 4 February 2020.

¹¹ The Civil Party Lawyers note that it is permissible to manually file documents in hard copy. See Practice Direction on Filing of Documents Before the ECCC (Rev. 8), arts. 2.1, 2.5, 2007.

¹² Email from Ms. Megan HIRST, International Lead Co-Lawyer, Subject: ECCC email accounts and Case 004/02, 3 February 2020 (describing Case 004/2 documents courtesy copied to the Civil Party Lead Co-Lawyers); Email from Ms. Megan HIRST, International Lead Co-Lawyer, Subject: Courtesy copy of ICP Request to Trial Chamber to Take Action to Obtain Access to Case 004/2 (Ao An) Indictment and Case File, 4 February 2020 (courtesy copy of filing was not attached to this email and CPLs have not been provided access to this document by the prosecution).

¹³ Case 004/2, **D359/27.1.2**, Email from Mr. Suy-Hong Lim, Greffier of the Trial Chamber, Subject: Information, 21 January 2020.

¹⁴ Case 004/2, **D359/27.1.3**, Email from Mr. Suy-Hong Lim, Greffier of the Trial Chamber, Subject: ICP request dated 4 February 2020, 10 Feb. 2020 (emphasis in the original).

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Trial Chamber's 21 January and 10 February e-mails, which the CPLs did not receive, and noting that "the key issue raised is being litigated by the international Co-Prosecutor before the pre-Trial Chamber."¹⁵ The e-mail also referred to a 13 February communication by the ICP, which Civil Parties had not received.¹⁶

11. In response to a further attempted filing by the ICP on 3 March 2020, the Trial Chamber again emailed the parties on 4 March 2020. Most, but not all, CPLs in Case 004/2 were copied on the correspondence.
12. On 12 March 2020, the international judges of the PTC issued an interoffice memorandum via email on "Transfer of Case File 004/2" and accompanying attachments to which only one CPL was copied.¹⁷ The attachments detailed numerous steps taken and often contradictory communications made by the judges and greffiers of the PTC concerning the transfer of the Case 004/2 case file to the TC.¹⁸ CPLs were not copied to these exchanges and remained unaware of most of these developments until the Memorandum of 12 March was issued.
13. On 16 March 2020, Judge Kimsan PRAK, President of the Pre-Trial Chamber, in his individual capacity, issued an interoffice memorandum via email on "Re-Confirmation of the Decision on Case File 004/2."¹⁹ The Memorandum of 16 March stated that no further administrative action was required to be taken by the PTC. Only a small subset of CPLs were copied on the correspondence.
14. On 30 March 2020, eight lawyers for the Case 004/2 Civil Parties filed a request to the PTC detailing the serious and repeated violations and disregard for the Civil Parties' rights to transparency, legal clarity, participation, and fair and balanced treatment in the Case 004/2 proceedings.²⁰ To date the PTC has not addressed this request.

¹⁵ Email from Mr. Suy-Hong LIM, Greffier of the Trial Chamber, Subject: Concerning ICP communication dated 13 February 2020, 3 March 2020.

¹⁶ *Id.*

¹⁷ Case 004/2, **D359/31.1.2**, Interoffice Memorandum issued by Judge Olivier BEAUVALLET and Judge Kang Jin BAIK, International Judges of the Pre-Trial Chamber, Subject: Transfer of Case File 004/2, paras. 5-20, 12 March 2020.

¹⁸ See Attachments 1-8 to Case 004/2, **D359/31.1.2**, Interoffice Memorandum issued by Judge Olivier BEAUVALLET and Judge Kang Jin BAIK, International Judges of the Pre-Trial Chamber, Subject: Transfer of Case File 004/2, 12 March 2020.

¹⁹ Case 004/2, **D359/31.1.1**, Interoffice Memorandum issued by Judge Kimsan PRAK, President of the Pre-Trial Chamber, Subject: Re-Confirmation of the Decision on Case File 004/2, 16 March 2020.

²⁰ Case 004/2, **D359/33**, Civil Party Lawyers' Request for Necessary Measures to be Taken by the Pre-Trial Chamber to Safeguard the Rights of Civil Parties to Case 004/2, 31 March 2020.

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15. On 3 April 2020, the TC Greffier emailed a statement to the parties (“3 April Statement”), and then posted the statement on the ECCC website.²¹ The 3 April Statement informed the parties that the national judges of the TC believe “there will not be a trial of Ao An now or in the future.”
16. On 4 May 2020, the International Co-Prosecutor filed her Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2.²²
17. On 14 May 2020 (but stamped by the Case File Officer on 26 May 2020), the Ao An Defense Team responded to the International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2.²³
18. On 26 May 2020, the International Co-Prosecutor filed her reply to the Ao An response.²⁴
19. On [DATE PENDING] 2020, in light of the lack of clarity regarding the legal representation of Civil Parties before the SCC, the CPLs filed a request that the SCC take all reasonable measures to safeguard the rights of Civil Parties to Case 004/2 and either recognize, grant case file access, and permit a filing on the view of Civil Parties on the status of Case 004/2 proceedings, or grant standing before the SCC to Co-Lawyers and permit them to file the instant submission on the same.
20. In its decision of [DATE PENDING] 2020, the SCC granted Co-Lawyers permission to file their submission detailing the views of Civil Parties on the status of Case 004/2 proceedings.

III. SUBMISSIONS

A. THE TC IS SEIZED OF CASE 004/2 AND THE CASE SHOULD PROCEED TO TRIAL IMMEDIATELY

1. The TC Erred in Law by Failing to Acknowledge That It Was Seized of the Case 004/2 Case File Pursuant to the ECCC Legal Framework

²¹ Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An, 3 April 2020, available at <https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao>.

²² Case 004/2, E004/2/1, International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020.

²³ Case 004/2, E004/2/1/1, Response to International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 14 May 2020.

²⁴ Case 004/2, E004/2/1/1/1, International Co-Prosecutor’s Reply to AO An’s Letter Regarding her Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 26 May 2020.

