

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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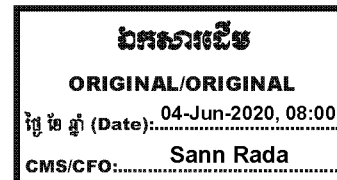
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**YIM TITH'S REQUEST FOR LEAVE TO INTERVENE IN  
CASE 004/02 ON THE JURISDICTION OF THE SUPREME COURT CHAMBER**

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**The Co-Lawyers for Mr AO An**

**Civil Parties in Case 004/2**

1. Mr YIM Tith, through his Co-Lawyers ('the Defence'), hereby requests leave to intervene in Case 004/02 by filing submissions on the Supreme Court Chamber's ('SCC') jurisdiction to hear the *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2* ('Immediate Appeal').<sup>1</sup> This request is made necessary since Mr YIM Tith has a legitimate interest in the SCC's disposal of the Immediate Appeal and denial of the intervention would cause him prejudice. The Defence proposes to make two submissions on the SCC's lack of jurisdiction: (i) the Immediate Appeal is moot, since the Pre-Trial Chamber ('PTC') made a unanimous finding that the Closing Orders in Case 004/02 were issued unlawfully and were, consequently, *null and void*; and (ii) the Immediate Appeal is manifestly inadmissible and frivolous because it does not identify any *appealable decision* for the SCC to consider. The Defence would request that the SCC summarily dismiss the Immediate Appeal for inadmissibility and declare it a *frivolous* motion.

**I. MR YIM TITH HAS A LEGITIMATE INTEREST IN THE REQUESTED INTERVENTION AND DENIAL WOULD CAUSE HIM PREJUDICE**

**A. JURISPRUDENCE**

2. The SCC has held that 'the primary consideration in allowing an intervention is whether it is in the legitimate interests of the requesting entity, and denial thereof could cause them prejudice.'<sup>2</sup> The SCC determined that while there was no right of parties to intervene on 'questions of law that might conceivably affect them,'<sup>3</sup> applications were to be granted 'where the interests of justice so dictate.'<sup>4</sup>
3. The SCC has recognised that the precedent of *Prosecutor v. Kallon and Kamara* before the Appeals Chamber of the Special Court for Sierra Leone demonstrates that requests for leave to intervene are to be assessed on the basis of the interests of the requesting party, rather than 'the court's own interest,' which the SCC considered the primary

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<sup>1</sup> Case 004/02, *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 4 May 2020, E004/2/1.

<sup>2</sup> Case 002, *Decisions on Requests to Intervene or Submit Amici Curiae Briefs in Case 002/01 Appeal Proceedings*, 8 April 2015, F20/1, para. 11.

<sup>3</sup> *Ibid.*, para. 12.

<sup>4</sup> *Ibid.*, para. 12.

consideration in granting status as *amicus curiae*.<sup>5</sup> It was on the basis of the interests of the requesting parties that the Appeals Chamber in *Prosecutor v. Kallon and Kamara* and *Prosecutor v. Norman* granted leave to intervene on novel legal issues concerning the granting of amnesties,<sup>6</sup> the scope of the court's jurisdiction,<sup>7</sup> and the judicial independence of the court.<sup>8</sup>

4. It is important to notice that international courts and tribunals allow for the admission of interveners in proceedings. For instance, Rule 131 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon ('STL') provides that the Trial Chamber may grant leave to persons to make written submissions on any issue and this provision does not preclude the Trial Chamber from granting leave to intervene to a defendant in another case before the tribunal.<sup>9</sup> Rule 131 distinguishes third party interveners from *amicus curiae*, even though this distinction does not appear to have been properly recognised in the jurisprudence on Rule 131.<sup>10</sup>
5. As another example, at the International Criminal Court ('ICC'), Rule 103(1) of the Rules of Procedure and Evidence provides that 'a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.'<sup>11</sup> Trial Chamber V(a) granted leave to the Government of Kenya to file submissions on the basis that its observations 'could

<sup>5</sup> *Ibid.*, para. 11.

