

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

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**YIM TITH'S RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S
APPEAL OF THE PRE-TRIAL CHAMBER'S FAILURE TO SEND CASE 004 TO
TRIAL AS REQUIRED BY THE ECCC LEGAL FRAMEWORK**

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INTRODUCTION

1. Mr YIM Tith, through his Co-Lawyers ('the Defence'), hereby submits to the Supreme Court Chamber ('SCC') his Response to The International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework ('ICP's Appeal') in English and Khmer ('Response'). The Defence respectfully requests the SCC to decline to exercise its inherent jurisdiction over Case 004 since the CIJs currently have exclusive jurisdiction over the case. The SCC should dismiss the ICP's Appeal *in limine*. In the alternative, the SCC should dismiss the ICP's Appeal because Grounds A, B and C seek to impermissibly relitigate previously decided issues and Ground D is irrelevant such that its judicial determination would be a redundant exercise. Furthermore, the ICP's Grounds are all inadmissible before the SCC pursuant to Rules 104(1) and 105(4).

I. PROCEDURAL HISTORY

2. On 17 September 2021, the Pre-Trial Chamber issued its *Considerations on Appeals Against Closing Orders* in Case 004 ('PTC Considerations').¹
3. On 23 September 2021, the ICP transmitted a request to the SCC – by email – requesting an extension of a time limit to file submissions to the SCC, in relation to which the ICP asserted that '[n]ormally this submission would be expected to be filed [...] within 30 days of the Case 004 Considerations.'²
4. On 23 September 2021, the Defence responded by email, refuting the ICP's assertion that the PTC Considerations is a decision subject to appeal to the SCC, and that it was necessary to hear first from the Defence before deciding on the matter.³
5. On 4 October 2021, the SCC issued its *Decision on International Co-Prosecutor's request for Extension of Time to File Her Submission Concerning the Pre-Trial Chamber's Closing Order Considerations in Case 004*.⁴

¹ *Considerations on Appeals Against Closing Orders*, 17 September 2021, D381/45 and D382/43.

² Email from the International Co-Prosecutor, 'ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

³ Email from the Defence, 'RE: ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

⁴ *Decision on International Co-Prosecutor's request for extension of time to file her submission concerning the pre-trial chamber's closing order considerations in case 004*, 4 October 2021, Doc. No. 2/2.

6. On 18 October 2021, the Defence submitted *YIM Tith's Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004* ('Defence Request to the CIJs') in English, which was notified on 19 October 2021.⁵ The Khmer translation was notified on 25 October 2021.
7. Nevertheless, the ICP, disregarding the existence of fully functioning judicial bodies in the ECCC – the Office of the Co-Investigating Judges ('OCIJ'), PTC, and Trial Chamber ('TC') – on 20 October 2021 filed her Appeal to the SCC, which was notified in English and Khmer on 21 October 2021.⁶

II. APPLICABLE LAW

8. Rule 21 of the Rules states in relevant part:
 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
 - a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;
 - b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;
 - c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and
 - d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.

[...]
 4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.

⁵ *YIM Tith's Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004*, 18 October 2021, D386.

⁶ *International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as required by the ECCC Legal Framework*, 20 October 2021, Doc No. 2.

9. Rule 69(2) of the Rules states:
2. Where no appeal is filed against a Closing Order, the Co-Investigating Judges shall seal the case file, and:
- a) If an Indictment is issued, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Trial Chamber to allow a date for trial to be set; or
 - b) If a Dismissal Order is issued, the case file shall be archived after the expiry of the time limit for appeal.
10. Rule 77(13) of the Rules states in relevant part: ‘A decision of the Pre-Trial Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal.’
11. Rule 77(14) of the Rules states:

All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. Such decisions shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the other parties by the Greffier of the Pre-Trial Chamber. The Co-Investigating Judges shall immediately proceed in accordance with the decision of the Pre-Trial Chamber.

12. Rule 104(1) of the Rules states in relevant part:

The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds:

- a) an error on a question of law invalidating the judgment or decision; or
- b) an error of fact which has occasioned a miscarriage of justice.

Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber’s discretion which resulted in prejudice to the appellant.

