

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

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**INTERNATIONAL CO-PROSECUTOR'S REPLY TO YIM TITH'S RESPONSE TO  
HER APPEAL OF THE ORDER DISMISSING THE CASE AGAINST YIM  
TITH (D381)**

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## I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby replies to Yim Tith’s response<sup>1</sup> to her appeal<sup>2</sup> of the National Co-Investigating Judge’s closing order (“Dismissal Order”).<sup>3</sup> Yim Tith erroneously argues that the unlawful issuance of two closing orders renders both orders invalid and, therefore, the ICP’s Appeal is moot and should be summarily dismissed.<sup>4</sup> For the reasons provided below, Yim Tith’s argument (i) misrepresents the Pre-Trial Chamber (“PTC”)’s Considerations on Appeals Against Closing Orders in Case 004/2 (“Case 004/2 Considerations”);<sup>5</sup> (ii) misinterprets Rule 67(2);<sup>6</sup> and (iii) fails to demonstrate how the issuance of two conflicting closing orders violates his fair trial rights. Consequently, Yim Tith’s requested remedies that the International Co-Investigating Judge’s closing order (“Indictment”)<sup>7</sup> and Case 004 be dismissed<sup>8</sup> are without merit.

## II. SUBMISSION

### A. Case 004/2 Considerations Does Not Demonstrate *Both* Closing Orders Are Invalid

2. Quite simply, the fact that all five judges of the PTC considered the merits of the closing orders in Case 004/2 after determining that the *issuance* of two conflicting orders was illegal defeats Yim Tith’s arguments and render his response without merit. The Considerations attests to the fact that the procedural error of the *issuance* of two opposing closing orders does not render either closing order invalid. Rather, as the judges did in their Considerations, each closing order must be reviewed to determine if there are fatal errors that would warrant overturning either or both of them. Had the PTC found the closing orders in Case 004/2 were invalid, the five Judges would not have (i) invoked “exceptional review powers”<sup>9</sup> and “exercise[d] [those] broad review powers to *restore*

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<sup>1</sup> **D381/26** Yim Tith’s Response to the International Co-Prosecutor’s Appeal of the National Co-Investigating Judge’s Closing Order, 20 Feb 2020 (“Yim Tith Response”).

<sup>2</sup> **D381/19** International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against Yim Tith (D381), 4 Dec 2019 (“ICP Appeal”).

<sup>3</sup> **D381** Order Dismissing the Case Against Yim Tith, 28 Jun 2019, para. 686.

<sup>4</sup> **D381/26** Yim Tith’s Response, paras 1, 7, 31, EN 01637754. Yim Tith does not respond to the ICP’s grounds of appeal regarding the Dismissal Order. *See e.g.* paras 1, 7, 27, 30.

<sup>5</sup> Case 004/2-**D359/24** & **D360/33** Considerations on Appeals Against Closing Orders, 19 Dec 2019 (“PTC Closing Order Considerations”).

<sup>6</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 Jan 2015 (“Internal Rules” or “Rules”).

<sup>7</sup> **D382** Closing Order, 28 Jun 2019, EN 01620059-71.

<sup>8</sup> **D381/26** Yim Tith Response, paras 1, 33, EN 01637754-55.

<sup>9</sup> Case 004/2-**D359/24** & **D360/33** PTC Closing Order Considerations, para. 124.

the legality and remedy the distortion of procedures caused by the Co-Investigating Judges' unlawful actions in this case",<sup>10</sup> (ii) declared that "it has not assembled an affirmative vote of at least four judges for a decision based on *common reasoning on the merits*",<sup>11</sup> (iii) expressly stated that the "impact" of their finding on the *issuance* of split closing orders is addressed in their separate opinions,<sup>12</sup> or (iv) considered the merits of the closing orders.<sup>13</sup> Indeed, neither the national nor international Judges found *both* closing orders were invalid.<sup>14</sup>

3. Consequently, and contrary to Yim Tith's assertion that "the PTC has in effect upheld the Defence's argument",<sup>15</sup> the PTC's unanimous actions in Case 004/2 unambiguously demonstrate that the closing orders in Case 004 are not null and void, that there is a clear legal basis upon which to proceed with the appeals of the closing orders, and that the ICP's Appeal of the Dismissal Order is not moot.<sup>16</sup>