<sup>6</sup> SCSL Appeals Chamber, *Prosecutor v. Kallon and Kamara* (SCSL-2004-15-AR72(E)), 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty,' 13 March 2004, p. 3.

<sup>7</sup> SCSL Appeals Chamber, *Prosecutor v. Norman* (SCSL-2004-14-AR72(E)), 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),' 31 May 2004, p. 3.

<sup>8</sup> SCSL Appeals Chamber, *Prosecutor v. Norman* (SCSL-2004-14-AR72(E)), 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence),' 13 March 2004, p.2.

<sup>9</sup> Rule 131 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon provides in full: 'Third Parties and Amicus Curiae (A) The Trial Chamber may decide, after hearing the Parties, that it would assist the proper determination of the case to invite or grant leave to a State, organisation or person to make written submissions on any issue, or to allow a State, organisation or person to appear before it as amicus curiae. (B) The Parties shall have the opportunity to respond to any submissions made by amicus curiae or third parties under paragraph (A).'

<sup>10</sup> See STL Contempt Judge, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat* (F0054), 'Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment,' 24 July 2014, para. 9. The Contempt Judge characterised the request for leave to make written submissions as *amicus curiae* as a request for leave to make submissions as a third party.

<sup>11</sup> Rule 103(1) of the Rules of Procedure and Evidence of the International Criminal Court.

assist the Chamber in its assessment.’<sup>12</sup> Despite noting the prosecution’s argument that the Government of Kenya was ‘merely repeat[ing] the submissions made by the Defence in their respective applications,’ the Chamber granted the request to file observations pursuant to Rule 103(1).<sup>13</sup> Presiding Judge Chile Eboe-Osuji stated that he ‘agreed with the Majority that the Government of Kenya should be granted leave to make intervener submissions in support of the Defence,’ clarifying that in his view the Government of Kenya was an intervener, not *amicus curiae*.<sup>14</sup> That the procedural frameworks of international courts and tribunals do not explicitly provide for defendants to request leave to intervene in another case, and that there is only limited practice of defendants seeking to intervene, does not demonstrate that procedural rules disallow intervention or that inherent powers may not be invoked to permit it.<sup>15</sup>

6. Third party interventions in criminal appeals have become increasingly common in other international and domestic jurisdictions. At the European Court of Human Rights, the President of the Court may grant permission to any person concerned to intervene in the interest of the proper administration of justice.<sup>16</sup> This has given rise to interventions on criminal law matters.<sup>17</sup> In the United Kingdom, since the establishment of the Supreme Court in 2009, intervener’s briefs have been increasingly

<sup>12</sup> ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11-1313), ‘Decision on defence applications for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” and the request of the Government of Kenya to submit amicus curiae observations,’ 23 May 2014, para. 34, p. 23.

<sup>13</sup> ICC Trial Chamber V(a), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11-1313), ‘Decision on defence applications for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” and the request of the Government of Kenya to submit amicus curiae observations,’ 23 May 2014, para. 9.

<sup>14</sup> ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11-1313-Anx-Corr), ‘Decision on defence applications for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” and the request of the Government of Kenya to submit amicus curiae observations,’ Partly dissenting opinion of Judge Eboe-Osuji, 23 May 2014, para. 1, fn 1. Presiding Judge Eboe-Osuji considered that while the application of the Government of Kenya was styled as an ‘*amicus curiae*,’ a term appearing in the title but not the body of Rule 103, the term ‘intervener’ was more appropriate.

<sup>15</sup> Case 002, *Decisions on Requests to Intervene or Submit Amici Curiae Briefs in Case 002/01 Appeal Proceedings*, 8 April 2015, F20/1, para. 10.

<sup>16</sup> European Convention on Human Rights, Article 36(2). Rules of Court of the European Court of Human Rights, Rule 44.

