

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

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**YIM TITH'S REPLY TO THE INTERNATIONAL
CO-PROSECUTOR'S RESPONSE TO YIM TITH'S
APPEAL OF THE INTERNATIONAL CO-INVESTIGATING
JUDGE'S CLOSING ORDER IN CASE 004**

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All Civil Parties in Case 004

INTRODUCTION

1. Mr YIM Tith, through his Co-Lawyers ('the Defence'), hereby submits YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004 ('Reply' and 'Response'). The ICP's Response should be dismissed. The Pre-Trial Chamber ('PTC') unanimously found in Case 004/02 that there is no legal basis for the Co-Investigating Judges ('CIJs') to issue two separate Closing Orders. It follows that the International Co-Investigating Judge's Closing Order in Case 004 ('ICIJ' and 'ICIJ's Closing Order') is illegal, and consequently, null and void.¹ As a result, all submissions on the merits of the ICIJ's Closing Order are now irrelevant to the current proceedings, rendering *Yim Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004* ('Appeal of the ICIJ's Closing Order') and the ICP's Response moot. Accordingly, the PTC should dismiss the defective ICIJ's Closing Order and either: (i) do so with full prejudice and dismiss the case against Mr YIM Tith; (ii) return the Case File to the CIJs to jointly issue a single Closing Order; or (iii) assess Case File 004 itself and issue its own Closing Order.

PROCEDURAL HISTORY

2. The Defence incorporates by reference the procedural histories included in *Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions*,² in *Yim Tith's Appeal of the Issuance of Two Closing Orders in Case 004*,³ and in *Yim Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004*.⁴
3. On 5 December 2019, the ICP filed the *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Yim Tith (D381)*.⁵

¹ *Closing Order*, 28 June 2019, D382.

² *Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions*, 26 November 2018, D378/5, paras 14 to 105.

³ *Yim Tith's Appeal of the Issuance of Two Closing Orders in Case 004*, 2 December 2019, D381/18 ('Appeal of the Issuance of Two Closing Orders'), paras 4 to 10.

⁴ *Yim Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004*, 4 December 2019, D382/22 ('Appeal of the ICIJ's Closing Order'), paras 3 to 9.

⁵ *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Yim Tith (D381)*, 5 December 2019, D381/19.

4. On 6 December 2019, the Co-Lawyers for the Civil Parties filed the *Civil Party Co-Lawyers' Appeal against the National Co-Investigating Judge's Closing Order in Case 004*.⁶
5. On 11 December 2019, the Defence filed *Yim Tith's Urgent Request for Extension of Page and Time Limits for His Responses to the Appeals of the Closing Orders*.⁷ The ICP responded on 20 December 2019.⁸
6. On 6 January 2020, the PTC issued the *Decision on Requests for Extensions of Page and Time Limits for Responses relating to Appeals in Case 004*.⁹
7. On 14 February 2020, the ICP filed the *International Co-Prosecutor's Response to YIM Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004*.¹⁰

**REPLY: THE APPEAL OF THE ICIJ'S CLOSING ORDER AND THE ICP'S
RESPONSE ARE RENDERED MOOT**

8. The Appeal of the ICIJ's Closing Order and the ICP's Response, in their entirety, are rendered moot, since (i) the PTC has decided unanimously in Case 004/02 that there is no legal basis for the CIJs to issue two Closing Orders; (ii) the ICIJ's Closing Order in Case 004 is consequently null and void; and as a result (iii) all individual grounds of appeal on the merits of the ICIJ's Closing Order and responses to those grounds are now irrelevant to the current proceedings.

⁶ *Civil Party Co-Lawyers' Appeal Against the National Co-Investigating Judge's Closing Order in Case 004*, 1 December 2019, D381/20.

⁷ *Yim Tith's Urgent Request for Extension of Page and Time Limits for His Responses to the Appeals of the Closing Orders*, 11 December 2019, D381/21 and D382/23.

⁸ *International Co-Prosecutor's Response to YIM Tith's Extension Requests relating to the Appeals in Case 004*, 20 December 2019, D381/23 and D382/25.

⁹ *Decision on Requests for Extensions of Page and Time Limits for Responses relating to Appeals in Case 004*, 6 January 2020, D381/24 and D382/26.

¹⁰ *International Co-Prosecutor's Response to YIM Tith's Appeal of the Case 004 Indictment*, 14 February 2020, D382/27 ('ICP's Response').

I. THE ISSUANCE OF TWO CLOSING ORDERS HAS NO LEGAL BASIS

9. The PTC judges have signed a unanimous disposition in Case 004/02 that ‘DECLARES that the Co-Investigating Judges’ issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC.’¹¹
10. The PTC held that the CIJs ‘committed a gross error of law’¹² by the ‘unprecedented simultaneous issuance of two separate and opposing Closing Orders in one single case,’¹³ and that the CIJs had ‘violated the ECCC legal framework, derogated from their highest duties and created an unprecedented legal predicament undermining the very foundations of their judicial office.’¹⁴ The PTC ‘unequivocally denounce[d] and condemn[ed] this grave violation of the ECCC legal system’ and found that the CIJs had ‘violated the very foundations of the ECCC legal system.’¹⁵
11. The PTC found it clear and unambiguous that under the ECCC legal framework, a Closing Order must be a single decision and that the framework makes no allowance for the issuance of split Closing Orders.¹⁶ The PTC found that Rule 67(1) ‘clearly stipulates’ that the CIJs ‘shall’ conclude the investigation by issuing ‘a Closing Order, *either* indicting a Charged Person [...], *or* dismissing the case.’¹⁷ The PTC considered that the Glossary in the Internal Rules provides that a ‘Closing Order refers to *the* final order made by the Co-Investigating Judges or the Pre-Trial Chamber at the end of the

¹¹ Case 004/02, *Considerations on Appeals Against Closing Orders*, 19 December 2019, D359/24 and D360/33 (‘Case 004/02 Considerations’), p. 61.

¹² *Ibid.*, paras 98 and 99.

¹³ *Ibid.*, para. 88.

¹⁴ *Ibid.*, para. 89.

¹⁵ *Ibid.*, paras 100 and 102.

¹⁶ *Ibid.*, paras 120 to 121.

