

BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**FILING DETAILS****Case No:** 004/07-09-2009-ECCC/OCIJ (PTC61) **Party Filing:** The Defence for YIM Tith**Filed to:** Pre-Trial Chamber**Original language:** ENGLISH**Date of document:** 16 March 2020**CLASSIFICATION****Classification of the document
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**YIM TITH'S REPLY TO THE INTERNATIONAL
CO-PROSECUTOR'S RESPONSE TO YIM TITH'S APPEAL OF
THE ISSUANCE OF TWO CLOSING ORDERS IN CASE 004**

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Reserve Judge Steven J. BWANA**Co-Prosecutors:**CHEA Leang
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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 Issuance of Two Closing Orders in Case 004 ('Reply' and 'Response'). The Response should be dismissed since it fails to substantiate the ICP's claims that the Defence misrepresented the consequences of illegal orders and that the remedies requested in its appeal are contrary to law. The ICP's Response is grounded on the false premise that Mr YIM Tith has been lawfully indicted. The ICP selectively misconstrues the Pre-Trial Chamber's ('PTC') unanimous finding in Case 004/02 that there is no legal basis for the Co-Investigating Judges ('CIJs') to issue two separate Closing Orders, interpreting the finding as non-applicable to the International Co-Investigating Judge's Closing Order ('ICIJ' and 'ICIJ's Closing Order'), but applicable to the National Co-Investigating Judge's Closing Order ('NCIJ' and 'NCIJ's Closing Order').¹ The ICP also ignores the obvious consequence of the finding that the unlawfully-issued Closing Orders are null and void. The PTC should dismiss the defective Closing Orders 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

¹ *Order Dismissing the Case against Yim Tith*, 28 June 2019, D381. *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, paras 3 to 9.

3. On 5 December 2019, the ICP filed the *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Yim Tith (D381)* ('ICP's Appeal of NCIJ's Order').⁵
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 Case 004 Indictment*.¹⁰
8. On 17 February 2020, the ICP filed the *International Co-Prosecutor's Response to Yim Tith's Appeal Against the Issuance of Two Closing Orders in Case 004*, miscalculating the deadline based on the 10-day time-limit under the Practice Direction on Filing Documents before the ECCC,¹¹ rather than the time-limit set by the PTC.¹²

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

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, D381/27.

¹¹ *International Co-Prosecutor's Response to Yim Tith's Appeal Against the Issuance of Two Closing Orders in Case 004*, 17 February 2020, D381/25 and D382/28, para. 7 ('ICP's Response'); see also Practice Direction on Filing Documents Before the ECCC, ECCC/01/2007/Rev.8, amended 7 March 2012, Article 8.3.

¹² *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, p. 4. The PTC 'ALLOW[ED] the Parties to file 60-page responses within 45 days from the notification of each Appeal.'

**REPLY: THE ICP FAILS TO SHOW THAT THE DEFENCE MISREPRESENTED
THE CONSEQUENCES OF ILLEGAL CLOSING ORDERS AND THAT ITS
REQUESTED REMEDIES ARE CONTRARY TO THE LAW**

9. The ICP erroneously claims that the Defence misrepresents the consequences of the PTC's unanimous finding 'regarding the impact of this error on the legal status of each closing order.'¹³ The ICP further erroneously claims that 'the Two Closing Orders Appeal should be dismissed, as the remedies requested are contrary to the plain language of the ECCC Agreement, ECCC Law, and Internal Rules, as well as the ECCC's consistent jurisprudence.'¹⁴ The ICP fails to substantiate these claims. Although the ICP states that she 'does not contest' the 'unequivocal' holding of the PTC that 'the CIJs' *issuance* of two conflicting closing orders was "illegal, violating the legal framework of the ECCC,"¹⁵ her Response is grounded on the false premise that a lawful indictment exists in Case 004 on which the Trial Chamber could try Mr YIM Tith. By ignoring the current procedural state of Case 004, and reiterating an appellate position that was conceived prior to the PTC issuing its Considerations in Case 004/02, the ICP proceeds to selectively misconstrue the PTC's finding, failing to recognise its immediate consequence for Case 004, namely, that the legal status of each Closing Order is already null and void.