#### **B. Rule 67(2) Is Inapplicable to the Consequences of the Issuance of Two Opposing Closing Orders**

4. Yim Tith ignores the plain language and purpose of Rule 67(2) to erroneously claim that the rule governs the consequence of the issuance of two opposing closing orders.<sup>17</sup> The language in Rule 67(2) is clear: it applies exclusively to indictments and provides that an indictment is *prima facie* void *only* when its content omits "the identity of the Accused, a description of the material facts[,] and their legal characterisations [...], including the relevant criminal provisions and the nature of the criminal responsibility."<sup>18</sup> Had the

<sup>10</sup> Case 004/2-D359/24 & D360/33 PTC Closing Order Considerations, fn. 59 (emphasis added). *See also* para. 47 ["the Pre-Trial Chamber notes that its power of review as a second-instance investigative chamber may comprise of (i) the Investigation Chamber's powers to purge any irregularities in the procedures it is seised of before sending the Case to trial"].

<sup>11</sup> Case 004/2-D359/24 & D360/33 PTC Closing Order Considerations, EN 01634239 (disposition) (emphasis added).

<sup>12</sup> Case 004/2-D359/24 & D360/33 PTC Closing Order Considerations, paras 89, 124.

<sup>13</sup> Case 004/2-D359/24 & D360/33 PTC Closing Order Considerations, Opinion of Judges Prak Kimsan, Ney Thol, and Huot Vuthy ("National Judges' Opinion"), paras 204-294 and Opinion of Judges Baik and Beauvallet ("International Judges' Opinion"), paras 303-684.

<sup>14</sup> The national Judges said that the impact was that the "Closing Order (Dismissal) [...] shall be upheld". The international Judges said that the impact was that the "Closing Order (Indictment) stands". *See* Case 004/2-D359/24 & D360/33 PTC Closing Order Considerations, EN 01634276 (National Judges' Opinion) and para. 326 (International Judges' Opinion).

<sup>15</sup> D381/26 Yim Tith Response, para. 11.

<sup>16</sup> *Contra* D381/26 Yim Tith Response, paras 1, 7, 12, 27, 30-31.

<sup>17</sup> D381/26 Yim Tith Response, paras 13-16, 26.

<sup>18</sup> Note in this regard that Rule 67(2) uses the language "Indictment", which is a section of the Closing Order, the charging instrument, while Rule 67(4) uses the language "Closing Order". It can only be concluded that the difference in terminology is intentional and not accidental.

drafters intended to include any other criteria, they would have done so. There is consequently no lacuna in Rule 67(2), as Yim Tith erroneously claims, and his resort to inapposite provisions regarding annulment of investigative acts, by analogy, is meritless.<sup>19</sup> Not only does Yim Tith ignore the plain language of Rule 67(2), he also ignores Rule 48, which concerns the annulment of procedural defects and the requirement to demonstrate an infringement of one's rights. He has failed to identify any ECCC law that supports his assertion that the unlawful issuance of two conflicting closing orders renders them both invalid, and he has completely failed to show the prejudice required.

**C. Yim Tith Fails to Demonstrate How the *Issuance* of Two Opposing Closing Orders Violates His Fair Trial Rights**

5. Yim Tith fails to demonstrate how the unlawful *issuance* of two opposing closing orders inherently causes him prejudice.<sup>20</sup> Nor does he show how acting in accordance with the PTC's recognition of the fundamental and determinative default position in the ECCC legal framework, *i.e.* that an indictment *shall* seize the Trial Chamber ("TC") unless overturned by a supermajority decision, could violate his fair trial rights.<sup>21</sup> The Supreme Court Chamber ("SCC") has held that "not all procedural errors will lead to a reversal of the judgement, but only procedural errors that resulted in a 'grossly unfair outcome in judicial proceedings'."<sup>22</sup> The issuance of two closing orders and sending an indictment to trial do not violate the principle of *in dubio pro reo*.<sup>23</sup> Additionally, the PTC has emphasised that the pre-trial stage "does not involve any determination of guilt or innocence" and that the "presumption of innocence is sufficiently safeguarded as, pursuant to Rule 98(4), a *conviction* at trial requires the affirmative vote of at least four judges, and without the required majority, 'the default decision shall be that the Accused is acquitted.'"<sup>24</sup> Furthermore, Yim Tith fails to appreciate that it is not only his rights that the Chamber must have regard to. Internal Rule 2 instructs the Chamber to have

<sup>19</sup> D381/26 Yim Tith Response, paras 14-26.

<sup>20</sup> D381/26 Yim Tith Response, para. 33, EN 01637754.