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a. The ECCC Agreement Must Be Interpreted in Accordance with Principles of Treaty Interpretation Under International Law as Codified in the Vienna Convention on the Law of Treaties

21. Under the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties, (“VCLT”)—generally applicable to all treaties and specifically incorporated by Article 2(2) of the ECCC Agreement—a treaty must be interpreted based on its plain meaning taken in the context of its object and purpose.²⁵ Article 31(1) of VCLT requires that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to [its] terms [] in their context and in the light of its object and purpose.”²⁶ A supplementary means of interpretation is available under Article 32, such that the preparatory work of the treaty and its context can be referenced to confirm the meaning of terms where an interpretation under Article 31 results in an “ambiguous or obscure” meaning or a “manifestly absurd or unreasonable” result.²⁷ In addition, State practice, including any subsequent agreement between the parties or any subsequent practice in the treaty’s application, is an authentic method of treaty interpretation and, where present, could be determinative.²⁸

i. The Plain Meaning of the ECCC Agreement Indicates That the Indictment Against AO An Should Proceed to Trial

22. The ECCC Agreement envisions that disagreements may arise between the Co-Prosecutors, the Co-Investigating Judges and the judges of the PTC at various stages in the lifecycle of a case; for each of these scenarios, the text of the ECCC Agreement lays out procedures that clearly favor the continuation of an investigation or prosecution in the absence of a supermajority decision to the contrary.

23. Article 7 of the ECCC Agreement details the procedural rule that governs disagreements within the PTC. According to the plain language of Article 7: “A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. [...] If there is no majority, as required for a decision, the investigation or prosecution **shall proceed**” (emphasis added). Unless there is a supermajority decision dismissing the ICIJ Closing Order, the

²⁵ Vienna Convention on the Law of Treaties, art. 31, 23 May 1969, 1155 U.N.T.S. 331 (hereinafter VCLT).

²⁶ *Id.* at art. 31(1).

²⁷ *Id.* at art. 32.

²⁸ *Id.* at arts. 31(3)(a), 31(3)(b).

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- plain meaning of Article 7 thus requires that AO An's indictment proceed to the next phase of the proceedings, namely trial.
24. Other provisions of the ECCC Agreement similarly reflect the principle that an investigation or prosecution should continue absent a supermajority decision to the contrary. For example, Article 5(4) states that if "the [C]o-[I]nvestigating [J]udges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests . . . that the difference . . . be settled in accordance with Article 7." The same language is used in Article 6(4) to set out the dispute resolution process in the case of disagreements between the Co-Prosecutors.
 25. Likewise, the text of the ECCC Law, which forms an integral part of the ECCC Agreement, calls for the continuation of an investigation or prosecution unless a supermajority decision holds otherwise. Article 23 *new* of the ECCC Law states that resolution of a disagreement between Co-Investigating Judges requires a "decision of the Pre-Trial Chamber" with "the affirmative vote of at least four judges," and that "[i]f there is no majority as required for a decision, the investigation shall proceed." According to Article 20 *new*, the resolution of a disagreement between the Co-Prosecutors similarly requires a supermajority of four votes in the PTC, in the absence of which "the prosecution shall proceed."
 26. Here, in keeping with the procedures detailed in the ECCC Agreement, the International Co-Prosecutor filed Introductory and Supplemental Submissions alleging that Ao An is subject to the jurisdiction of the ECCC.²⁹ The Co-Investigating Judges carried out an investigation on the basis of these Submissions, which resulted in their issuing divergent findings on, among others, whether Ao An is subject to the jurisdiction of the ECCC. The plain language of the ECCC Agreement, which is repeated in the ECCC Law, makes clear that the ICIJ Closing Order indicting Ao An should continue to the Trial Chamber absent a supermajority decision to the contrary by the PTC. Any other outcome would contravene the plain language of the ECCC Agreement, which Cambodia and the United Nations formally agreed to.

²⁹ Case 004/20-11-2008-ECCC ("Case 004"), **D1/1**, Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009; Case 004/2, **D27**, Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 15 June 2011; Case 004/2, **D65**, Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011; Case 004/2, **D191**, Co-Prosecutors' Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014; Case 004/2, **D254/1**, Response to Forwarding Order and Supplementary Submission regarding Wat Ta Mealc, 4 August 2015; Case 004/2, **D272/1**, Response to Forwarding Order dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015.

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- ii. The Failure to Proceed to Trial Would Lead to an Absurd Result, Invalidating the AO An Indictment in Contravention of the Object and Purpose of the ECCC Agreement

27. The VCLT requires that the text of the ECCC Agreement be interpreted in light of its “object and purpose,”³⁰ which both further confirm that the Ao An indictment should proceed to trial absent a supermajority decision to the contrary.
28. First, the ECCC Agreement makes clear that a principal object and purpose of the ECCC is bringing suspects to trial. Article 1 of the ECCC Agreement states that “[t]he purpose of the . . . Agreement is to regulate the cooperation [between the U.N. and Cambodia] in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes” committed during the Khmer Rouge period.³¹ Article 11 of the ECCC Agreement, which prohibits the Cambodian government from requesting “an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement,” further underscores the importance that the drafters of the ECCC Agreement placed on effective prosecutions.³² The ECCC Law similarly highlights that a principal object and purpose of the work of the ECCC is bringing suspects to trial.³³ Procedurally stalling the Ao An indictment at the pre-trial stage absent a definitive decision to dismiss the indictment clearly contravenes this object and purpose.
29. Second, the ECCC Agreement identifies access to justice for victims as another primary object and purpose of the ECCC. The preamble to the ECCC Agreement affirms the ECCC’s commitment to providing redress to victims and to the community at large, emphasizing that a purpose of the ECCC is to seek accountability for the crimes

³⁰ VCLT, *supra* note 25, arts. 31-32.

³¹ 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, art. 1, 6 June 2003 [hereinafter ECCC Agreement].