13. Rule 104(4) of the Rules states in relevant part: ‘The following decisions of the Trial Chamber are subject to immediate appeal: a) decisions which have the effect of terminating the proceedings[.]’
14. Rule 105(2) of the Rules states:

A party wishing to appeal a decision of the Trial Chamber where immediate appeal is available under Rule 104(4) shall file an immediate appeal setting out the grounds of appeal and arguments in support thereof. In respect of each ground of appeal it shall:

- a) specify an alleged error on a question of law and demonstrate how it invalidates the decision; or
 - b) specify a discernible error in the exercise of the Trial Chamber's discretion which results in prejudice to the appellant; or
 - c) specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice.
15. Rule 105(4) states: 'Appeals shall identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber.'

III. STANDARD OF APPELLATE REVIEW

16. Pursuant to 'the standard of appellate review against decisions set out in Rules 104(1) and 105(4), the Supreme Court Chamber shall decide immediate appeals on the following grounds': (i) an error of law invalidating the decision; (ii) an error of fact which has occasioned a miscarriage of justice; or (iii) 'a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the ICP'.⁷
17. Where the SCC considers that an appeal does not conform with the provisions of Rule 104(4)(a), it has found the appeal ground inadmissible.⁸ In such circumstances, the SCC has nonetheless found that an appeal can be admissible – only pursuant to its *inherent jurisdiction* – in order 'to ensure that legal certainty and finality are achieved in the determination of this case and to uphold the integrity of the institution of the ECCC.'⁹
18. When an immediate appeal requests the SCC to depart from its previous decisions, the interests of legal certainty and predictability require that the appellant demonstrate 'cogent reasons in the interests of justice.'¹⁰ Departure is 'the exception' to the rule that

⁷ Case 004/2, *Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 10 August 2020, E004/2/1/1/2 ('SCC Decision in Case 004/2'), para. 36.

⁸ See Case 002, *Decision on IENG Sary's Appeal Against Trial Chamber's Decision on IENG Sary's Rule 89 Preliminary Objections (Ne Bis in idem and Amnesty and Pardon)*, 20 March 2012, E51/15/12, p. 2 (considering that the jurisprudence of the SCC establishes that Rule 104(4)(a) contemplates only appeals against decisions that have the effect of terminating the proceedings, as opposed to all decisions concerning ECCC jurisdiction'). See also Case 002, *Decision on IENG Sary's Appeal Against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity*, 19 March 2012, E95/8/1/4, para. 8, p. 2.

⁹ SCC Decision in Case 004/2, para. 65.

¹⁰ Case 003, *Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Chum Neou*, 13 February 2013, D11/3/4/2, Opinion of Judges Chung and Downing, paras 16-17 ('Opinion of Judges Chung and Downing'); ICTY Appeals Chamber, *Prosecutor v. Aleksovski*, IT-94-14/1-A, 'Appeal Judgement', 24 March 2000, para. 108. ICTR Appeals Chamber, *Prosecutor v. Semanza*, ICTR-97-20-A, 'Decision', 31 May 2000, para. 92.

previous decisions are to be followed ‘and can be made only after careful consideration has been given to a precedent “both as to the law, including the authorities cited, and the fact [*sic*].”’¹¹ Instances where cogent reasons permit a departure include where a decision has been ‘wrongly decided, ... because the judge or judges were ill-informed about the applicable law.’¹² Thus, when an immediate appeal requests the SCC to depart from its conclusions of law in previous cases, it must be shown that there was a clear error in the SCC’s reasoning or a change in circumstances that would warrant the SCC to decide differently.¹³

19. ‘Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and need not be considered on the merits.’¹⁴ Such arguments include: (i) repetition of arguments without a demonstration of why their rejection constituted an error;¹⁵ (ii) arguments that ‘suffer from ... formal and obvious insufficiencies;’¹⁶ and (iii) ‘arguments that are clearly irrelevant.’¹⁷

IV. ADMISSIBILITY

i. **The ICP’s Appeal is inadmissible because the CIJs have exclusive jurisdiction over Case 004**

20. The ICP erroneously requests the SCC to admit the ICP’s Appeal under its *inherent jurisdiction* and order that Case 004 be forwarded to the TC for trial.¹⁸ In doing so, the ICP fails to recognise that the CIJs are seized with Case 004 and have exclusive jurisdiction.

¹¹ Opinion of Judges Chung and Downing, para. 17 (internal citation omitted).

¹² Opinion of Judges Chung and Downing, para. 16 (internal citations omitted).