¹⁷ *Ibid.*, para. 121 (italic emphasis in original). The ECCC legal framework provides further support. Under Article 5(4) of the 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 (‘UN-RGC Agreement’), 6 June 2003, the CIJs are required to ‘cooperate with a view to arriving at a common approach to the investigation.’ Under Article 23^{new} of the 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’), investigations are ‘the joint responsibility of two investigating judges.’ Rule 14’s text means that the CIJs will carry out their investigations jointly and with equal authority and this provision does not refer to the CIJs acting individually to issue a Closing Order (notably the Rule 14(4) requirement under which the issuance of a Closing Order is an action that must be ‘taken jointly under the ECCC Law and these IRs’ such that no delegation from the rule is possible). Lastly, there is no reference anywhere in the UN-RGC Agreement, Establishment Law, or Internal Rules to the possibility of unilateral issuance by a CIJ of a separate Closing Order. See Appeal of the Issuance of Two Closing Orders, paras 22 to 30.

judicial investigation, *whether* Indictment *or* Dismissal Order.’¹⁸ The PTC also reasoned that the interpretative clause in Rule 1(2) ‘does not offer a sufficient basis to override or undermine core principles of the ECCC Agreement [...] or to claim a power when the effects of such power would conflict with those principles.’¹⁹ The PTC concluded by stressing that:

[T]he errors committed by the Co-Investigating Judges in this case undermine the very foundations of the hybrid system and proper functioning of the ECCC. Despite the crucial and sensitive nature of the matter at stake, the Co-Investigating Judges have allowed themselves to issue the split Closing Orders with remarkably minimal reasoning to justify their action, recalling simply one of their prior decisions. The Chamber finds it especially disturbing that the split Closing Orders were issued on the same day, in one language only, with *an explicit declaration by the two Judges that they agreed on the unlawful issuance of separate and conflicting Closing Orders*. The Chamber considers that the Co-Investigating Judges’ malpractice has in this case jeopardised the whole legal system upheld by the Royal Government of Cambodia and the United Nations. It is astonishing to observe that the Judges were fully “aware of the problem” that the issuance of split Closing Orders would cause, notably on appeal [...].²⁰

[T]he Pre-Trial Chamber strongly deplures and condemns the unprecedented legal predicament which the Co-Investigating Judges’ unlawful actions have precipitated upon the current ECCC proceeding.²¹

12. The PTC’s unanimous finding in Case 004/02 must be applied equally to Case 004. Rule 21 mandates legal certainty in ECCC proceedings.²² The same judicial bench is hearing the appeals in Case 004 and both cases face the identical procedural situation of opposing Closing Orders. The unanimous, unequivocal finding of the PTC has in

¹⁸ Case 004/02 Considerations, para. 121 quoting Internal Rules, Glossary, p. 83 (italic emphasis in original).

¹⁹ *Ibid.*, para. 121.

²⁰ *Ibid.*, para. 123 (italic emphasis added).

²¹ *Ibid.*, para. 124.

²² 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 004/02 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 *ibid.*, para. 38.

effect upheld the Defence's argument in its Appeal of the Issuance of Two Closing Orders.²³ It is now beyond dispute that the two impugned Closing Orders that were the subject of the Case 004 appeals lack any basis in the ECCC legal framework.

II. THE ICIJ'S CLOSING ORDER IS NULL AND VOID

13. The effect of the PTC's unanimous finding is that the ICIJ's Closing Order is null and void. It is trite law that a judicial order with no legal basis is a nullity, meaning, in other words, that to all intents and purposes it no longer exists.²⁴
14. It is axiomatic that ECCC proceedings must take place in accordance with the applicable law.²⁵ As the PTC has recognised, Rule 67 is the applicable law for the issuance of a Closing Order.²⁶
15. Under Rule 67(2), an indictment is 'void for procedural defect' if it does not set out 'the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.'²⁷ Given the specificity of the conditions in Rule 67(2), and the 'void', not voidable, nature of any indictment that has procedural defects, it is beyond question that a Closing Order not issued in strict

²³ Appeal of the Issuance of Two Closing Orders, para. 2: 'By electing to issue their own separate and conflicting Closing Orders in Case 004, both the NCIJ and the ICIJ acted in contravention of the *Constitution of the Kingdom of Cambodia* [...], the *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* [...], and the Rules. The Closing Orders submitted by the CIJs must accordingly be rejected as procedurally defective under Rule 67(2). The Defence submits that the PTC must now intervene to provide Mr YIM Tith with the definitive conclusion to the investigation to which he is entitled and to protect his fundamental fair trial rights.'

²⁴ Black's Law Dictionary defines *nullius in loco* as 'of no legal force,' *void* as 'of no legal effect; null' and a *void judgment* as 'A judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally. From its inception, a void judgment continues to be absolutely null. It is incapable of being confirmed, ratified, or enforced in any manner or to any degree.' Garner, B., [Ed.] *Black's Law Dictionary*, 9th edition, pp. 921, 1173 and 1709.

²⁵ Article 13(1) of the UN-RGC Agreement provides for the protection of the rights of the accused in accordance with Articles 14 and 15 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR'). Article 14(1) of the ICCPR states: 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' See also Establishment Law, Article 35^{new}, providing for the applicability of the minimum guarantees in Article 14 of the ICCPR. Article 33^{new} of the Establishment Law provides that ECCC trials must be 'conducted in accordance with existing procedures in force [...]'. Rule 21 further provides that '[t]he 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 ECCC Agreement.'

²⁶ Case 004/02 Considerations, p. 61.

²⁷ Rule 67(2): 'The Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.'

conformity with the ECCC's procedural law is null and void. The drafters of Rule 67 could not have envisaged every novel twist and turn of ECCC proceedings, still less the unlawful situation in which the CIJs would indict and dismiss at the same time, hence there is a *lacuna* in Rule 67. Despite the absence in Rule 67 of any reference to the current procedural impasse facing the PTC judges, it unambiguously provides that a Closing Order that has no basis in the ECCC's procedural law is null and void.

16. The interpretation of Rule 67(2)'s provisions on the annulment of procedurally defective Closing Orders, including the *lacuna* therein, must be carried out in accordance with the civil law rules of interpretation. According to the Supreme Court Chamber, these interpretive rules 'take[e] into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objectives.'²⁸
17. Aside from Rule 67(2), the ECCC legal framework does not contain any other specific rule or principle for the annulment of Closing Orders. In order to correctly interpret Rule 67(2) within the 'system' of annulment in ECCC pre-trial proceedings, it must be read in the context of the Rule 76 provisions on annulment during the judicial investigation. Under Rule 76(1), the CIJs are required to notify the parties of any part of the proceedings that they consider to be null and void. Rule 76(2) grants the parties the right to submit annulment requests to the CIJs prior to the close of the judicial investigation and to request them to seize the PTC. Rule 76(7) provides that procedural defects in the investigation will be cured by the Closing Order and that the curing of procedural defects by the Closing Order is 'subject to appeal.' The drafters of Rule 76 crafted these annulment mechanisms while contemplating that pre-trial annulments would take place only during the judicial investigation, not afterwards. They could not have envisaged the need for a procedure to challenge the legal basis of the Closing Order's issuance itself.²⁹

²⁸ Case 002/01, *Decision on Immediate Appeal by KHIEU Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31.