³² See *id.* at art. 11; see also *id.* at Preamble (“**WHEREAS** the Cambodian authorities have requested assistance from the United Nations **in bringing to trial** senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979; **WHEREAS** prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations (hereinafter, “the Secretary-General”) and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia **for the prosecution of crimes** committed during the period of Democratic Kampuchea[.]”) (emphasis added).

³³ See, e.g., Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, arts. 1 and 40 *new*, 19 Aug. 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS RKM 1004 006) [hereinafter ECCC Law].

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committed during the Khmer Rouge period, and that the tribunal should be guided by the “pursuit of justice and national reconciliation, stability, peace and security.”³⁴ In particular, the preamble quotes a United Nations (“U.N.”) General Assembly resolution recalling that “the serious violations of Cambodian and international humanitarian law during the period of Democratic Kampuchea . . . continue to be matters of vitally important concern to the international community as a whole” and recognizing “the legitimate concern of the Government and the people of Cambodia in pursuit of justice and national reconciliation, stability, peace and security.”³⁵

30. In the absence of a supermajority decision to the contrary, advancing the Ao An indictment to trial would thus be consonant with the text of the ECCC Agreement, as well as its twin goals of bringing suspects to trial and providing justice to victims. Nor would doing so infringe on the rights of the accused as set out in Article 14 and 15 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”), namely the rights to equality before the law, to a fair trial, to the presumption of innocence, to a fair and public hearing by an impartial tribunal, and to freedom from ex post facto application of the law.³⁶ Allowing the case to move forward in the absence of a supermajority would not implicate any of the above fair trial rights: such a decision goes purely to the jurisdiction of the court and does not intimate the suspect’s innocence or guilt, or otherwise engage the merits of the case in any way. Notably, as per the ECCC framework, AO An could only be convicted of the crimes in the ICIJ Closing Order by a supermajority decision of the Trial Chamber (or ultimately of the Supreme Court Chamber). In contrast, the failure to advance an otherwise valid indictment to the Trial Chamber would entirely extinguish the victims’ rights to seek justice.

*b. Supplementary Means of Interpretation Under Article 32 of the VCLT
Further Support Having AO An’s Indictment Proceed to Trial.*

i. The Negotiating History of the ECCC

³⁴ See ECCC Agreement, Preamble.

³⁵ *Id.*

³⁶ See ECCC Law, art. 33 *new* (Requiring the Extraordinary Chambers to “ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.”); International Covenant on Civil and Political Rights, arts. 14, 15, 19 December 1966, 999 UNTS 171.

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31. The preparatory work of the ECCC, which is a supplementary means of interpretation under Article 32 of the VCLT, reflects that the ECCC was founded with the help of the international community to prosecute the perpetrators of Khmer Rouge-era crimes, along with providing redress for their victims. The history of the Khmer Rouge underscores the importance to victims and the Cambodian community of a public condemnation of the atrocities in a court of law. From 17 April 1975 to 7 January 1979, at least 1.7 million people died from execution, torture, starvation, and forced labor, occurring within the overall four-year collectivization plan that included other human rights violations such as family separation, forced marriages, and child exploitation.³⁷ In addition to the millions of victims who remained in Cambodia, following the country's fall to the Khmer Rouge regime, approximately 600,000 Cambodians fled the country,³⁸ many having suffered severe trauma without judicial recourse. Cambodian refugees from the Khmer Rouge period resettled in numerous countries throughout the world, among them: the United States (152,748), Vietnam (150,000), France (38,598), Canada (21,489), Australia (17,605), Malaysia (10,000), New Zealand (5,995), and Switzerland (1,717).³⁹
32. Acknowledging a mounting need for accountability and justice, then co-Prime Ministers of Cambodia wrote to U.N. Secretary-General Kofi Annan in 1997 for assistance, "[hoping] that the United Nations and the international community [could] assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion."⁴⁰ With the civil war having recently ended, the co-Prime Ministers recognized that "Cambodia [did] not have the resources or expertise to conduct this very important procedure" of "bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979."⁴¹

³⁷ *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, (n.d.), <https://www.eccc.gov.kh/en/introduction-eccc>; see also DOCUMENTATION CENTER OF CAMBODIA, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979), http://www.d.dccam.org/Projects/Genocide/DK_Book/DK_History--EN.pdf (last visited Nov. 1, 2019).

³⁸ Stéphanie Nann, *Les Cambodgiens en France, entre l'image et la réalité*, MIGRATIONS SOCIÉTÉ 19, 147, 152 (2007).

³⁹ The numbers in parentheses indicate the total number of Khmer Rouge-era refugees resettled in each country. YUK WAH CHAN, DAVID HAINES, AND JONATHAN H.X. LEE, THE AGE OF ASIAN MIGRATION: CONTINUITY, DIVERSITY, AND SUSCEPTIBILITY, VOLUME I, at 245 (2014).

⁴⁰ Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, U.N. Doc. A/51/930 (June 21, 1997).

⁴¹ *Id.*

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33. Over the following years, Cambodia and the international community collaborated to set up a new tribunal mechanism. The King of Cambodia echoed the co-Prime Ministers by voicing support for an internationally-assisted tribunal, as the crimes in Cambodia “concerns the conscience of the world community.”⁴² The U.N. Group of Experts on Cambodia likewise found widespread support among the population: “accountability first and foremost [was] a statement to the millions of Cambodian victims and their relatives and friends that their cries have at last been heard, providing the survivors with a sense of justice and some closure on the past.”⁴³ The Group of Experts reported that “from [their] consultations with Cambodians in and out of Government, [they] heard an unambiguous demand for trials. All spoke of the importance of justice for peace, stability and national reconciliation.”⁴⁴ None of the Cambodians consulted in the report “suggested that peace and trials were irreconcilable.”⁴⁵
34. For its part, the U.N. supported and encouraged a jurisdictional framework designed to be comprehensive. Writing to the General Assembly and Security Council, Secretary-General Annan expressed that “the trial of a single Khmer Rouge military leader which would leave the entire political leadership unpunished would not serve the cause of justice and accountability.”⁴⁶ In its research of the jurisdictional standard ultimately adopted—senior leaders and those “most responsible”—the Group of Experts determined that “the number of persons to be tried might well be in the range of some 20 to 30.”⁴⁷ The Group likewise advocated for what has become a foundational element of the ECCC: dedicated public attendance in the proceedings, because the “trials of the Khmer Rouge leaders must observe the maxim that justice not only be done, but be seen to be done.”⁴⁸ As such, the negotiating history of the ECCC invariably reflects widespread calls for healing, acknowledgement, and reconciliation through trials in pursuit of international justice.

ii. Subsequent Practice Following the Creation of the ECCC

⁴² U.N. Secretary-General, *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, U.N. Doc. A/53/850, Annex ¶ 93 (March 16, 1999).