**I. THE ICP SELECTIVELY MISCONSTRUES THE PTC'S UNANIMOUS
FINDING IN CASE 004/02**

10. The ICP cites the unanimous finding of the PTC in Case 004/02 that the two separate Closing Orders have no legal basis, yet, contradictorily, she argues that Mr YIM Tith should be tried on the basis of the ICIJ's (unlawful and procedurally defective) Closing Order in Case 004.¹⁶ In doing so, the ICP claims to be 'cognisant of the PTC's recent unanimous declaration in Case 004/2,'¹⁷ yet in fact she misleadingly seeks to blur the unanimous finding and to read ambiguity into the PTC's reasoning when in reality there is none.

¹³ ICP's Response, para. 27.

¹⁴ ICP's Response, para. 3.

¹⁵ ICP's Response, paras 26 and 27 (*italic emphasis in original*).

¹⁶ ICP's Response, paras 29 to 38 and 43.

¹⁷ ICP's Response, para. 26.

11. The ICP suggests that she respects the PTC's unanimous finding, stating that she 'does not contest this aspect of the Two Closing Orders Appeal'¹⁸ and is willing to abandon the position she took in her appellate submissions prior to the Case 004/02 Considerations. Closer scrutiny reveals that the ICP does not accept the PTC's unanimous finding that the Closing Orders both lack any foundation in law. The ICP's Response seeks to subvert and challenge the unanimous finding, and can only be construed as a request for reconsideration of a PTC finding that does not meet the requisite standard¹⁹ or an impermissible attempt to lodge an appeal of the PTC finding that is prohibited by Rule 77(13).²⁰
12. The ICP selectively misconstrues the PTC's unanimous finding, disapplying it to the ICIJ's Closing Order in a teleological argument that there is a legitimate indictment on which to try Mr YIM Tith. The argument is teleological because the ICP wants to send Mr YIM Tith to trial at any cost, and she advances spurious reasons to do so based on that aim, not on legal foundations. She claims that 'only the Indictment may be upheld under the ECCC's legal framework'²¹ while submitting that the NCIJ's Closing Order, a Dismissal Order issued pursuant to Rule 67(3), 'was not validly issued and should be overturned on this basis alone.'²² This is a selective and irrational interpretation of the PTC's finding that *both* CIJs 'committed a gross error of law' and 'violated the ECCC legal framework,' by issuing two separate Closing Orders.²³
13. While appearing to respect the PTC's unanimous finding by describing it is 'unequivocal',²⁴ the ICP calls the finding into question by submitting that the PTC had

¹⁸ ICP's Response, para. 27.

¹⁹ Case 002, *Decision on the Reconsideration of the Admissibility of Civil Party Applications*, 1 July 2011, D250/3/2/1/8, para. 6 ('In its previous jurisprudence, the Pre-Trial Chamber has applied the following test for reconsideration: "[...] The Application for Reconsideration may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decisions. The Appeals Chamber of the ICTY has held that a Chamber may "always reconsider a decision that it has previously made, not only because of a change of circumstances but also where it is realized that the previous decision was erroneous or that it has caused an injustice." [...] The standard for reconsideration has also been described as follows: "a Chamber has discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'"') (underline emphasis in original) (internal citations omitted).

²⁰ Rule 77(13) provides in relevant part: 'A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal.'

²¹ ICP's Response, paras 30 to 38.

²² ICP's Response, para. 38.

²³ Case 004/02, *Considerations on Appeals Against Closing Orders*, 19 December 2019, D359/24 and D360/33 ('Case 004/02 Considerations'), paras 89, 98, 99, and p. 61.

²⁴ ICP's Response, para. 27.

‘repeatedly and unanimously confirmed that the CIJs are not required to issue joint decisions.’²⁵ This misrepresents the PTC’s unanimous finding. The ICP misleadingly portrays an aspect of the ECCC procedure that the PTC took into consideration, and wrongly suggests that the PTC is of the view that the CIJs are not required to issue a joint Closing Order. The PTC precisely found to the contrary – the CIJs may only issue a *single* Closing Order.²⁶