²⁹ Indeed, judicial opinion in the ECCC PTC has recognised that action taken in respect of unauthorised procedures will be void: 'A fair hearing or determination of a matter will involve [sic] not only a right to know the case one has to answer and a right to be heard, but also a right to procedural fairness. Procedural fairness in this regard will include a transparent and authorised procedure where the rights and obligations are properly provided, expressed and applied. In this way there is certainty in the expectation that a matter will be dealt with in a predictable, proper and defined manner. It is not for a court or judges, without any authorisation, to change

18. In correctly interpreting Rule 67(2), the content of Rule 76 supports that *the main underlying principles and objectives of the system* for pre-trial annulments are to ensure that the CIJs' procedurally defective actions or orders are subjected to annulment by the PTC. In both the English and French versions of Rule 76(5), the equivalent terms for 'annulment' and 'cancellation' are used interchangeably.³⁰ In French, '*annuler*' means 'to set aside; declare void'³¹ while '*cancellation*' is synonymous with '*annulation*,' meaning 'erasing an act that is written.'³² Under Rule 76(5), an annulled or cancelled procedurally defective act no longer exists; it is *removed* from the Case File and it is prohibited to draw any inference against the parties from it.³³ This annulment procedure is mirrored in Articles 280 and 281 of the Cambodian Code of Criminal Procedure and Articles 174 and 206 of the French Code of Criminal Procedure.³⁴
19. The proposition that an illegally issued Closing Order is procedurally defective within the meaning of Rule 67(2) finds further support in domestic and international jurisdictions. The PTC has adopted an interpretive approach in which, after applying

stated procedures as a matter of expediency or for any other unauthorised reason. This is fundamentally procedurally unfair. Any action taken in respect of such unauthorised procedure is void.' Case 002, *Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order 250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications*, 27 April 2010, D250/3/2/1/5, Opinion of Judges PRAK Kisman and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties, para. 13.

³⁰ The French language version of Rule 76(5) refers to 'les parties annulées sont cancellées' and '[a]près annulation ou cancellation [...]'.

³¹ F.H.S. Bridge, *The Council of Europe French-English Legal Dictionary*, Council of Europe Publishing, 1994, p. 16.

³² According to the commentary of Professeur Jean-Paul Doucet, *cancellation* is defined in terms of the French verb *biffer*: 'CANCELLATION (Canceller): Cf. Abolition, Nullité. Du latin "cancellare": biffer. Terme juridique visant le fait d'annuler un acte juridique d'une manière matérielle : en le biffant, en le raturant ou en le lacérant.' *Dictionnaire de Droit Criminel*, 'Cancellation,' available at https://ledroitcriminel.fr/dictionnaire/lettre_c/lettre_c_can.htm (last accessed 11 March 2020). A publicly available French dictionary defines *cancellation* as: 'Fait d'annuler un acte en effaçant ce qui est écrit. Signifie également "annulation".' *Linternaute, Dictionnaire Française*, 'Cancellation,' available at <https://www.linternaute.fr/dictionnaire/fr/definition/cancellation/> (last accessed 11 March 2020).

³³ The PTC ordered 'the cancellation and removal' of procedurally defective parts of the investigation from the Case File in *Decision on YIM Tith's Application to Annul the Investigative Material Produced by Paolo STOCCHI*, 25 August 2017, D351/1/4, para. 36 and p. 17.

³⁴ Cambodian Code of Criminal Procedure, Article 281: 'After nullification, the Investigation Chamber may: return the dossier to the investigating judge; revoke competence from one investigating judge and send [the] dossier to another investigating judge; or continue the investigation of the case by itself.' French Code of Criminal Procedure, Article 206: 'After an annulment, [the Investigation Chamber] may either transfer the case to itself and proceed pursuant to the conditions set out in articles 201, 202 and 204, or return the case file to the same investigating judge or to another investigating judge in order to continue the investigation.' [Légifrance Translation]. See also Cambodian Code of Criminal Procedure, Article 280; French Code of Criminal Procedure, Article 174.

the standard rules of interpretation to the ECCC legal framework, it will then look to Cambodian procedure, then procedure at the international level.³⁵

20. In civil law jurisdictions other than Cambodia and France, it is prescribed by law that illegally issued orders are null and void and consequently have no legal effect. For instance, in the Republic of Korea, '[p]ublic prosecution shall be dismissed by judgment [...] [w]here the procedure for instituting public prosecution is void by reason of its having been contrary to the provisions of Acts.'³⁶ In another example, Libya, nullity occurs upon non-observance of the law and when a procedure is deemed invalid 'all effects resulting directly from such procedure shall likewise be deemed invalid [...]'.³⁷
21. From the Defence's analysis of civil law jurisdictions, it is obvious that the principle that illegally issued orders are null and void and consequently have no legal effect is *trite law*, a principle so notorious and entrenched that it is commonly known and rarely disputed. Inevitably, case law in which judges deliberate over the meaning of this principle is scant or non-existent.³⁸
22. It is also considered *trite law* in common law jurisdictions. Although the principle that unlawful judicial decisions are 'null and void' and lack legal effect is often invoked in the jurisprudence, it is rarely disputed. In United States jurisprudence, for instance, '[t]he effect of determining that a judgment is void is well established. It is as though

³⁵ The PTC has held that the Internal Rules are the principle source of procedural law at the ECCC and that Cambodian criminal procedure 'should only be applied where a question arises which is not addressed by the Internal Rules.' Case 002, *Decision on Nuon Chea's Appeal against Order Refusing Annulment*, 26 August 2008, D55/I/8, paras 14 to 15. Where Cambodian criminal procedure 'does not deal with a particular matter,' the Chamber may seek guidance in procedural rules established at the international level. See UN-RGC Agreement, Article 12(1); Establishment Law, Article 33*new*; Rule 2. See also Case 002/01, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, paras 118 to 126. The PTC considered the correct interpretation of the term 'acquitted' in Article 12 of the Cambodian Code of Criminal Procedure. The PTC set out the 'recognised principles of interpretation' with regard to the construction of statutes and all written instruments noting that 'the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or inconsistency with the rest of the document.' In para. 118, the PTC noted that the UN-RGC Agreement, Establishment Law, and Internal Rules do not afford protection against double jeopardy nor address the effects of a previous conviction on the proceedings before the ECCC, finding that '[i]n accordance with Article 12 of the Agreement and Article 33 new of the ECCC Law, the Pre-Trial Chamber examines the CPC [...]'. The PTC proceeded to examine Cambodian procedure in paras 119 to 124, finding that the ordinary sense of Article 12 of the Cambodian Code of Criminal Procedure does not apply to convictions. The PTC resorted to seeking guidance in the procedural rules at the international level.

³⁶ Republic of Korea, Criminal Procedure Act, Act No. 9765, 9 June 2009, Article 327(2).

³⁷ Libya Code of Criminal Procedure and supplementary laws, 28 November 1953, Articles 304 and 309.