<sup>17</sup> See ECtHR, *A.T. v. Luxembourg*, Application No 30460/13, Judgment, 9 April 2015, para. 8.

common, the Supreme Court Rules providing that any person can make applications to intervene in any kind of appeal.<sup>18</sup>

## B. ARGUMENT

7. Mr YIM Tith has a legitimate interest in receiving a reasoned decision from the SCC that dismisses the Immediate Appeal for lack of jurisdiction and declares it *frivolous*, for the reasons set out in the two proposed submissions.<sup>19</sup> It is highly likely, in view of the principle of equal treatment,<sup>20</sup> that the PTC will maintain its unanimous position regarding the unlawfulness of the issuance of two Closing Orders.<sup>21</sup> At the same time, the ICP is causing a procedural quagmire in Case 004/02 by constantly filing manifestly inadmissible submissions to the Trial Chamber ('TC'), and now to the SCC, trying to push the case forward in contravention of the ECCC's procedural rules. It is therefore foreseeable that the ICP would, in such circumstances, similarly seek to push for the prolongation of the proceedings in Case 004.<sup>22</sup> An SCC decision dismissing the Immediate Appeal and declaring it frivolous would contribute to ensuring that the ICP does not repeat this absurd practice in Case 004.
8. Mr YIM Tith has a legitimate interest in the outcome of the two novel issues arising from the Immediate Appeal concerning the SCC's jurisdiction. The SCC has never been asked to decide on a non-existent TC decision. There are no previous arguments from other parties that would allow the SCC to predict that Mr YIM Tith's submissions would be superfluous. In Case 004, when the Co-Investigating Judges ('CIJs') faced a novel legal issue in which all parties to Cases 003, 004, and 004/02 had a legitimate interest, namely the question of whether the ECCC's budgetary situation required a permanent stay of proceedings, the CIJs took active steps to invite submissions from all interested parties.<sup>23</sup> The CIJs were similarly active in inviting submission on novel

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<sup>18</sup> Supreme Court of the United Kingdom, Supreme Court Rules, Rule 26(1). In Privy Council cases, any person claiming to have an interest in an appeal may apply for permission to intervene in an appeal: Judicial Committee (Appellate Jurisdiction) Rules 2009, Rule 27(1).

<sup>19</sup> *Infra*, sections II(A) and II(B).

<sup>20</sup> See Rule 21(b).

<sup>21</sup> *Infra*, sections II(A) and II(B).

<sup>22</sup> Immediate Appeal, para. 48.

<sup>23</sup> *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D249, para. 85.

legal issues that were common to all cases under investigation, the International CIJ inviting submissions from the parties to Cases 003 and 004 as to whether, under customary international law applicable between 1975 and 1979, an attack by a state or organisation against members of its own armed forces may amount to an attack directed against a civilian population for the purposes of Article 5 of the ECCC Law.<sup>24</sup>

9. Mr YIM Tith's interest in intervening in Case 004/02 at the current juncture in proceedings is distinct from the Case 002 litigation in which the SCC considered that the interests of the suspects in Cases 003 and 004 were not sufficient and denied their requests to file submissions in Case 002 on the question of the applicability of the JCE III mode of liability.<sup>25</sup> That question, according to the SCC, had been 'repeatedly litigated in both Cases 001 and 002,' the SCC referring to the submissions of four different defence teams to the Pre-Trial Chamber and TC, as well as its expectation of receiving further submissions on appeal.<sup>26</sup> The SCC further considered that it was 'inevitable that the content of the proposed intervention would be largely similar to those already offered in the past' and the SCC took into consideration that 'the question of whether JCE III formed part of customary international law between 1975 and 1979 was of a fixed nature and the defendants were 'unlikely to be able to offer any new circumstances or arguments in addition to those previously submitted.'<sup>27</sup> The SCC considered there was already a 'plethora of submissions on file' that would protect the interests of the Defence.<sup>28</sup>
10. Mr YIM Tith's proposed submissions are markedly different from those of AO An and the SCC will benefit from hearing him. AO An's submissions on the SCC's jurisdiction to consider the Immediate Appeal rest on the arguments that there are two Closing Orders in Case 004/2, neither of which was overturned by a supermajority on appeal, that the Dismissal Order stands under Rule 77(13)(a), and that even if the Closing Order Indictment also stands under Rule 77(13)(b), this does not impact the validity of

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<sup>24</sup> *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs*, 19 April 2016, D306.