⁴³ *Id.* at Annex ¶2.

⁴⁴ *Id.* at Annex ¶94.

⁴⁵ *Id.* at Annex ¶100.

⁴⁶ *Id.* at page 3.

⁴⁷ *Id.* at ¶ 110.

⁴⁸ *Id.* at ¶134.

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35. The adoption of the ECCC Internal Rules after the creation of the ECCC, which are now in their ninth version, can be relied upon as an expression of subsequent practice within the meaning of the VCLT. These Internal Rules reflect a continued commitment to allowing investigations and prosecutions to move forward absent a supermajority decision to the contrary, as well as an acknowledgment that the ECCC provisions should be interpreted to provide meaningful participation for the victims.
36. First, various procedural provisions within the Internal Rules reflect overarching principles that favor the advancement of tribunal proceedings as a default presumption. As in the ECCC Law, Internal Rule 72(2) establishes that in the event of disagreement either Co-Investigating Judge may submit the matter for review by the PTC.⁴⁹ If the PTC subsequently fails to achieve the majority to reach a decision, “the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand.”⁵⁰ For other pre-trial appeals, Rule 77 likewise requires an affirmative vote to halt the *status quo* continuation of any challenged proceeding. By default, in the absence of the required majority, any “order or investigative action other than an indictment . . . shall stand.”⁵¹ Similarly, in the absence of a supermajority decision to the contrary, Rule 77 provides “[a]s regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.”⁵²
37. Second, Internal Rule 21 sets out the fundamental principles of the ECCC, including that the core ECCC documents must always be interpreted to safeguard the interests of the victims and to ensure that their rights are respected throughout the proceedings.⁵³ As the PTC recognized in Case 002, “the [ECCC] Agreement provides that one of the fundamental principles for the establishment of [the] ECCC is ‘national reconciliation.’”⁵⁴ This guides the Judges and Chambers of [the] ECCC to not only seek the truth about what happened in Cambodia, but also to pay special attention and assure a meaningful participation for the victims of the crimes committed as part of its pursuit for national reconciliation.⁵⁵ Likewise, Internal Rule 29 similarly enshrines the need for

⁴⁹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 72(2) (revised on 16 January 2015).

⁵⁰ *Id.* at Rule 72(4)(d).

⁵¹ *Id.* at Rule 77(13)(a).

⁵² *Id.* at Rule 77(13)(b).

⁵³ *Id.* at Rule 21; Case File No. 002/19-09-2007-ECCC (“Case 002”), **D404/2/4**, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, ¶ 61.

⁵⁴ *Id.* at ¶ 61.

⁵⁵ *Id.*

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the ECCC to consider the rights and needs of victims, mandating that the ECCC “ensure the protection of [v]ictims who participate in the proceedings,” and that the officers of the Court “take account of the needs of victims” when fulfilling their duties.⁵⁶ In pursuit of these aims, the ECCC provides a unique mechanism for victim participation—the Civil Party action—whose “purpose before the ECCC is to . . . [s]eek collective and moral reparations.”⁵⁷ This language, taken together, guides the ECCC to pay special attention to and assure the meaningful participation of victims and their right to seek justice as part of the broader national pursuit of truth and reconciliation. These articulated aspirations would ring hollow however, if an otherwise valid indictment does not proceed to trial because of procedural deadlock before the PTC.

2. Cambodian Law, Including the International Law It Incorporates Via Its Constitution, Supports Permitting an Existing Indictment to Proceed to Trial

a. Cambodian Law Favors Justice for Victims and the Continuation of Proceedings in the Absence of a Contrary Ruling by a Superior Authority

38. Cambodian domestic law, on which the governing rules of the ECCC draw heavily, favors justice for victims and the continuation of proceedings in the absence of a contrary ruling. In the opening remarks to the Criminal Procedure Code, Minister of Justice Ang Vong Vathana states that they believe the Code will become an “important instrument” for promoting “access to justice in the Kingdom of Cambodia.”⁵⁸ Indeed, this reference to access to justice is the last line of these opening remarks, thereby framing the entirety of the Code’s content.
39. The content of the Code itself also supports allowing AO An’s case to move forward, especially in its articulation of a presumption of continuation. For example, Article 255 of the Cambodian Criminal Procedure Code directs that, “[i]f the Investigation Chamber receives a request for nullification, the investigating judge can continue his/her investigation, unless it is decided otherwise by the president of the Investigation Chamber.”⁵⁹ Likewise, Article 275 asserts that, “[i]n case there is an appeal against any warrant other than a settlement warrant, the investigating judge can continue his/her investigation unless there is a decision made otherwise to the contrary by the president

⁵⁶ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 29(2) (revised on 16 January 2015).

⁵⁷ *Id.* Rule 23(1)(b) *new*.

⁵⁸ Criminal Procedure Code of Kingdom of Cambodia (2007), Remarks of His Excellency Ang Vong Vathana.

⁵⁹ Criminal Procedure Code of Kingdom of Cambodia, art. 255.