³⁸ Despite the Defence's due diligence and best efforts to locate jurisprudence from civil law jurisdictions on the consequences of illegal decisions, the Defence was unable to locate, from the resources available to it, references in court decisions explaining the legal consequences of illegally issued orders.

such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.’³⁹ Illustrative of this principle is the Texas Court of Criminal Appeals ruling in *Ex parte Seidel* wherein the trial judge’s dismissal ‘with prejudice’ was considered ‘more than a variance from the normal conduct; that action was outside the parameters of any rule or procedure in place at that time.’⁴⁰ The Court concluded that ‘the trial judge’s action was more than a mere violation of statutory procedure’ and that ‘[t]he trial judge’s action was not authorized by law and was, therefore, void.’⁴¹ The Court held:

[A] void judgment is a nullity from the beginning, and is attended by none of the consequences of a valid judgment. It is entitled to no respect whatsoever because it does not affect, impair, or create legal rights.⁴²

23. In *State v. Simpkins*, the Supreme Court of Ohio distinguished between a *voidable* judicial action that is based on an error of law and a wholly unlawful judicial action that is necessarily *void*:

[I]n circumstances in which the judge disregards what the law clearly commands, such as when a judge fails to impose a nondiscretionary sanction required by a sentencing statute, the judge acts without authority. Such actions are not mere errors that render a sentence voidable rather than void. If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful. “If an act is *unlawful* it [is] not erroneous or voidable, but it is wholly unauthorized and void.”⁴³

24. The Supreme Court of the United Kingdom recently upheld the same principle in *R v. Miller* in the context of unlawful advice given by the Prime Minister to Her Majesty the Queen that parliament should be prorogued:

³⁹ *Romito v. Maxwell*, 227 N.E.2d, 223, 224 (Ohio 1967): ‘The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment (internal citations omitted). The vacation of the prior burglary sentence in the instant case was an integral part of the habitual criminal proceedings, and when such habitual criminal proceedings were declared void the vacation of the burglary sentence was also voided. The petitioner was in the same position that he was prior to the habitual criminal proceedings, under a valid sentence for burglary.’ See also *State v. Bezak*, 868 N.E.2d 961, 963 (Ohio 2007) quoting *Romito v. Maxwell*: ‘Here, Bezak was not informed about the imposition of post release control at his sentencing hearing. As a result, the sentence imposed by the trial court is void. “The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.”’ See also *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001).

⁴⁰ *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001).

⁴¹ *Ibid.*

⁴² *Ibid.*, quoting *Ex parte Spaulding*, 687 S.W.2d 741, 745 (Teague, J., concurring).

⁴³ *State v. Simpkins*, 884 N.E.2d 568, 575 (Ohio 2008) (italic emphasis in original) (internal citations omitted).

This means that it was null and of no effect [...] It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.⁴⁴

25. The jurisprudence of international criminal tribunals has recognised that illegal orders or acts – i.e. those in contravention of the applicable law and procedure – are null and void and without legal effect. The ICTR Trial Chamber in *Ntuyahaga* found that the Registrar’s ‘Safe Conduct’ document that was delivered to the Defendant upon his release was ‘null and void’ since ‘neither the provisions of Security Council resolutions, nor those of the Statute, nor those of the Rules of Procedure and Evidence, nor any instructions rendered by the Trial Chamber, empower[ed] the Registrar to issue the document entitled “Safe Conduct.”’⁴⁵ The Trial Chamber was ‘mindful of the need for the Tribunal to ensure the proper respect and compliance for the law.’⁴⁶
26. The ICTY Appeals Chamber found in *Kupreškić et al.* that the Trial Chamber’s ruling to take depositions from Defence witnesses was ‘null and void’ for failure to comply with the requirements of the ICTY Statute and Rules of Procedure and Evidence.⁴⁷ The Presiding Judge of the Trial Chamber had informed the parties that one of the Trial Chamber Judges was ill and unlikely to attend hearings throughout the week.⁴⁸ He then made an oral ruling that Rule 71 of the ICTY Rules of Procedure and Evidence was applicable and depositions of Defence witnesses were taken with only two Judges present acting as Presiding Officers.⁴⁹ The Trial Chamber issued a written decision confirming the oral ruling the following day.⁵⁰ The Appeals Chamber found that the ‘requirement in Rule 71 that an order for depositions to be taken may only be rendered

⁴⁴ *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41, para. 69. See also *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*, [2017] UKSC 51, para. 119: ‘The Fees Order is unlawful under both domestic and EU law because it has the effect of preventing access to justice. Since it had that effect as soon as it was made, it was therefore unlawful ab initio, and must be quashed.’

⁴⁵ ICTR Trial Chamber I, *Prosecutor v. Ntuyahaga* (ICTR-98-40-T), ‘Declaration on a Point of Law,’ 22 April 1999, paras 1, 4 and 17. The Registrar issued a document entitled ‘Safe Conduct’ requesting UN Member States, international organizations, and others concerned to accord the Defendant necessary cooperation to enable him to ‘move freely in or transit through, without let or hindrance, any country to his final destination.’ The Defence endeavored to request an original version of this decision but it is currently under legal review by the ICTR (MICT) to determine its legal classification and is not publicly available.

⁴⁶ *Ibid.*, para. 17.

⁴⁷ ICTY Appeals Chamber, *Prosecutor v. Kupreškić et al.* (IT-95-16-AR73.3), ‘Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition,’ 15 July 1999, para. 14.

⁴⁸ *Ibid.*, para. 4.

⁴⁹ *Ibid.*, paras 6 and 7.

⁵⁰ *Ibid.*, para. 7.

by a Trial Chamber, ha[d] not been met' because Article 12 of the ICTY Statute stipulates that a Trial Chamber shall be composed of *three* Judges.⁵¹ The Appeals Chamber considered that the Trial Chamber's written confirmation of the oral ruling 'could not *ipso facto* cure this illegality.'⁵²

27. A correct interpretation of Rule 67(2), that is, taking into account its place in the ECCC legal framework – including the context of the annulment procedure in Rule 76 – and the main underlying principles and objectives for pre-trial annulments, mandates that the effect of the PTC's unanimous finding in Case 004/02 is that the ICIJ's Closing Order is null and void. This is further supported by Cambodian and French criminal procedure and the concept of 'nullity' found in other domestic and international jurisdictions. The PTC's unanimous finding was, in all but name, a finding of procedural defect,⁵³ which carries the same procedural consequences set out in Rule 76(5) of 'annulment' or 'cancellation'.⁵⁴ The procedurally defective ICIJ's Closing Order must be removed from the Case File and accorded no legal effect.⁵⁵

⁵¹ *Ibid.*, para. 14.

⁵² *Ibid.*, para. 14: 'Where the Statute or the Rules prescribe that a matter is to be decided by a *Trial Chamber*, two sitting Judges may not do so on the part of the Trial Chamber, save in the case where the Trial Chamber has received prior authorisation by the President. Such authorisation may, however, only be given in respect of routine matters pursuant to Sub-rule 15(E). In the present case, no such authorisation had been given by the President, and, in any event, the making of a decision to proceed by way of deposition with regard to the examination of witnesses giving evidence on facts relating to the specific charges made against an accused, thereby having a direct bearing on the determination of the guilt or innocence of the accused, does not, in the view of the Appeals Chamber, constitute "routine matters" within the meaning of Sub-rule 15(E)' (italic emphasis in original).