14. The ICP relies on irrelevant policy considerations to support her erroneous legal argument that the ICIJ’s Closing Order must proceed to trial.²⁷ The ICP acknowledges that the PTC held that the CIJs ‘committed an error of law and failed to judiciously employ the procedures necessary to resolve their disagreement.’²⁸ At the same time, the ICP erroneously maintains that two opposing Closing Orders are permissible, continuing to claim, as she did in the Appeal of NCIJ’s Order, that the disadvantages of requiring a single Closing Order include violating judicial independence and undermining transparency.²⁹ The PTC’s findings in Case 004/02 render these policy considerations irrelevant to the current proceedings.³⁰
15. It is incontrovertible that the PTC judges 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.’³¹ The PTC found it clear and unambiguous under the ECCC legal framework that a Closing Order must be a *single decision* and that the framework makes *no allowance* for the issuance of opposing Closing Orders.³² The PTC held that the CIJs ‘committed a gross error of law’³³ by the ‘unprecedented simultaneous issuance of two separate and opposing Closing Orders in one single case,’³⁴ 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

²⁵ ICP’s Response, para. 29.

²⁶ Case 004/02 Considerations, para. 121.

²⁷ ICP’s Response, paras 26, 28 to 38.

²⁸ ICP’s Response, paras 25 to 26.

²⁹ ICP’s Response, para. 25.

³⁰ Case 004/02 Considerations, para. 121, p. 61.

³¹ Case 004/02 Considerations, p. 61.

³² Case 004/02 Considerations, para. 120.

³³ Case 004/02 Considerations, paras 98 and 99.

³⁴ Case 004/02 Considerations, para. 88.

office.³⁵ The PTC also found that ‘the errors committed by the Co-Investigating Judges in this case undermine the very foundations of the hybrid system and proper functioning of the ECCC.’³⁶ The unanimous legal finding in Case 004/02 must be applied to Case 004.³⁷

16. The ICP’s Response is based on an indefatigable and relentless prosecutorial attitude to Case 004 that continues to argue for Mr YIM Tith to be tried despite the lack of any validly-issued indictment. The ICP appears willing to maintain this attitude of ‘the ends justify the means’ in all procedural situations, irrespective of any legal impediment, even when the ICIJ’s Closing Order has been found to have no basis in law. This is clear from the ICP’s obvious attempt to selectively misconstrue the PTC’s unanimous finding to argue that only the ICIJ’s Closing Order should stand.

II. THE ICP IGNORES THAT THE OBVIOUS CONSEQUENCE OF THE PTC’S FINDING IS THAT BOTH CLOSING ORDERS ARE NULL AND VOID

17. By failing to recognise that the obvious consequence of the PTC’s unanimous finding in Case 004/02 is that the legal status of each Closing Order in Case 004 is null and void,³⁸ the ICP fails to show that the Defence Appeal of the Issuance of Two Closing Orders misrepresented the consequences of illegal Closing Orders and that the requested remedies are contrary to the law.
18. Confusingly, the ICP seeks to create an erroneous distinction between the lawful *issuance* of a Closing Order and the lawfulness of the Closing Order itself.³⁹ There is

³⁵ Case 004/02 Considerations, para. 89.

³⁶ Case 004/02 Considerations, para. 123.

³⁷ 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.

³⁸ ICP’s Response, paras 27 to 28.

³⁹ ICP’s Response, paras 26, 28, 59.

no legal distinction between these two concepts. Any judicial activity is either (i) carried out in accordance with the applicable law, or (ii) not carried out in accordance with the applicable law, in which case the judge issuing the decision has acted arbitrarily and *ultra vires* and the procedurally defective decision is a nullity that has no legal effect.⁴⁰ The PTC has found unanimously that when the CIJs issue more than one Closing Order, they violate the ECCC legal framework. As a result, the opposing Closing Orders are illegal and procedurally defective, and consequently, null and void.⁴¹

19. The ICP submits that:

Whilst the PTC held in its Case 004/2 Considerations that the CIJs' *issuance* of conflicting closing orders was not permitted under the ECCC's legal framework, this does not warrant the dismissal of both Closing Orders. Rather, the ICP submits that the PTC must now, as it did in Case 004/2, consider the legal status of each Closing Order to determine whether either (or both) is so procedurally or substantively flawed as to require overturning.⁴²

20. The ICP further submits that the Defence misrepresents the impact of the CIJs' legal error.⁴³ In fact, it is the ICP that misrepresents the unanimous part of the Case 004/02 Considerations, seeking to portray a simple, unanimous finding of illegality as complex. Nothing in the unanimous Considerations suggests that the PTC was minded to dismiss only one Closing Order in these circumstances, yet that is what the ICP misleadingly requests.⁴⁴