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of the Investigation Chamber.”⁶⁰ These Articles embody the same idea that is evident in the ECCC Law and the Internal Rules—in the absence of a superior authority affirmatively halting proceedings, the presumption is in favor of continuation.

b. International Obligations, including the Duty to Prosecute and Victims' Right to a Remedy, are Part of Cambodian Law and Support Moving the Indictment Forward

40. Cambodian law incorporates international law. Therefore, the duty to prosecute and the right to a remedy for victims established in international treaty and custom are a duty and a right under Cambodian law. Insofar as the ECCC is a Cambodian institution, it is constrained by these obligations.⁶¹
41. International law is binding in Cambodia. Article 31 of the Cambodian Constitution incorporates the obligation to respect human rights as stipulated in international law sources into domestic law.⁶² In 2007, the Cambodian Constitutional Council affirmed that international law recognized by Cambodia is, indeed, law in force in that country and shall be taken into account by the country's judges.⁶³ Even if considered a complementary source of law here, international law comports with and reinforces the relevant norms and procedural rules established in Cambodian domestic law.⁶⁴
42. Sources of international law to which Cambodia is bound—treaties, state practice, and international jurisprudence—oblige States to prosecute crimes of a certain gravity. Multilateral treaties to which Cambodia is a party contain within them either an explicit or implied duty to prosecute perpetrators of grave offenses.⁶⁵ Soft law sources and

⁶⁰ Criminal Procedure Code of Kingdom of Cambodia, art. 275.

⁶¹ Separately, the Vienna Convention on the Law of Treaties reiterates the need to take into account “any relevant rules of international law applicable in the relations between the parties.” VLCT, *supra* note 25, art. 31(3)(c).

⁶² The Constitution of the Kingdom of Cambodia, 21 September 1993, art. 31 (as amended through 2008).

⁶³ Decision No. 092/003/2007 CC.D (Constitutional Council 10 July 2007) (Cambodia) (“The term ‘Laws’ as above referred to means the national laws, including the Constitution which is the supreme law, all the laws that remain in force, and the international laws already recognized by the Kingdom of Cambodia, in particular the Convention on the Children’s Rights.”).

⁶⁴ BORA MEAS, CAMBODIAN CONSTITUTIONAL LAW 81 (Peng Hor et al. eds. 2016) (suggesting that the proper place of international law within Cambodian law is complementary to domestic law, at times superseding the latter, while at other times taking precedence, depending on the norm in question).

⁶⁵ See generally Thoris Ingadottir, *The ICJ Armed Activity Case — Reflections on States’ Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions*, 78 NORDIC J. INT’L L. 581, 591-95 (2010) (describing the international obligation to prosecute grave breaches); see also Rome Statute of the International Criminal Court, Preamble, 17 July 1998, 2187 U.N.T.S. 90 (Cambodia ratified on 11 April 2002) (“affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation[.]”); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, 12 August 1949,

international courts have reiterated the prohibition against impunity for severe human rights violations. The Universal Declaration of Human Rights proclaims, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁶⁶ A 2006 U.N. General Assembly resolution establishing guidelines for protecting the right to a remedy affirms the duty to prosecute three separate times.⁶⁷ The duty has been asserted by States before the International Court of Justice (ICJ),⁶⁸ and the ICJ has encouraged States to cooperate with criminal tribunals and to subject perpetrators to domestic proceedings.⁶⁹

75 U.N.T.S. 31 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [listed in Article 50], and shall bring such persons, regardless of their nationality, before its own courts.”) (Cambodia accession on 8 June 1959); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, 12 August 1949, 75 U.N.T.S. 85 (Cambodia accession on 8 June 1959) (same for breaches in its Article 51); Geneva Convention (III) relative to the Treatment of Prisoners of War, art. 129, 12 August 1949, 75 U.N.T.S. 135 (same for breaches listed in its Article 130) (Cambodia accession on 8 June 1959); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 146, 12 August 1949, 75 U.N.T.S. 287 (same for breaches listed in its Article 147) (Cambodia accession on 8 June 1959); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5, 7.1, 10 December 1984, 1465 U.N.T.S. 85 (Article 5: “Each State Party shall take measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: [listing territorial or national links to the offender, the offense, or the victim]); (Article 7.1: The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”) (Cambodia accession on 15 October 1992); Convention on the Prevention and Punishment of the Crime of Genocide, arts. IV, VI, 9 December 1948, 78 U.N.T.S. 277 (Article IV: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”) (Article VI: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction[.]”) (Cambodia accession on 14 October 1950); International Covenant on Civil and Political Rights, art. 2(3)(a), 19 December 1966, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”) (Cambodia accession on 26 May 1992).

⁶⁶ Universal Declaration of Human Rights, art. 8, G.A. Res. 217 (III), (10 December 1948).

⁶⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶¶ 3(b), 4 and 22(f), G.A. Res. 60/147, UN Doc. A/RES/60/147 (21 March 2006).

⁶⁸ See, e.g., *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. Rep. 3, ¶ 8 (24 May 1980) (presenting the U.S. claim that Iran should “submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates[.]”); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 25 (19 December 2005) (presenting the Congo claim that Uganda violated principles of international law by “failing to punish persons under its jurisdiction or control having engaged in [human rights abuses.]”); *Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, Judgment, 2012 I.C.J. Rep. 422, ¶ 71 (20 July 2012) (“Belgium requested the Court to adjudge and declare that Senegal is obliged to bring criminal proceedings [against an alleged torturer] . . . and, failing that, to extradite him to Belgium.”).