⁵³ Rule 76(5) provides that defective investigative actions are 'cancelled' and the relevant document should be 'removed from the case file and archived by the Greffier of the [PTC]. After any such annulment or cancellation, the [PTC] shall return the case file to the Co-Investigating Judges.' It bears repeating that even the CIJs understood that the issuance of separate and conflicting Closing Orders was unlawful and they were fully aware that the lawfulness of issuing split Closing Orders would not survive the scrutiny of the PTC on appeal. Case 004/02 Considerations, para. 123: The PTC noted the CIJs' 'explicit declaration [...] that they agreed on the unlawful issuance of separate and conflicting Closing Orders.' The PTC found unanimously that the CIJs' 'malpractice has in this case jeopardized the whole legal system upheld by the Royal Government of Cambodia and the United Nations. It is astonishing to observe that the Judges were fully "aware of the problem" that the issuance of split Closing Orders would cause, notably on appeal [...]'.

⁵⁴ As the PTC unanimously found, there has never 'been any case in history of any national or international system that closed with the simultaneous issuance of two contradictory decisions emanating from one single judicial office.' Case 004/02 Considerations, para. 124. It necessarily follows that neither Cambodian criminal procedure nor procedural rules established at the international level address the procedural consequences of illegally issued opposing Closing Orders. Yet Rules 2 and 21 provide interpretive guidance here: the applicable criminal procedural laws must be interpreted so as to always safeguard the Charged Person's interests. See UN-RGC Agreement, Article 12(1); Establishment Law, Article 33*new*; Rules 2, 21. The only way of protecting Mr YIM Tith's interests is to fill the *lacuna* in the Internal Rules by applying existing provisions by analogy. "[I]f the existence of gaps is admitted, the task of court is to fill them by using statutory provisions which regulate essentially similar problems or case" [...]. "[S]ometimes a statute will purport to treat a topic exhaustively but an 'unproven case' will arise. Here the court may treat this case analogously to the way in which 'provided' case is

III. ALL APPELLATE ARGUMENTS ON THE MERITS OF THE ICIJ'S CLOSING ORDER ARE NOW IRRELEVANT TO THE CURRENT PROCEEDINGS

28. The ICP's Response is limited to the grounds raised in the Appeal of the ICIJ's Closing Order, raising no issues unrelated to the merits of the ICIJ's Closing Order. The ICP submitted that Mr YIM Tith: (i) 'fails to demonstrate any reviewable error or abuse of discretion in the ICIJ's conduct of the Case 004 investigation and decision to issue an Indictment based on YIM Tith's claim that his fundamental fair trial rights were violated';⁵⁶ (ii) 'fails to demonstrate a reviewable error of law in the sufficiency of the ICIJ's findings' as 'the Indictment sets out the requisite elements in accordance with Internal Rule 67(2);'⁵⁷ (iii) 'fails to demonstrate any reviewable error in the scope of the facts contained in the Indictment';⁵⁸ (iv) 'fails to demonstrate any reviewable error in the ICIJ's purported reliance on [Joint Criminal Enterprise]';⁵⁹ and (v) 'fails to

treated in the same statute.'" Koszowski, M., 'Analogical Reasoning in Statutory Law' (2017) *Journal Forensic Research* (8) 1, p. 2 quoting Wróblewski, J., 'Statutory Interpretation in Poland,' in *Interpreting Statutes: A Comparative Study*, Ashgate/Dartmouth, Aldershot, 1991, pp. 257 to 309 and Summers, R., 'Statutory Interpretation in the United States' in *Interpreting Statutes: A Comparative Study*, Ashgate/Dartmouth, Aldershot, 1991, pp. 407 to 459. See also Koszowski, M., 'The Scope of Application of Analogical Reasoning in Statutory Law' (2017), *American International Journal of Contemporary Research* (7) 16, pp. 17 and 19: '[A] legal gap occurs whenever there is no statutory rule that can be applied to the case at hand, although it is socially desirable to have such a rule and the case at hand being provided for [...]. The filling of such gaps by resorting to analogical reasoning consists in principle in finding a statutory rule that embraces cases that are similar to the case at hand and then – although this case does not fall under its coverage – applying the so-selected rule to the case at hand [...]. The filling of *extra legem* gaps by analogy also has its foundation in the pursuit – in legal practice and theory – of the coherence and completeness [closure] of the legal system' (internal citations omitted). See also Peczenik, A., 'Analogia Legis. Analogy from Statutes in Continental Law,' in Hubien, H. [Ed] *Legal Reasoning. Proceedings of the World Congress for Legal and Social Philosophy* 329, Brussels 1971, p. 332 citing French Code of Criminal Procedure, Article 4: '[A]nalogia is a rhetorical argument [...] connected with the following Principle of Justice: essentially similar objects ought to be treated in a similar way. Rhetorical arguments are indispensable in legal thinking among others because the judge is bound to decide a case even if the law is unclear (e.g. Code Napoléon, § 4, prohibition of *denegatio justitae*). Imre Zajte describes the process of analogical statutory reasoning as follows: '[T]he first category of reasoning by analogy takes for its starting point a rule laid down by a written law or statute. The process consists in, firstly, a search for what constitutes the very essence of this rule, and to that end the rule is stripped of all its secondary elements: the rule, thus reduced to its essential components, will thereafter be applied in a case which differs from the hypothesis provided by the statute only, and precisely, in respect of its secondary elements.' Zajtay, I., 'Reasoning by analogy as a method of law interpretation' (1980) *The Comparative and International Journal of Southern Africa* (13) 324, p. 326.

⁵⁵ The PTC ordered 'the cancellation and removal' of procedurally defective parts of the investigation from the Case File in *Decision on YIM Tith's Application to Annul the Investigative Material Produced by Paolo STOCCHI*, 25 August 2017, D351/1/4, para. 36 and p. 17.

⁵⁶ ICP's Response, para. 23. See also *ibid.*, paras 24 to 44.

⁵⁷ *Ibid.*, para. 45; See also *ibid.*, paras 46 to 56.

⁵⁸ *Ibid.*, paras 57 to 60.

⁵⁹ *Ibid.*, paras 61 to 64.

demonstrate any reviewable error in the conclusion that he was “most responsible” and thus within the ECCC’s personal jurisdiction.’⁶⁰

29. Since the ICIJ’s Closing Order is null and void (non-existent and with no legal effect), all appellate arguments on the merits of the ICIJ’s Closing Order have become irrelevant to the current proceedings.
30. The five grounds of appeal argued by the Defence in the Appeal of the ICIJ’s Closing Order and sub-grounds of appeal therein are irrelevant to the current proceedings because they solely concern the merits of the ICIJ’s Closing Order. The Defence submitted that the ICIJ: (i) erred in law by violating Mr YIM Tith’s fundamental fair trial rights by conducting the judicial investigation and issuing an indictment in circumstances in which no fair trial is possible;⁶¹ (ii) erred in law by issuing a Closing Order that is void for procedural defects due to his failure to correctly identify the law and refer to the evidentiary analysis in his findings on personal jurisdiction;⁶² (iii) erred in law by exceeding the factual scope of the investigation;⁶³ (iv) erred in law by using Joint Criminal Enterprise liability as a relevant consideration to assess personal jurisdiction;⁶⁴ and (v) erred in fact and law in finding that Mr YIM Yith was ‘most responsible’ and thus within the ECCC’s personal jurisdiction.⁶⁵
31. The Appeal of the ICIJ’s Closing Order is rendered moot in the sense of having ‘no practical significance.’⁶⁶ ‘[A]n appeal should “be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant ‘any effectual relief whatever’ in favor of the appellant,”’ or when it ‘can no longer affect the rights of litigants in the case.’⁶⁷ Consequently, the ICP’s Response is also moot and should be dismissed as it solely responds to the grounds raised in the moot Appeal of the ICIJ’s Closing Order.