21. The ICP fundamentally fails to recognise the obvious consequence of the unanimous finding in the Case 004/02 PTC Considerations.⁴⁵ The CIJs were *not* permitted to exercise their independent discretion; they were required to issue a single Closing Order.⁴⁶ This means that both Closing Orders are null and void. As set out in the Defence's Response to the ICP's Appeal of the NCIJ's Closing Order, it is trite law

⁴⁰ See *YIM Tith's Response to the International Co-Prosecutor's Appeal of the National Co-Investigating Judge's Closing Order*, 20 February 2020, D381/26 ('Defence Response to the ICP's Appeal of the NCIJ's Closing Order'), paras 12 to 26.

⁴¹ See Defence Response to the ICP's Appeal of the NCIJ's Closing Order, paras 12 to 26.

⁴² ICP's Response, para. 59 (*italic emphasis in original*).

⁴³ ICP's Response, paras 27 to 28.

⁴⁴ ICP's Response, paras 27 to 28.

⁴⁵ ICP's Response, para. 30.

⁴⁶ Case 004/02 Considerations, para. 121.

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.⁴⁷

22. 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ It is also considered trite law in common law jurisdictions: ‘[t]he 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.’⁵¹
23. The ICP fails to substantiate her claim that the remedies requested in the Defence Appeal of the Issuance of Two Closing Orders are contrary to the law. Her assertion that only the ICIJ’s Closing Order should stand relies on a grasping interpretation of the words ‘the investigation shall proceed’ which does not survive any serious scrutiny.⁵² The only interpretation of ‘the investigation shall proceed’ that is consistent with the ECCC legal framework and jurisprudence and Cambodian criminal procedure is for the PTC to issue its own Closing Order.⁵³

⁴⁷ See Defence Response to the ICP’s Appeal of the NCIJ’s Closing Order, paras 12 to 26.

⁴⁸ 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.

⁴⁹ Cambodian Code of Criminal Procedure, Articles 280 and 281; French Code of Criminal Procedure, Articles 174 and 206.

⁵⁰ See e.g., Republic of Korea, Criminal Procedure Act, Act No. 9765, 9 June 2009, Article 327(2); Libya Code of Criminal Procedure and supplementary laws, 28 November 1953, Articles 304 and 309.

⁵¹ *Romito v. Maxwell*, 227 N.E.2d, 223, 224 (Ohio 1967). See also *State v. Bezak*, 868 N.E.2d 961, 963 (Ohio 2007); *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001); *State v. Simpkins*, 884 N.E.2d 568, 575 (Ohio 2008); *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; *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*, [2017] UKSC 51, para. 119.

⁵² ICP’s Response, paras 31 to 36, 40 and 41.

⁵³ Rule 79(1); Internal Rules, Glossary, p. 83; Cambodian Code of Criminal Procedure, Article 281; 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 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22.

24. A *lacuna* was left in Rule 67(2) since the drafters could not envisage the issuance of two separate Closing Orders.⁵⁴ The interpretation of Rule 67(2)'s provisions on the annulment of procedurally defective Closing Orders, including this *lacuna*, must be carried out in accordance with the civil law rules of interpretation.⁵⁵ After applying the civil law rules of interpretation to the ECCC legal framework, the PTC then looks to Cambodian procedure, then procedure at the international level.⁵⁶ 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 both Closing Orders are 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.⁵⁷ The PTC has also found that 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.'⁵⁸ 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.'⁵⁹ The proper legal interpretation of these provisions of the ECCC legal framework makes abundantly clear that the only remedies available to the PTC are those requested by the Defence, which the ICP has failed to show as contrary to this framework.
25. The ICP has recognised that the remedies requested in the Defence Appeal of the Issuance of Two Closing Orders are within the law, correctly submitting in the ICP's Appeal of NCIJ's Order that 'it is settled in ECCC jurisprudence and international law that when it is shown that a discretionary decision was premised on erroneous legal reasoning and/or factual findings, the appellate chamber *must annul* that decision and either send it back to the lower chamber to apply the correct standard or substitute its

⁵⁴ See Defence Response to the ICP's Appeal of the NCIJ's Closing Order, para. 14.