⁶⁹ *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 280 (19 December 2005) (finding that Uganda “by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its

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43. All of the international sources discussed above denote that Cambodia is bound under domestic law by both treaty and custom to prosecute those accused of gross human rights abuses. Advancing the ICIJ Closing Order's indictment of AO An to the Trial Chamber would, therefore, not only be consistent with a reading of the ECCC Agreement in light of international law but would also satisfy Cambodia's concrete obligation to prosecute under its own law.
44. In addition to establishing Cambodia's duty to prosecute serious human rights offenders, international law establishes victims' right to a remedy. This right includes participation in the prosecution of those responsible for their harm and the ability to claim reparations. When a case is frozen in procedural limbo, these remedies are both placed beyond reach.
45. Treaty and customary law entitle victims to an effective remedy. This right was the subject of a U.N. General Assembly resolution relying on provisions found in the Universal Declaration of Human Rights (article 8); the International Covenant on Civil and Political Rights (article 2); the International Convention on the Elimination of All Forms of Racial Discrimination (article 6); the Convention against Torture (article 14); and the Rome Statute (articles 68 and 75), among others.⁷⁰ That resolution asserts that victims of serious crimes have the rights to "[e]qual and effective access to justice; [a]dequate, effective and prompt reparation for harm suffered; [and a]ccess to relevant information concerning violations and reparation mechanisms."⁷¹
46. The ECCC echoes these entitlements within its own procedural mechanisms, such as the participation of Civil Parties through Internal Rule 23. These objectives, which comprise the international legal right to a remedy, are only satisfied in practice if otherwise valid indictments are permitted to proceed to the trial phase, where judges can make findings of law and fact to determine the responsibility of the accused for the

obligations"); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 471(6) (26 February 2007) (finding Serbia responsible under the Genocide Convention for not cooperating with the International Criminal Tribunal for the former Yugoslavia); Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. Rep. 422, ¶ 122 (20 July 2012) (finding the Republic of Senegal had breached its obligation "by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed[.]").

⁷⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble, G.A. Res. 60/147, UN Doc. A/RES/60/147 (21 March 2006).

⁷¹ *Id.* at ¶11.

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crimes alleged, as well as any corresponding collective and moral reparations awarded to the Civil Parties.

B. CIVIL PARTIES ARE PARTIES TO THE PROCEEDINGS AND THEIR RIGHTS MUST BE RESPECTED

47. Civil parties are parties to the proceedings.⁷² Internal Rule 23*bis*(2) provides that “[u]nless and until rejected, Civil Party applicants may exercise Civil Party rights.”⁷³

48. Article 12(2) of the ECCC Agreement provides that:

The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.⁷⁴

49. Article 34 *new* of the Law on the Establishment of the ECCC provides that:

Trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international non-government organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.⁷⁵

50. Rule 21(1) of the Internal Rules provides that:

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:

...

⁷² Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Glossary (revised on 16 January 2015) (defining “Party” to include the Co-Prosecutors, the Charged Person/Accused and Civil Parties).

⁷³ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9) (revised on 16 January 2015).

⁷⁴ ECCC Agreement, article 12(2).

⁷⁵ ECCC Law, article 34 *new*.

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(c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings[.]⁷⁶

51. The Supreme Court Chamber has held that the rights contained in Article 14(1) of the International Covenant on Civil and Political Rights apply to civil parties.⁷⁷ Article 14(1) provides “[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁷⁸

1. The Fundamental Rights of Victims Enshrined in ECCC Core Documents and International Law Must Guide These Proceedings

52. Despite the clear need for the transfer of the Case 004/2 Indictment and underlying case file to the TC, the Court Management Section has yet to effectuate the transfer. As a result, Case 004/2 is caught in procedural limbo between the Office of the Co-Investigating Judges, the PTC and the TC, which has caused—and continues to cause—substantial prejudice to the rights of the Civil Parties.

53. Respect for the rights of victims is an essential component of national reconciliation, a goal identified as “one of the fundamental principles for the establishment of [the] ECCC[.]”⁷⁹ This court recognized in Case 002/2 that the principle of national reconciliation “guides the Judges and Chambers of [the] ECCC to not only seek the truth about what happened in Cambodia, but also to pay special attention and assure a meaningful participation for the victims of the crimes committed as part of its pursuit for national reconciliation.”⁸⁰ Whether or not the case is allowed to move to trial fundamentally affects the rights and interests of civil parties – if the case does not proceed, their rights before the ECCC are extinguished, including the right to participate in all stages of the proceedings going forward and have their legal interests represented, their right to a judicial decision, as well as their right to reparation for the

⁷⁶ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 21(1) (revised on 16 January 2015).

⁷⁷ Case 002, **F26/2/2**, Decision on Co-Prosecutors and Civil Party Lead Co-Lawyers’ Request for Additional Time for Examination of SCW-5, para. 7, 30 June 2015 (recognizing that Civil Parties “enjoy fair trial rights defined in Article 14(1) of the ICCPR” and “have a specific and limited role in the proceedings, as set out in the ECCC’s Internal Rules”).

⁷⁸ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

⁷⁹ Case 002, **D404/2/4**, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, para. 65, 24 June 2011.

⁸⁰ *Id.*

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harm suffered if the accused is convicted. The Civil Parties must be given the right to be heard on the matters that may serve to extinguish their participatory rights.

54. Internal Rule 21 further sets out the fundamental principles of the ECCC, including that the core ECCC documents must always be interpreted to “safeguard the interests” of the victims and to ensure that their rights are respected throughout the proceedings.⁸¹ Likewise, Internal Rule 29 mandates that the ECCC “ensure the protection of [v]ictims who participate in the proceedings,” and that the officers of the Court “take account of the needs of victims” when fulfilling their duties.⁸² In pursuit of these aims, the ECCC provides a unique mechanism for victim participation – the Civil Party action.⁸³ This is echoed by the international judges of the PTC who cite to the fundamental rights embodied in Internal Rule 21(1) in their Memorandum of 12 March to warn that “No rights will be preserved, if the Pre-Trial Chamber does not clarify the possibility for the parties to access the competent judges, namely the Trial Chamber.”⁸⁴
55. Treaty and customary international law also enshrine the obligation to protect victims and entitle victims to rights, including the right to a remedy and access to justice. Victims’ rights were the subject of a U.N. General Assembly resolution asserting that victims of serious crimes have the right to “[e]qual and effective access to justice; [a]dequate, effective and prompt reparation for harm suffered; [and a]ccess to relevant information concerning violations and reparation mechanisms.”⁸⁵ Other international

⁸¹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 21 (revised on 16 January 2015); Case 002, **D404/2/4**, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, para. 61, 24 June 2011.