⁶⁰ *Ibid.*, paras 65 to 165.

⁶¹ Appeal of the ICIJ’s Closing Order, paras 20 to 55.

⁶² *Ibid.*, paras 56 to 94.

⁶³ *Ibid.*, paras 95 to 103.

⁶⁴ *Ibid.*, paras 104 to 120.

⁶⁵ *Ibid.*, paras 121 to 265.

⁶⁶ Garner, B., [Ed.] *Black’s Law Dictionary*, 9th edition, p. 1099. See also *Stotts v. Community Unit Sch. Dist. No. 1*, 230 F.3d 989, 990 (7th Cir. 2000) (when a court’s decision would have no practical impact on the parties, the case is moot).

⁶⁷ *Dorel Juvenile Group, Inc. v. DiMartinis*, 495 F.3d 500, 503 (7th Cir. 2007) quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996) and citing *Worldwide Street Preachers’ Fellowship v. Peterson*, 388 F.3d 555, 558 (7th Cir. 2004). See also *Borowski v. Canada (Attorney General)* [1989] 1 SCR 342, 344: ‘An appeal is moot when a

32. ECCC judges have recognised situations where a decision or filing is rendered ‘moot’ since there is no longer any live issue for the court to determine.⁶⁸ More to the point, ECCC judges have declared moot responses and replies where they either denied an underlying submission or did not consider the need to hear further arguments.⁶⁹ For example, when the Case 002/02 Trial Chamber denied the admission of a document sought to be admitted by NUON Chea, it declared moot the Co-Prosecutors’ request in response: ‘Given that the Chamber denies the admission of document 8, the request in response made by the Co-Prosecutor to admit <other> three documents is moot.’⁷⁰ In another example, the Supreme Court Chamber denied the Co-Prosecutors’ request for a

decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties.’

⁶⁸ *Decision on the International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District*, 13 February 2018, D365/3/1/5, paras 30 to 32. See also *Notice from the International Co-Investigating Judge to the Parties Regarding Re-Issue of Decisions Taken by Judge Harmon on or After 31 July 2015*, 8 September 2015, D262, paras 2 to 4. ICIJ Bohlander found that decisions issued by ICIJ Harmon after his term of office ended were without legal effect, since Harmon was *functus officio* at the time of their issuance. ICIJ Bohlander informed the parties that ‘[a]ny decisions that may have been appealed will become moot’ as soon as he re-issued a new version. Case 003, *Decision on MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Notification of Charges against MEAS Muth*, 3 February 2016, D128.1/1/11, paras 6 to 8. ICIJ Bohlander rescinded charges brought in ICIJ Harmon’s Decision to Charge *In Absentia* and informed MEAS Muth that ‘the statement of charges considered in that Decision was therefore moot.’ When MEAS Muth filed a new appeal against ICIJ Bohlander’s charges, the PTC found his appeal against ICIJ Harmon’s charges was ‘therefore moot, and should be dismissed as such, without determining its admissibility or merits.’ *Further Decision on the Urgent Request on Remote Working*, 29 August 2016, D321/4, paras 2 and 5 to 7. The ICIJ declared moot AO An’s *Urgent Request for Remote Working* in light of the Defence Support Section proposal of new terms of reference for legal consultants. Case 004/01, *Order on IM Chaem’s Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of Her and Her Co-Lawyers’ Summonses*, 18 August 2014, D207/1, paras 35 and 38. The ICIJ declared moot IM Chaem’s request for a stay of the Suspect’s and the Co-Lawyers’ summonses in light of her failure to appear at her scheduled initial appearance, her Co-Lawyer’s notice that she would not appear voluntarily at the ECCC, and the PTC’s denial of her request for a stay. Case 004/02, *Decision on AO An’s Request for Clarification*, 5 September 2017, D369, paras 11, 20, 38, and 39. The ICIJ declared moot AO An’s requests for clarification as to whether the Co-Prosecutors would file separate Final Submissions and the effect that disagreement between the Co-Prosecutors may have on the timing of the Final Submission, given that both Co-Prosecutors had already filed their Final Submissions. In addition, international criminal tribunals have declared filings and decisions ‘moot’ where there is no longer any dispute for the court to determine. MICT Appeals Chamber Senior Judge Jean-Claude Antonetti, *Prosecutor v. Karadžić* (MICT-13-55-A), ‘Order on Motion to Disqualify Judge Theodor Meron,’ 2 October 2018, p. 2. Judge Meron decided to withdraw from the appeal in *Karadžić*, rendering the Defence motion to disqualify him moot. MICT President, *Prosecutor v. Nikolić* (MICT-14-65-ES), ‘Public Redacted Version of the 27 January 2017 Decision on Ratko Mladić’s Requests for Leave to Reply and Reconsideration or, Alternatively, Certification or Disqualification,’ 6 June 2018, para. 28, fn. 52 (‘In view of the fact that I am granting Mladić’s request for reconsideration in part, I hereby dismiss as moot Mladić’s alternative requests for certification to appeal the Decision for Access or for my disqualification’). STL Appeals Chamber, *Prosecutor v. Ayyash et al.* (STL-11-01/PT/AC/AR90.2), ‘Decision on Defence Appeals Against Trial Chamber’s “Decision on Alleged Defects in the Form of the Amended Indictment”,’ 5 August 2013, para. 2: ‘Given that the previous indictment has thereby fallen away, the challenges to it have become moot. We accordingly dismiss the appeals.’

⁶⁹ Case 002/02, Transcript of Trial Hearing, 17 October 2016, E1/484.1 at ERN 01385430, lines 20 to 24; Case 002/01, *Decision on Co-Prosecutor’s Request for Appeal Hearing on Scope of Trial in Case 002/01 or Leave to File Joint Reply*, 18 December 2012, E163/5/1/12, paras 3 and 4.