⁵⁵ See Defence Response to the ICP's Appeal of the NCIJ's Closing Order, para. 15.

⁵⁶ See Defence Response to the ICP's Appeal of the NCIJ's Closing Order, para. 18.

⁵⁷ See Defence Response to the ICP's Appeal of the NCIJ's Closing Order, paras 11 to 26.

⁵⁸ See Appeal of the Issuance of Two Closing Orders, para. 39; Case 004/02 Considerations, para. 32.

⁵⁹ Internal Rules, Glossary of Terms, p. 83.

own judgment on the matter.’⁶⁰ Yet she conveniently omits this in articulating the PTC’s standard of review in her Response.⁶¹ The ICP mischaracterizes PTC jurisprudence in claiming that where there are disagreements between the CIJs, only a decision to indict and send to trial is coherent with the default position that the ‘investigation shall proceed.’⁶² By so doing, the ICP also either ignores or misrepresents the PTC’s findings in Case 004/02.

26. The ICP submits that the Defence incorrectly interpreted or applied the principle of *in dubio pro reo* in the Defence Appeal of the Issuance of Two Closing Orders.⁶³ The ICP erroneously claims that the principle of *in dubio pro reo* does not apply to factual findings at the pre-trial stage, misrepresenting the applicable law and misrepresenting jurisprudence cited in the Defence Appeal of the Issuance of Two Closing Orders.⁶⁴
27. The Trial Chamber in its Judgments in Cases 002/01 and 002/02 did not hold, state, or otherwise imply that the principle of *in dubio pro reo* was strictly limited to the trial stage.⁶⁵ That the Trial Chamber overturned the PTC on an issue of substantive law is irrelevant. In its reasoning, the Trial Chamber did *not* reverse the PTC’s invocation of *in dubio pro reo* at the pre-trial stage, nor did *in dubio pro reo* factor into its reasoning at all.⁶⁶ The ICC Pre-Trial Chamber’s holding in *Bemba* illustrates that the principle of *in dubio pro reo* applies at the pre-trial stage, despite the standard of proof being less than that of beyond a reasonable doubt.⁶⁷ The remedies requested in the Defence

⁶⁰ ICP’s Appeal of NCIJ’s Order, para. 8 (italic emphasis in original).

⁶¹ ICP’s Response, para. 14.

⁶² ICP’s Response, paras 31 and 32.

⁶³ ICP’s Response, paras 44 and 45.

⁶⁴ Appeal of the Issuance of Two Closing Orders, paras 31 to 36. ICP’s Response, paras 44 and 45.

⁶⁵ See Case 002/01, *Case 002/01 Judgement*, 7 August 2014, E313, para. 22; Case 002/02, *Case 002/02 Judgement*, 16 November 2018, E465, paras 21, 3014.

⁶⁶ In Case 002, the PTC found that it was unable to identify, in the absence of clear State practice and *opinio juris*, ‘the crucial tipping point between 1968 and 1984’ when the nexus to an armed conflict was no longer required for crimes against humanity under customary international law. Applying the principle of *in dubio pro reo*, the PTC resolved this ambiguity in favour of the accused. The Trial Chamber overturned the PTC’s holding, based on its independent analysis of State practice and *opinio juris*, holding that the armed conflict nexus was not part of the definition of crimes against humanity within customary international law between 1975 and 1979. See Case 002, *Decision on Ieng Sary’s Appeal against the Closing Order*, 11 April 2011, D427/1/30, para. 310; Case 002, *Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order*, 15 April 2011, D427/2/15, para. 144; Case 002, *Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity*, 26 October 2011, E95/8, para. 33.

⁶⁷ The ICC Pre-Trial Chamber in *Bemba* specifically noted that the Rome Statute establishes three, progressively higher thresholds for each stage of the proceedings and that the standard applicable at the confirmation of charges stage is lower than that of beyond a reasonable doubt. It nonetheless held that in making its determination on the confirmation of charges, ‘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

Appeal of the Issuance of Two Closing Orders mandate strict adherence to the principle of *in dubio pro reo* and its applicability to this stage of proceedings.