<sup>21</sup> Case 004/2-D359/24 & D360/33 PTC Closing Order Considerations, paras 106-107, 111-112, 116-117 and citations therein. *See also* Rules 79(1), 77(13)(b); Case 001-F28 Appeal Judgement, 3 Feb 2012, para. 65; D381/25 International Co-Prosecutor's Response to Yim Tith's Appeal Against the Issuance of Two Closing Orders in Case 004, 17 Feb 2020 ("ICP Response to Two Closing Orders Appeal"), paras 31-33, 50, 49, 34.

<sup>22</sup> Case 002-F36 Appeal Judgement, 23 Nov 2016, para. 100.

<sup>23</sup> *See* D381/25 ICP Response to Two Closing Orders Appeal, paras 41-45. *Contra* D381/26 Yim Tith Response, para. 33.

<sup>24</sup> Case 004/2-D359/24 & D360/33 PTC Closing Order Considerations, para. 163 (original emphasis). *See also* Case 002-E176/2/1/4 Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 Sep 2012, para. 52.

“particular attention to the fundamental principles set out in Rule 21”,<sup>25</sup> which safeguards the interests not only of Yim Tith but also of victims, and mandates fair proceedings that preserve a balance between parties’ rights.<sup>26</sup> Such balance promotes national reconciliation by ensuring victims of the crimes have a meaningful voice,<sup>27</sup> while protecting the Accused’s fair trial rights.

#### D. Yim Tith’s Requested Remedies Are Inappropriate

6. For the abovementioned reasons,<sup>28</sup> Yim Tith’s request that the Indictment be dismissed with full prejudice and that the ICP’s Appeal of the Dismissal Order be summarily dismissed is inconsistent with the Case 004/2 Considerations and must be rejected.<sup>29</sup>
7. Additionally, Yim Tith’s request to have Case 004 dismissed ignores the extremely high threshold for the termination or stay of proceedings at the ECCC and, therefore, must also be rejected.<sup>30</sup> The SCC and TC have held that there is no authority to order termination other than for the explicit reasons in Article 7 of the Cambodian Code of Criminal Procedure: death of the accused, the expiry of statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*.<sup>31</sup>
8. Moreover, Yim Tith’s conclusion that “the PTC [...] must now act definitively in accordance with its unanimous view” in Case 004/2<sup>32</sup> completely undermines his requested relief, given that the PTC’s unanimous actions in that case defeat Yim Tith’s claims regarding the legal validity of the closing orders in Case 004.

<sup>25</sup> See also **D381/25** ICP Response to Two Closing Orders Appeal, para. 56.

<sup>26</sup> See also Case 004/2-**D359/24** & **D360/33** PTC Closing Order Considerations, para. 51; **D381/25** ICP Response to Two Closing Orders Appeal, para. 55.

<sup>27</sup> Case 002-**D411/3/6** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 Jun 2011, paras 64-65; 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 Jun 2003, preamble.

<sup>28</sup> See *supra* paras 2-3.

<sup>29</sup> *Contra* **D381/26** Yim Tith Response, paras 1, 7, 31, EN 01637754-55.

<sup>30</sup> **D381/26** Yim Tith Response, paras 1, 33, EN 01637754.

<sup>31</sup> Case 002-**E138/1/10/1/5/7** Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith, 14 Dec 2012, para. 38; Case 002-**E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 Sep 2011, paras 16-17. This high threshold is also reflected in Article 6 of the French Code of Criminal Procedure and international jurisprudence where such measures have been granted where discontinuance is considered the *only* remedy capable of ensuring the fairness of proceedings or otherwise imperative in the interests of justice. See e.g. *Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Motion for Stay of Proceedings, 8 Apr 2010, para. 4; *Lubanga Dyilo*, ICC-01/04-01/06-772, Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 Dec 2006, para. 30.



<sup>32</sup> **D381/26** Yim Tith Response, para. 34.



### III. RELIEF REQUESTED

9. In accordance with the ICP's Appeal of the Dismissal Order, the ICP requests the Pre-Trial Chamber to:
- i. dismiss Yim Tith's Appeal of the Issuance of Two Closing Orders in Case 004;<sup>33</sup>
  - ii. overturn the Dismissal Order;
  - iii. uphold the Indictment; and
  - iv. send Case 004 to trial on the basis of the Indictment.

Respectfully submitted,

Date	Name	Place	Signature
25 March 2020	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh 	

<sup>33</sup> **D381/18 & D382/21** Yim Tith's Appeal of the Issuance of Two Closing Orders in Case 004, 2 Dec 2019.