⁷⁰ Case 002/02, Transcript of Trial Hearing, 17 October 2016, E1/484.1 at ERN 01385430, lines 20 to 24.

public hearing and dismissed their alternative request to file a joint reply to the Defence responses to their appeal as moot, considering that there was no need to hear further arguments on the appeal.⁷¹

33. International criminal tribunals have likewise declared moot submissions in response where they either denied an underlying submission or did not consider the need to hear further arguments.⁷² The ICTY Trial Chamber in *Karadžić* dismissed the Accused's requests to delay the Appeals Chamber's decision on his appeal until he obtained additional evidence to be submitted pursuant to Rule 115 of the ICTY Rules of Procedure and Evidence and the Prosecution's request for leave to file a sur-reply as moot, considering that the Accused submitted his Rule 115 motion prior to the Appeals Chamber rendering its decision on the appeal.⁷³ The ICC Trial Chamber in *Ntaganda* declared moot the Defence's response to the Prosecution's request for leave to reply, finding that 'it would not benefit from receiving additional submissions on any of the five issues identified by the Prosecution in the Request for Leave to Reply' and that it was thus unnecessary to address the Defence's response.⁷⁴
34. There is no further legal argument to be had in reply to the moot ICP's Response given that the resolution of the moot Appeal of the ICIJ's Closing Order has no consequence and is therefore subject to summary dismissal.⁷⁵

⁷¹ Case 002/01, *Decision on Co-Prosecutor's Request for Appeal Hearing on Scope of Trial in Case 002/01 or Leave to File Joint Reply*, 18 December 2012, E163/5/1/12, paras 3 and 4.

⁷² ICTY Appeals Chamber, *Prosecutor v. Karadžić* (IT-95-5/18-AR73.4), '*Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement*,' 12 October 2009, para. 56; ICC Trial Chamber VI, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2109), '*Decision on Prosecution request for disclosure concerning Witness D-0017*,' 10 November 2017, para. 5 and p. 9.

⁷³ See ICTY Appeals Chamber, *Prosecutor v. Karadžić* (IT-95-5/18-AR73.4), '*Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement*,' 12 October 2009, para. 56: 'Considering that the Appellant filed his Rule 115 Motion prior to the rendering of the present Decision, the Appeals Chamber dismisses the Appellant's requests to delay the Appeals Chamber's decision on the Appeal and the Prosecution's Request for Leave to File a Sur-Reply as moot.'

⁷⁴ ICC Trial Chamber VI, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2109), '*Decision on Prosecution request for disclosure concerning Witness D-0017*,' 10 November 2017, para. 5 and p. 9.

⁷⁵ In Case 004/02, the PTC declared itself unable to reach a supermajority under Article 7(4) of the ECCC Agreement only in relation to 'the lack of an affirmative vote of at least four judges for a decision based on common reasoning on the merits.' Case 004/02 Considerations, para. 169.

CONCLUSION

35. The PTC has already pronounced on the unlawfulness of issuing two Closing Orders, so the outcome of the Defence *Appeal of the Issuance of Two Closing Orders* is foregone and inevitable.
36. The ICIJ's Closing Order is premised on a 'gross error of law'⁷⁶ invalidating his decision.⁷⁷ Its issuance 'violated the very foundations of the ECCC legal system.'⁷⁸ Accordingly, the PTC must address the ICIJ's *ultra vires* actions by resorting to one of the remedies requested in the *Appeal of the Issuance of two Closing Orders*, namely: dismiss the defective ICIJ's Closing Order with full prejudice;⁷⁹ dismiss the defective ICIJ's Closing Order and return the Case File to the CIJs;⁸⁰ or dismiss the defective ICIJ's Closing Order, assess Case File 004 itself and issue its own Closing Order.⁸¹ To do otherwise, proceeding on the basis of an unlawfully-issued indictment, would irreparably violate Mr YIM Tith's fundamental rights to a fair trial.
37. The PTC 'is responsible for ensuring, at the investigation stage, that the fundamental principles underlying the criminal procedure applicable before the ECCC are respected.'⁸² The most appropriate course of action is for the PTC to definitively conclude Case 004 by dismissing the defective ICIJ's Closing Order and the case against Mr YIM Tith with full prejudice. The unlawful and procedurally defective ICIJ's Closing Order is null and void under Rule 67(2). Since there is no valid indictment, Rule 77(13)(b) is inapplicable and the Trial Chamber cannot be seised of

⁷⁶ Case 004/02 Considerations, paras 98 and 99.

⁷⁷ See Case 004/02 Considerations, para. 30; Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22.

⁷⁸ Case 004/02 Considerations, para. 102.

⁷⁹ Constitution of Cambodia, Article 38; Establishment Law, Article 35*new*; Rule 21(1)(d); ICCPR, Article 14(2).

⁸⁰ Rule 76(5); Constitution of Cambodia, Articles 31 and 38; Cambodian Code of Criminal Procedure, Article 351; Establishment Law, Article 35*new*; Rule 21(1)(d); ICCPR, Article 14(2). See also Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22.

⁸¹ Rule 79(1); Constitution of Cambodia, Article 38; Cambodian Code of Criminal Procedure, Article 351; Establishment Law, Article 35*new*; Rule 21(1)(d); ICCPR, Article 14(2). See also Case 001, *Decision on Appeal against Closing Order Indicting Kaing Guek Eav, alias "DUCH"*, 5 December 2008, D99/3/42, para. 40; Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22. The PTC 'fulfils the role of the Cambodian Investigation Chamber in the ECCC,' and, when seised by appeals against Closing Orders, 'Internal Rule 79(1) suggests that [it] has the power to issue a new or revised Closing Order that will serve as a basis for trial.'

⁸² Case 004/02 Considerations, para. 52.

Case 004.⁸³ There is no procedure currently in force at the ECCC,⁸⁴ nor is any such procedure conceivable in any circumstance, to permit the Trial Chamber to be seised of an unlawful, null and void indictment. Just as there has never been, as the PTC noted, ‘any criminal case in the history of any national or international legal system that closed with the simultaneous issuance of two contrary decisions emanating from one single judicial office,’⁸⁵ neither has there ever been a criminal trial on the basis of an unlawful, null and void indictment.

38. Alternatively, in the event the PTC is not minded to dismiss the defective ICIJ’s Closing Order with full prejudice, the PTC should dismiss the defective ICIJ’s Closing Order and return the Case File to the CIJs with an order to jointly issue a Closing Order in accordance with the applicable law, noting that any persisting disagreement must be resolved in favour of Mr YIM Tith.⁸⁶ The PTC has held that it ‘will normally remit the decision back to the Co-Investigating Judges for reconsideration’ when it identifies an error or abuse fundamentally determinative of the CIJs’ exercise of discretion.⁸⁷ The unlawful issuance of two separate Closing Orders qualifies as an

⁸³ If the PTC is unable to reach a supermajority decision, the Trial Chamber cannot be seised based on an invalid Closing Order issued by only one CIJ. Rule 79: ‘The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.’

⁸⁴ Trials at the ECCC must be ‘conducted in accordance with existing procedures in force.’ Establishment Law, Article 33*new*. See also Case 004/02 Considerations, para. 95: ‘Articles 20*new*, 23*new*, 33*new* and 37*new* of the ECCC Law make it clear that ECCC organs must follow all existing procedures in force. The Chamber finds that these provisions aim to guarantee the legality, fairness and effectiveness of ECCC proceedings.’

⁸⁵ Case 004/02 Considerations, para. 124.