<sup>25</sup> Case 002, *Decisions on Requests to Intervene or Submit Amici Curiae Briefs in Case 002/01 Appeal Proceedings*, 8 April 2015, F20/1, para. 15.

<sup>26</sup> *Ibid.*, para. 13.

<sup>27</sup> *Ibid.*, para. 14.

<sup>28</sup> *Ibid.*, para. 14.

the Dismissal Order.<sup>29</sup> Mr YIM Tith, to the contrary, would submit that *both* Closing Orders are null and void and the Immediate Appeal is moot, and there is no appealable decision from the TC that could be subjected to the SCC's appellate review.<sup>30</sup>

11. Mr YIM Tith will be prejudiced if he is prevented from intervening on the two issues set out below.<sup>31</sup> In Case 002, the PTC invited the Civil Parties from a separate Case File to intervene in Case 002 in circumstances where the determination of the application would lead to the issuance of general directions on procedural rights.<sup>32</sup> Similarly, Mr YIM Tith will be prejudiced if the SCC hears the Immediate Appeal and issues any general directions on procedural matters that impact him.
12. Furthermore, Mr YIM Tith will be prejudiced if he is prevented from intervening and the SCC decides to grant the Immediate Appeal in whole or in part, since the remedies requested by the ICP will impact Mr YIM Tith.<sup>33</sup> The remedies include asking the SCC to 'provide legal certainty,'<sup>34</sup> and the ICP herself submits that there is a lack of legal certainty in Case 004/02 that impacts Case 004.<sup>35</sup> The ICP thus explicitly recognises that the SCC may set a precedent that impacts Case 004.<sup>36</sup> While the SCC would not be technically bound by *stare decisis* to apply the same ruling to Mr YIM Tith, it would be bound to afford him the right to equal treatment to AO An.
13. The demonstrated willingness of the ICP to make filings to the TC and SCC in Case 004/02 in spite of the unanimous finding of the PTC in Case 004/02, makes it foreseeable that, in the event Case 004 arrives at the same procedural juncture, the ICP will seek to seize the SCC with similar arguments. The ICP has ignored the unanimous finding of the PTC in Case 004/02 and shown no consideration for the application of

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<sup>29</sup> Case 004, *Response to International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 14 May 2020, E004/2/1/1, p. 5 and 7.

<sup>30</sup> *Infra*, sections II(A) and II(B).

<sup>31</sup> *Infra*, sections II(A) and II(B).

<sup>32</sup> Case 002, *Decision on IENG Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav 'Duch'*, 6 October 2008, D99/3/19, para. 11.

<sup>33</sup> Immediate Appeal, p. 27.

<sup>34</sup> Immediate Appeal, p. 27.

<sup>35</sup> Immediate Appeal, para. 48.

<sup>36</sup> Immediate Appeal, para. 61. The ICP presumptuously and prematurely considers this possibility to be 'likely,' in spite of the proceedings that are pending before the PTC.

the Rules.<sup>37</sup> The Defence therefore wishes to address the SCC on the two reasons that it must act decisively to dismiss the Immediate Appeal as inadmissible and to declare it *frivolous*.

## II. PROPOSED SUBMISSIONS FOR INTERVENTION

14. The Defence proposes to make two submissions on the SCC's lack of jurisdiction: (i) the Immediate Appeal is moot, since the PTC made a unanimous finding that the Closing Orders in Case 004/02 were issued unlawfully and were, consequently, *null and void*; and (ii) the Immediate Appeal is manifestly inadmissible and frivolous because it does not identify any appealable decision for the SCC to consider. The Defence proposes to request that the SCC summarily dismiss the Immediate Appeal for inadmissibility and declare it a *frivolous* motion. The Defence proposes to file these submissions within five days of receiving notification of a decision on the present Request, and accordingly, the Defence further requests to file the submissions in English with the Khmer translation to follow.<sup>38</sup>

### A. PROPOSED SUBMISSION 1: THE IMMEDIATE APPEAL IS MOOT, SINCE THE PTC FOUND UNANIMOUSLY THAT THE CLOSING ORDERS WERE ISSUED UNLAWFULLY AND WERE, CONSEQUENTLY, NULL AND VOID

15. The ICP erroneously submits that there is a valid indictment in Case 004/02 and she proceeds on that basis throughout the entirety of the Immediate Appeal.<sup>39</sup>
16. The Defence would submit that the ICP systematically ignores or calls into question the unanimous finding of the PTC that the Closing Orders in Case 004/02 were issued

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<sup>37</sup> *Infra*, paras 15-19.