⁸² Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 29 (revised on 16 January 2015).

⁸³ Case 002, **D404/2/4**, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, para. 96, 24 June 2011; Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 23(1)(b) *quinquies* (revised on 16 January 2015).

⁸⁴ Interoffice Memorandum issued by Judge Kang Jin BAIK and Judge Olivier BEAUVALLET, International Judges of the Pre-Trial Chamber, Subject: Notification of the Pre-Trial Chamber’s Considerations in Case 004/2, 3, 29 January 2020; *see also* Attachment 6 to Case 004/2, **D359/31.1.2**, Interoffice Memorandum issued by Judge Olivier BEAUVALLET and Judge Kang Jin BAIK, International Judges of the Pre-Trial Chamber, Subject: Transfer of Case File 004/2, 12 March 2020; Case File No. 001/18-07-2007-ECCC/SC, **F28**, Appeal Judgment, para. 661, 3 February 2012 (“[T]his Chamber is of the view that although collective and moral reparations may not reinstate the victims of human rights abuses either physically or economically, other general purposes of reparations are fulfilled before the ECCC to the extent that the reparation responds to ‘the psychological, moral, and symbolic elements of the violation.’ This is achieved through the ‘verification of the facts and full and public disclosure of the truth’ as fostered by the findings of the Co-Investigating Judges and three Chambers, **through the access and participation of victims to proceedings**, and through victims’ identification and individual recognition in the final judgement that represent a public acknowledgement of their suffering...” (emphasis added).

⁸⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para.11, 16 December 2005, U.N.G.A. Res. 60/147.

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treaties and tribunals, including the International Criminal Court, have recognized that the fundamental right to a remedy and to effective participation in ongoing proceedings “lie at the heart of victim’s rights.”⁸⁶

56. Taken together, this language requires the ECCC to take particular care to assure the effective and meaningful participation of victims and protect their right to seek justice as part of the broader national pursuit of truth and reconciliation. These fundamental principles must guide all parties in all proceedings before the court, including those before the SCC now.

2. Victims’ Rights to be Heard, to Information, to Legal Certainty, and to the Safeguard of their Dignity and Well-being Must Be Respected in Proceedings before the ECCC

57. The continued uncertainty surrounding the status of Case 004/2 violates victims’ rights to be meaningfully heard and prevents Civil Parties from effectively and meaningfully participating in the proceedings. All parties and entities of the ECCC must conduct themselves in a manner that safeguards the dignity and well-being of the victims and ensures that their rights are respected.

a. Civil Parties’ right to legal certainty requires that the court provide Civil Parties legal certainty and timely, clear and transparent information on the status of Case 004/2

58. All parties, including victims, have a right to legal certainty and transparency throughout the ECCC proceedings. Under Internal Rule 21, the core ECCC documents must always be interpreted to “ensure legal certainty and transparency of proceedings.”⁸⁷ In this court and others, the principles of transparency and legal

⁸⁶ Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, Pre-Trial Chamber II, para. 5, 3 November 2010; *see also* Rome Statute of the International Criminal Court, arts. 68, 75, 17 July 1998, 2187 U.N.T.S. 90; American Convention on Human Rights, art. 25(1), 22 November 1969, 1144 U.N.T.S.123. (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention”); Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, art. 27(1), 9 June 1998, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997) (“If the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation”); Universal Declaration of Human Rights, art. 8, 10 December 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71; International Covenant on Civil and Political Rights, art. 2, 16 December 1966, 999 U.N.T.S. 171; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, 10 December 1984, 1465 U.N.T.S. 85.

⁸⁷ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 21 (revised on 16 January 2015).

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certainly require that the court issue reasoned decisions in the matters that come before them.⁸⁸ Under international standards of criminal justice, legal certainty and transparency also encompass the court's obligation to keep victims informed of the "scope, timing, and progress of proceedings,...especially where serious crimes are involved" and to "avoid[] unnecessary delay in the disposition of cases[.]"⁸⁹

59. In Case 002, the PTC cautioned that the Co-Investigating Judges must issue reasoned decisions on the admissibility of Civil Parties in order to respect fundamental principles of legality, including transparency and legal certainty.⁹⁰ In its *Considerations on Appeals Against Closing Orders*, the PTC once more recognized the importance of legal certainty as one of the "fundamental pillars of law."⁹¹ The chamber noted that the Royal Government of Cambodia and the United Nations secured the principle of legal certainty through procedures "to conclusively resolve such disagreements in order to avoid procedural stalemates that would, inter alia, hamper the effectiveness of proceedings."⁹² The PTC itself found that the issuance of split Closing Orders constitutes an "affront to the principle of legal certainty[.]"⁹³ and creates an "unprecedented legal predicament" that violates the principles of the ECCC.⁹⁴

60. The PTC's issuance of its *Considerations* did not provide legal certainty to Civil Parties. Despite the ECCC's legal framework that mandates the Case 004/2 Indictment

⁸⁸ Case 002, **D411/3/6**, Pre-Trial Chamber Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, paras. 37-38, 24 June 2011. The Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible. See *Prosecutor v. Momir Nikolic*, Judgment on Sentencing Appeal, Appeals Chamber, para. 96, 8 March 2006, Case No. IT-02-60/1-A. The Appeals Chamber of the ICTY held that "as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision." *Prosecutor v. Milutinovic et al.*, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release, Appeals Chamber, para. 11, 1 November 2005, Case No. IT-05-87-AR65.1; see also *Prosecutor v. Lubanga*, ICC-01/04-01/06 -774, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81," Appeals Chamber, para. 30, 14 December 2006 (noting that "only on the basis of a reasoned decision will proper appellate review be possible").