28. The ICP tramples on the most basic of fair trial rights protected by Rule 21, erroneously submitting that the '[t]he way forward is clear and cannot be overridden by [...] the *in dubio pro reo* principle [...].'⁶⁸ The ICP misinterprets Rule 21 by erroneously submitting that 'the fact that a particular scenario might not be expressly covered by [a legal text] does not raise "doubt" from which a defendant will always profit,' as if the ICP views the calculation of the accused's fair trial rights as a zero-sum game.⁶⁹ The ICP fails to recall that PTC has held that Civil Party fair trial rights, which are also protected under Rule 21, cannot 'directly and adversely affect the position of the Accused, such as whether to prosecute or not [...].'⁷⁰ The rights protected by Rule 21 are clear and cannot be interpreted differently in different situations.
29. The ICP further erroneously submits that the *in dubio pro reo* principle is 'inapplicable to questions of procedure such as this' since 'it is mainly a rule of proof and not one of legal interpretation.'⁷¹ The ICP misrepresents the jurisprudence of the Supreme Court Chamber ('SCC'), incorrectly quoting: 'As the SCC held, '*in dubio pro reo* will therefore be unnecessary when addressing legal *lacunae*.'⁷² In fact, the SCC's holding was that '*in dubio pro reo* will usually be unnecessary on the occasion of addressing legal *lacunae*.'⁷³ Despite the *lacuna* in Rule 67(1), there is no doubt that the unlawfully-issued Closing Orders in Case 004 are null and void.

proceedings, including the pre-trial stage.' 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, paras 27 to 31.

⁶⁸ ICP's Response, para. 51.

⁶⁹ ICP's Response, para. 54: 'In any event, its narrow applicability to dilemmas of law is limited to doubts that remain after *interpretation* using the civil rules of interpretation, that is, upon taking into account the language of the provision, its place in the system (including its relation to the main underlying principles, and its objective). Every legal text is subject to interpretation and the fact that a particular scenario might not expressly be covered by it does not raise 'doubt' from which a defendant will always profit. As the SCC held, '*in dubio pro reo* will therefore be unnecessary when addressing legal *lacunae*' (italic emphasis in original).

⁷⁰ Case 002, *Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, 24 June 2011, D411/3/6, para. 97.

⁷¹ ICP's Response, para. 52.

⁷² ICP's Response, para. 54.

⁷³ Case 002/01, *Decision on Immediate Appeal by KHIEU Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31 (italic emphasis added).

30. Furthermore, the ICP fallaciously submits that the Defence is requesting an ‘automatic advantage’ arising on the interpretation of the Rules.⁷⁴ The ICP misrepresents and overstates the Defence position by submitting that ‘[i]f all procedural uncertainty were to be permitted to automatically benefit the charged person to the point of terminating proceedings, this would violate Cambodian and French procedural law.’⁷⁵ The Defence did not claim such entitlement. Once again, the ICP demonstrates a willingness to misrepresent facts, jurisprudence and parties’ submissions, in this case a motion from the Defence that simply requested the PTC to adhere strictly to the ECCC legal framework.

CONCLUSION

31. The current situation in Mr YIM Tith’s case is that the parties’ appeals are to be heard by a Chamber that unanimously considers the impugned orders to lack any procedural basis in law. There is no validly issued document on which Mr YIM Tith’s trial can proceed. He cannot be tried on a null and void indictment. The ICP misconstrued the PTC’s unanimous finding in Case 004/02 and its consequence for Case 004. In doing so, the ICP fails to show that the Defence Appeal of the Issuance of Two Closing Orders misrepresented the consequences of illegal Closing Orders and that the remedies requested by the Defence are contrary to the law.
32. As such, the outcome of the *Defence Appeal of the Issuance of Two Closing Orders* is foregone and inevitable. The only legal avenues open to the PTC are the remedies requested by the Defence. Since the validity of the procedure in the judicial investigation cannot be raised before the Trial Chamber or SCC,⁷⁶ it is the PTC that must now provide a definitive end to these proceedings.

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:

⁷⁴ ICP’s Response, para. 55.

⁷⁵ ICP’s Response, para. 57.

⁷⁶ Rule 76(7).

- (1) **Dismiss** the ICP's Response; and
- (2) **Grant** the Defence's Appeal of the Issuance of Two Closing Orders, *and*
- (3) **Dismiss** the defective Closing Orders with full prejudice and dismiss the case against Mr YIM Tith; *or*
- (4) **Dismiss** the defective Closing Orders 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*
- (5) **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 16th day of March 2020.