<sup>38</sup> The Defence wishes to file the proposed submissions as expeditiously as possible. Article 7.2 of Practice Direction ECCC/01/2007/Rev.8 allows the SCC to authorise filing in one language under exceptional circumstances. While the Practice Direction does not require parties to file a separate request for authorisation, authorisation is hereby requested in accordance with established practice, and the absence of any specific guidance in the Internal Rules or Practice Directions. The Immediate Appeal raises important, complex, and novel matters of law and procedure in Case 004/02 that have never been litigated at the ECCC. The Co-Lawyers are required by their professional due diligence obligation to seek leave to intervene on these matters.

<sup>39</sup> Immediate Appeal, paras 41-61.



unlawfully and were, consequently, *null and void*.<sup>40</sup> The SCC has no jurisdiction to hear an appeal that seeks to impugn the disposition in Case 004/02 that was signed by each and every one of the PTC judges.<sup>41</sup>

17. The consequence of the PTC's unanimous finding in Case 004/02 is that both Closing Orders are null and void because a judicial order with no legal basis is a nullity. It is trite law that to all intents and purposes such a judicial order no longer exists.<sup>42</sup> 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.'<sup>43</sup> 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 conformity with the ECCC's procedural law is null and void.
18. Rule 67(2) should be interpreted by first applying the standard rules of interpretation to the ECCC legal framework, then looking to Cambodian procedure, then procedure at the international level.<sup>44</sup> In order to correctly interpret Rule 67(2) within the 'system'

<sup>40</sup> Case 004/02, *Considerations on Appeals Against Closing Orders*, 19 December 2019, D359/24 and D360/33, p. 61.

<sup>41</sup> *Ibid.*, paras 88-89, 100, 102, 120-121.

<sup>42</sup> 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.

<sup>43</sup> 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.'

<sup>44</sup> According to the SCC, interpretation of the ECCC framework must be carried out in accordance with the civil law rules of interpretation, which '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.' Case 002/01, *Decision on Immediate Appeal by KHIEU Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31. 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, D55/1/8, 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 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003, Article 12(1); 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), Article 33*new*; Rule 2.

of annulment in ECCC pre-trial proceedings, it must be read in the context of the Rule 76, which 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. 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.<sup>45</sup> 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.<sup>46</sup> Domestic and international jurisdictions provide further support for the proposition that an illegally issued Closing Order is procedurally defective within the meaning of Rule 67(2).<sup>47</sup>

<sup>45</sup> 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.

<sup>46</sup> 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.

<sup>47</sup> 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 laws.' See Republic of Korea, Criminal Procedure Act, Act No. 9765, 9 June 2009, Article 327(2). 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. 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 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.' *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). 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

19. For the foregoing reasons, the consequence of the PTC's unanimous finding in Case 004/02 that the issuance of two Closing Orders was unlawful is that both are null and void. The PTC's finding was not subject to appeal. The Immediate Appeal, which

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conduct; that action was outside the parameters of any rule or procedure in place at that time.' *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001). The Court held that 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. 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.' *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001) quoting *Ex parte Spaulding*, 687 S.W.2d 741, 745 (Teague, J., concurring). 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 not erroneous or voidable, but it is wholly unauthorized and void." *State v. Simpkins*, 884 N.E. 2d 568, 575 (Ohio 2008) (internal citations omitted). 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: 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. *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.' 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.' The Trial Chamber was 'mindful of the need for the Tribunal to ensure the proper respect and compliance for the law.' ICTR Trial Chamber, *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. 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. 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. 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. The Trial Chamber issued a written decision confirming the oral ruling the following day. The Appeals Chamber found that the 'requirement in Rule 71 that an order for depositions to be taken may only be rendered 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. The Appeals Chamber considered that the Trial Chamber's written confirmation of the oral ruling 'could not *ipso facto* cure this illegality.' 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, paras 4, 6-7, 14.