⁸⁶ The principle of *in dubio pro reo* is a central component of the presumption of innocence, guaranteed under the Constitution of Cambodia, the Cambodian Code of Criminal Procedure, ECCC law, and international law. It demands that doubt be interpreted in favour of the accused and applies to ambiguity arising in both factual findings on the evidence and determinations of personal responsibility. See Constitution of Cambodia, Article 38 (‘Any case of doubt shall be resolved in favour of the accused’); Cambodian Code of Criminal Procedure, Article 351 (‘Beyond reasonable doubts shall be the benefits of the accused’); Case 002/02, *Case 002/02 Judgement*, 16 November 2018, E465, paras 21 and 3014 (the Chamber resolved factual ambiguity ‘by applying the interpretation most favouring the Accused in conformity with the principle of *in dubio pro reo*’); Case 002/01, *Case 002/01 Judgement*, 7 August 2014, E313, para. 22 (‘Upon a reasoned assessment of the evidence, the Chamber interprets any doubt as to guilt in the Accused’s favour’); Case 002, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31 (‘The Supreme Court Chamber must stress that the *in dubio pro reo* rule, which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia and has its primary function to denote a finding in the event where factual doubts are not removed by the evidence’); ICCPR, Article 14(2); ICC Pre-Trial Chamber II, *Prosecutor v. Bemba* (ICC-01/05-01/08-424), ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’, 15 June 2009, para. 31 (‘Lastly, in making this determination [on the confirmation of charges] the Chamber wishes to underline that it is guided by the principle of *in dubio pro reo* as a component of the presumption of innocence, which as a general principle applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage’).

⁸⁷ Case 004/02 Considerations, para. 30 citing Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22; Case 002, *Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the*

error of this nature. This remedy is preferable to the PTC substituting its own decision, which the PTC will do ‘only in exceptional circumstances,’⁸⁸ since the CIJs make their discretionary decisions having ‘in-depth, intimate knowledge of the Case File.’⁸⁹ As the PTC has previously acknowledged, it was neither ‘established’ nor ‘equip[p]ed to conduct investigations’ in the context of the unique nature of ECCC cases, ‘which involve large scale investigations and extrem[e]ly voluminous cases.’⁹⁰

39. As a further alternative, the PTC has the power to issue its own unanimous Closing Order, either indicting Mr YIM Tith or dismissing the case against him. As the PTC has recognised, it ‘fulfils the role of the Cambodian Investigation Chamber in the ECCC,’ and, when seised by appeals against Closing Orders, ‘Internal Rule 79(1) suggests that [it] has the power to issue a new or revised Closing Order that will serve as a basis for trial.’⁹¹ Logically, the PTC likewise has the power to issue a new or revised Closing Order *dismissing* the case. This is consistent with the definition of a Closing Order in the Glossary of the Internal Rules as ‘the final order made by the Co-Investigating Judges or the Pre-Trial Chamber at the end of the judicial investigation, whether Indictment or Dismissal Order.’⁹²
40. In the event the PTC decides to issue its own Closing Order, it should consider the National Co-Prosecutor’s *Final Submission Concerning YIM Tith Pursuant to Internal Rule 66*,⁹³ *International Co-Prosecutor’s Rule 66 Final Submission Against YIM Tith*,⁹⁴ and *YIM Tith’s Combined Response to the National and International Co-Prosecutors’*

Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/3/1/3, paras 15 to 16; Case 002, *Decision on Nuon Chea’s Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D174, D178, and D284*, 28 July 2010, D300/1/7, paras 19 and 26.

⁸⁸ Case 004/02 Considerations, para. 30 citing Case 002, *Decision on Reconsideration of the Co-Prosecutors’ Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes*, 27 September 2010, D365/2/17, para. 67.

⁸⁹ Case 002, *Decision on Reconsideration of the Co-Prosecutors’ Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes*, 27 September 2010, D365/2/17, para. 67.

⁹⁰ Case 002, *Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the SHARED MATERIALS DRIVE*, 12 November 2009, D164/3/6, para. 24.

⁹¹ Case 004/02 Considerations, para. 30; Case 001, *Decision on Appeal against Closing Order Indicting Kaing Guek Eav, alias “DUCH”*, 5 December 2008, D99/3/42, para. 40; Case 004/1, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22.

⁹² Internal Rules, Glossary, p. 83.

⁹³ *Final Submission Concerning YIM Tith Pursuant to Internal Rule 66*, 31 May 2018, D378/1.

⁹⁴ *International Co-Prosecutor’s Rule 66 Final Submission Against YIM Tith*, 4 June 2018, D378/2.

*Final Submissions.*⁹⁵ While the PTC, like the CIJs, would not be bound by the parties' submissions in issuing a new Closing Order,⁹⁶ it would certainly benefit from the parties' extensive views on the evidence in the Case File, the negotiating history of the UN-RGC Agreement, and the law and jurisprudence relevant to its exercise of discretion in determining whether Mr YIM Tith falls within the ECCC's personal jurisdiction.

41. As the PTC unanimously held in Case 004/02, its review power as an Investigation Chamber is intended 'first and foremost, to ensure that the conditions for the issuance of the closing order and the preparatory investigation are in accordance with the ECCC Internal Rules 21 and 76, and Article 261 of the Cambodian Code of Criminal Procedure.'⁹⁷ 'This power of review is so important and determinative that "[n]o issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber."⁹⁸ Accordingly, it is the PTC that must now act definitively in accordance with its unanimous view to correct the ICIJ's unlawful procedural action.

REMEDY

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 Pre-Trial Chamber:

- (1) **Dismiss** the ICP's Response; and
- (2) **Dismiss** the defective ICIJ's Closing Order with full prejudice and dismiss the case against Mr YIM Tith; *or*

⁹⁵ *YIM Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions*, 26 November 2018, D378/5.

⁹⁶ Rule 67(1): 'The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors submissions.' See also Case 002, *Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for a Stay of the Proceedings*, 20 September 2010, D390/1/2/4, paras 2, 3, 5, 13 and p. 3. In Case 002, the CIJs denied IENG Sary's requested for extension of page and time limits to file a Response to the Final Submission, reasoning that 'nothing in the Internal Rules provides for a response to the Co-Prosecutors' Final Submissions,' and later refused to accept the filing of the Response to the Final Submission. On appeal, the PTC ordered the CIJs to immediately place the Response to the Final Submission on the Case File, reasoning that the CIJs 'can only benefit from receiving submissions of both the OCP and the Co-Lawyers,' and that 'a judicial body is never bound by the submissions of a party.'

⁹⁷ Case 004/02 Considerations, para. 50.


⁹⁸ Case 004/02 Considerations, para. 52 quoting Rule 76(7).

- (3) **Dismiss** the defective ICIJ's Closing Order and return the Case File to the CIJs with an order to jointly issue a Closing Order in accordance with the applicable law, noting that any persisting disagreement must be resolved in favour of Mr YIM Tith; *or*
- (4) **Dismiss** the defective Closing Orders, assess Case File 004 itself and issue its own Closing Order either indicting Mr YIM Tith or dismissing the case against him.

Respectfully submitted,



SO Mosseny



Suzana TOMANOVIĆ

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 13th day of March 2020.