⁸⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 6(a), (e), 29 November 1985, U.N.G.A. Res. 40/34, Annex A.1; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 14, 16 December 2005, U.N.G.A. Res. 60/147.

⁹⁰ Case 002, **D411/3/6**, Pre-Trial Chamber Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, paras. 37-38, 24 June 2011.

⁹¹ Case 004/2, **D359/24 & D360/33**, Considerations on Appeals Against Closing Orders, paras. 68, 95, 205, 19 December 2019.

⁹² Case 004/2, **D359/24 & D360/33**, Considerations on Appeals Against Closing Orders, para. 111, 19 December 2019.

⁹³ Case 004/2, **D359/24 & D360/33**, Considerations on Appeals Against Closing Orders, para. 205, 19 December 2019.

⁹⁴ Case 004/2, **D359/24 & D360/33**, Considerations on Appeals Against Closing Orders, paras. 101-24, 19 December 2019.

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should proceed to trial absent a supermajority decision to the contrary, as discussed above, opposing directives from the national and international judges of the PTC to the case file officer have resulted in procedural deadlock and the failure to transfer the Case 004/2 case file to the TC, effectively bringing the proceedings to a halt without any clear process for resolving the stalemate.

61. Since the *Considerations* were issued, neither the PTC nor any other body of the ECCC has issued a clear, public explanation regarding the status of Case 004/2 or the way forward. The additional conflicting inter-office memoranda issued by the international judges of the PTC on 12 March 2020 and by the Presiding Judge of the PTC in his individual capacity on 16 March 2020 have simply amplified the problem. Most recently, the TC's issuance of a statement sharing information concerning the status of the Case File was an apparent attempt to provide information to the Civil Parties, but its inclusion of the national judges' opinion that "there will not be a trial of Ao An now or in the future" only fostered further confusion in light of the ongoing proceedings. The lack of clarity inherent in these communications constitutes a clear violation of victims' right to legal certainty and to timely, clear and transparent information, leaving Civil Parties unclear as to the status of Case 004/2 and their rights going forward.

b. The SCC Bears a Duty to Protect the Dignity and Well-Being of Victims Participating in the ECCC Proceedings

62. It is a fundamental principle of proceedings before the ECCC that the interests of victims be safeguarded.⁹⁵ Undergirding the entire regime of victim participation at the ECCC are principles of international law recognizing and responding to the vulnerabilities and trauma experienced by victims of crime and mass atrocity and intended to prevent harm to such victims as a consequence of their participation in the justice process. International norms governing judicial processes call for victims to be treated with sensitivity, compassion, and respect for their dignity, to be given special consideration and care to prevent their re-traumatization, and to be protected from physical and psychological harm.⁹⁶

⁹⁵ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), Rule 21 (revised on 16 January 2015).

⁹⁶ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 10, 16 December 2005, U.N.G.A. Res. 60/147; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 4, 16, U.N.G.A. Res. 40/34, 29 November 1985, Annex A.1; Rome Statute of the International Criminal Court, arts. 68, 75, 17 July 1998, 2187 U.N.T.S. 90.

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63. As detailed elsewhere in this filing, the obstacles to meaningful and effective victim participation, the inadequacy of information sharing with victims, and the lack of transparency and legal certainty embodied in the ongoing deadlock in Case 004/2 cause lasting and impermissible harm to victims. **If allowed to persist, these circumstances would not only constitute a grave and ongoing violation of victim rights, but would risk re-traumatizing victims, undermining their trust and confidence in the judicial process, jeopardizing the contributions to national reconciliation that the ECCC may make, and sending the particularly damaging messages that the court does not respect victim rights, value victim participation, or understand victim suffering.**
64. The SCC has the power to mitigate or avoid perpetuating these unnecessary harms to victims by redressing the TC's error in failing to allow the Ao An Indictment to proceed to trial, as called for by the ECCC legal framework, and by redressing the violations of Civil Party and victim rights that have occurred in these proceedings.



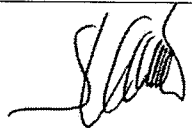

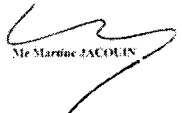
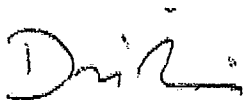
IV. CONCLUSION

65. The Co-Lawyers respectfully submit that the Trial Chamber erred in law by failing to acknowledge that it was seized of the AO An indictment. The ECCC legal framework mandates the default advancement of its proceedings in the absence of express resolution by the PTC. This standard is borne out by the plain meaning of the ECCC Agreement and its accompanying Law, the object and purpose of the tribunal in adjudicating mass atrocities of the Khmer Rouge, and domestic and international law principles emphasizing victims' rights and the duty to prosecute. It is incumbent on the SCC to redress this error of law and safeguard the rights of the victims participating in these proceedings.
66. Accordingly, Co-Lawyers for Civil Parties respectfully request that the Supreme Court Chamber:
- A. **Find** that the Trial Chamber is seized of Case 004/2;
 - B. **Order** the immediate transfer the Case 004/2 Case File to the Trial Chamber;
 - C. **Order** the Trial Chamber to initiate trial proceedings in Case 004/2 with all due haste and hear the case expeditiously;
 - D. **Order** any other administrative actions necessary to facilitate the efficacy and efficiency of Case 004/2 proceedings before the Trial Chamber;

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- E. **Acknowledge** the grave and continued violations of the rights of the Civil Parties and victims and address them accordingly; and
- F. **Issue**, or order issued by the appropriate ECCC body, a clear public statement on the current status of Case 004/2 in light of the 3 April 2020 Trial Chamber statement posted to the ECCC website as well as on the anticipated next steps that will resolve the current procedural deadlock.

Respectfully submitted,

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[DATE PENDING] 2020	LOR Chunthy	Phnom Penh, Cambodia	
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[DATE PENDING] 2020	Daniel MCLAUGHLIN	Phnom Penh, Cambodia	
[DATE PENDING] 2020	Nushin SARKARATI	Phnom Penh, Cambodia	