systematically ignores the non-existence of any lawful Closing Order in Case 004/02, is *moot*, in the sense that it has ‘no practical significance.’<sup>48</sup>

**B. PROPOSED SUBMISSION 2: THE IMMEDIATE APPEAL IS MANIFESTLY INADMISSIBLE AND FRIVOLOUS BECAUSE IT DOES NOT IDENTIFY ANY APPEALABLE DECISION FOR THE SCC TO CONSIDER**

20. The ICP erroneously submits that the SCC has jurisdiction over the Immediate Appeal under Rule 104(4)(a) or pursuant to its inherent jurisdiction<sup>49</sup> because the effect of a Press Release issued by the TC, the TC’s actions or inactions in Case 004/02, and the

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<sup>48</sup> Garner, B., [Ed.] *Black’s Law Dictionary*, 9th edition, p. 1099. 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. See *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 on the 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, *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 Trial Chamber, *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’).

<sup>49</sup> Immediate Appeal, para. 41.

TC's physical return of documents is that the TC effectively terminated the proceedings.<sup>50</sup>

21. The Immediate Appeal is manifestly inadmissible since it is not an 'immediate appeal' under Rule 104(4)(a) of a 'decision which has the effect of terminating the proceeding.' The TC did not make any other *appealable decision* over which the SCC could exercise its inherent jurisdiction. No proceedings before the TC were conceivably possible, extinguishing *ab initio* any argument that the TC has made a decision that could be subject to the SCC's appellate review, since the two Closing Orders in Case 004/02 are *null and void*.<sup>51</sup>
22. The TC Press Release, its actions or inactions in Case 004/02, and its physical return of documents do not constitute an appealable decision by which the TC effectively terminated the proceedings.<sup>52</sup> A statement made in an informal press release cannot engage the jurisdiction of the SCC as an appealable decision. In any event, the TC Press Release expressly stated that 'issuing a formal decision [...] is not possible'<sup>53</sup> and that the statement has 'no legal force.'<sup>54</sup>
23. The ICP's submission in the alternative that the SCC has inherent jurisdiction to hear the Immediate Appeal is specious and self-contradicting.<sup>55</sup> The foundation of the entire Immediate Appeal is that the TC has 'effectively terminated' Case 004/02. It is logically inconsistent for the ICP to argue that the SCC has jurisdiction other than under Rule 104(4)(a).
24. In light of the manifest inadmissibility of the Immediate Appeal, the SCC should use its inherent power to declare the motion *frivolous*.<sup>56</sup> In the jurisprudence of international courts and tribunals, motions have been declared frivolous even without

<sup>50</sup> Immediate Appeal, paras 42-44. ECCC Press Release, *Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An*, 3 April 2020, published on the ECCC website ('TC Press Statement').

<sup>51</sup> *Supra*, section II(A).

<sup>52</sup> Immediate Appeal, para. 42.

<sup>53</sup> TC Press Statement, p. 2.

<sup>54</sup> TC Press Statement, p. 2.

<sup>55</sup> Immediate Appeal, paras 46-48.

<sup>56</sup> The SCC has an inherent power to where an appeal is inadmissible pursuant to Rule 104. The Defence notes that Rule 87(3) permits the Chamber to reject as evidence material which is *inter alia* intended to prolong proceedings or is frivolous.

reference to any explicit power to do so.<sup>57</sup> At the ICTR, a motion was declared frivolous since it was ‘devoid of any arguments in relation to the requirements prescribed by Rule 108 of the Rules [concerning ‘Notice of Appeal’] and the jurisprudence of the Appeals Chamber.’<sup>58</sup> In addition, Article 25 of the Code of Professional Conduct for Counsel Appearing Before the ICTY provided that Counsel shall not bring or defend a proceeding or action unless there is a basis for doing so that is not frivolous.<sup>59</sup> The ICTY Trial Chamber also dismissed a motion as ill-founded and frivolous on the basis of being aimed at ‘ultimately [bringing] chaos’ in the case.<sup>60</sup>

25. The ICP calls into question the PTC’s unanimous finding on the unlawfulness of both Closing Orders and tries to circumvent the impossibility of appealing the PTC’s finding by distorting the procedural rules and attempting to appeal a non-existent TC decision to the SCC. The ICP appears to have made numerous and excessively persistent attempts to engage the TC,<sup>61</sup> and now the SCC, in Case 004/02, despite being that the Closing Orders were null and void. The ICP is building up a practice of filing manifestly inadmissible motions in Case 004/02. Although the TC litigation is not the subject of the present request, the Defence submits that the cumulative effect of the ICP’s systematic attempts to litigate Case 004/02 is to make use of the ECCC’s time and resources in a highly disproportionate manner. The cumulative effect of the ICP’s approach to litigating Case 004/02 is to render the Immediate Appeal frivolous.

<sup>57</sup> ICTR Trial Chamber, *Prosecutor v. Muhimana* (ICTR-95-1B-I), ‘Decision on the Defence Motion for the Annulment of the Initial Appearance,’ 20 March 2000, para. 16. Rule 73(D) of the ICTY Rules of Procedure and Evidence and Rule 73(F) of the ICTR Rules of Procedure and Evidence refer to frivolous motions.

<sup>58</sup> ICTR Appeals Chamber, *Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-AR73.19), ‘Decision on Matthieu Ngirumpatse’s Appeal Against a Sanction Imposed on Counsel by Trial Chamber’s Decision of 1 September 2010,’ 21 March 2011, para. 18. ICTR Appeals Chamber, *Prosecutor v. Nahimana et al.* (ICTR-99-52-A), ‘Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Submit Additional Grounds of Appeal, To Amend the Notice of Appeal and to Correct his Appellant’s Brief,’ 17 August 2006, para. 19.

<sup>59</sup> Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125, Rev. 3, 6 August 2009, Article 25.

<sup>60</sup> ICTY Trial Chamber, *Prosecutor v. Brđanin and Talić* (IT-99-36-T), ‘Decision on “Request for Certification to Appeal Against the Decision to Separate Trials” and on “Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal”’, 3 October 2002, paras 10-13.

<sup>61</sup> Immediate Appeal, paras 7, 9, 19, 22. The Defence may not have been notified of all of the requests that have kept the TC occupied in Case 004/02.

## CONCLUSION


26. The SCC would benefit from receipt of the two submissions proposed above. Granting leave to intervene would cause no prejudice to any other party and would not cause undue delay. To the contrary, proper consideration of the arguments of all parties who have a legitimate interest in the Immediate Appeal will ensure that the SCC is able to issue a reasoned decision affirming its lack of jurisdiction over Case 004/02, thereby avoiding the wasteful use of the ECCC's limited resources on hearing the Immediate Appeal and the unnecessary duplication of proceedings in Case 004.<sup>62</sup>


## REMEDY

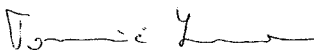
**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests that, in the interests of justice, the Supreme Court Chamber:

- (1) **Find** this request admissible;
- (2) **Grant** this request;
- (3) **Permit** the Defence to file a written brief in Case 004/02 of no more than 20 pages in English and limited to the proposed submissions set out in this request;
- (4) **Permit** the Defence to do so within five days of notification of a decision on this request; and
- (5) **Permit** the Defence to do so in English only with the Khmer translation to follow.

Respectfully submitted,

  
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 Suzana TOMANOVIĆ

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 3<sup>rd</sup> day of June 2020.

<sup>62</sup> ICTR Appeals Chamber, *Prosecutor v. Karemera et al.* (ICTR-98-44-AR73), 'Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File An Amended Indictment,' 19 December 2003, para. 18.