¹³ Case 002, *Decision on Khieu Samphân’s Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal*, 7 June 2019, F44/1, p. 2; Case 002, *Decision on Co-Prosecutors’ Submissions on Proceeding with Appeal Hearing*, 3 December 2015, F30/16/1, p. 3; ICTY Appeals Chamber, *Prosecutor v. Šešelj*, IT-03-67-AR72.1, ‘Decision on Motion for Reconsideration of the “Decision on the Interlocutory Appeal Concerning Jurisdiction” Dated 31 August 2004’, 15 June 2006, para. 9.

¹⁴ Case 001, *Appeal Judgement*, 3 February 2012, F28 (‘Case 001 Appeal Judgement’), para. 20.

¹⁵ Case 001 Appeal Judgement, para. 20; ICTY Appeals Chamber, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, ‘Judgement’, 9 December 2015, para. 22.

¹⁶ Case 001 Appeal Judgement, para. 20.

¹⁷ ICTY Appeals Chamber, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, ‘Judgement’, 9 December 2015, para. 22.

¹⁸ ICP’s Appeal, paras 11-16, 31-35, 74.

21. It is foundational to the structure of the ECCC that decisions of the PTC are not subject to appeal to the SCC, as reflected in Rule 77(13). Specifically, in the dispositive part of the unanimous findings of the PTC Considerations, all judges held (unanimously) that ‘the present Decision is not subject to appeal.’¹⁹ Furthermore, the PTC Considerations is not a decision or judgment of the TC appealable under Rule 104(4)(a) or Rule 105(4), such that none of the ICP’s Grounds A, B, C and D is admissible on the basis of the procedures set out in the Internal Rules.
22. Nonetheless, the Defence recognises the SCC’s inherent jurisdiction to terminate proceedings in certain, limited circumstances. In its Decision in Case 004/2, the SCC found the ICP’s appeal inadmissible under Rule 104(4)(a) and Rule 105(4).²⁰ The SCC decided to exercise its inherent discretion ‘in the interest of justice and fairness and admit the appeal to ensure legal certainty and finality,’²¹ in circumstances where the OCIJ was not fully functioning, and it was unclear which body is seized with the Case 004/02 after the PTC Considerations.
23. The imperative that compelled the SCC to ensure that legal certainty and finality were achieved in the determination of Case 004/2 does not exist in Case 004.²²
24. The ICP misleads the SCC by cherry-picking from the PTC Considerations, omitting to brief the SCC that the PTC found that following the issuance of the Considerations, the CIJs are seized of Case 004.²³ The PTC unanimously ‘DECLARE[D] that the Co-Investigating Judges’ issuance of Two Closing Orders was illegal, violating the legal framework of the ECCC,’ finding that *the CIJs* ‘have a judicial duty to decide on matters in dispute of which they are seized.’²⁴ The PTC specified that ‘[w]hen their disagreement prevents them from arriving at a common final determination of such matters, they must still discharge this joint judicial duty by following the procedures available in the ECCC legal system to make sure that a conclusive determination on the matters within their

¹⁹ PTC Considerations, p. 49.

²⁰ SCC Decision in Case 004/2, paras 57 and 65.

²¹ SCC Decision in Case 004/2, paras 40, 42, 44, 58 and 60. The SCC did so on the jurisdictional basis requested by the ICP (the ICP had asked the SCC to ‘dispose of the legal matter before it in a definite manner’ and ‘to exercise its inherent jurisdiction to find the appeal admissible on the basis that “there is an imperative need to ensure a good and fair administration of justice”’, while the Defence for AO An did not support the application of the inherent jurisdiction of the SCC).

²² SCC Decision in Case 004/2, para. 65.

²³ Case 004 Considerations, p. 49.

²⁴ Case 004 Considerations, p. 49, para. 111.

jurisdiction is attained.’²⁵ The legal effect of this finding was clarified in Case 003, where the PTC held that upon notification ‘of the operative part of the Pre-Trial Chamber’s considerations’ the CIJs ‘are responsible for processing the case.’²⁶ The PTC also found that the reinstatement of the CIJs ‘puts the Office of the Co-Investigating Judges in a position to carry out its duty, unlike after the Considerations in Case 004/2 were issued.’²⁷

25. Ignoring the PTC’s finding, the ICP misleadingly argues, based on jurisprudence of other international criminal tribunals, that Case 004 is in procedural circumstances similar to cases where ‘no court had the power to pronounce on the matter due to “legal impediments or practical obstacles”’ and ‘it was necessary to remedy possible gaps in legal proceedings or ensure that justice was not only done but was also *seen* to be done.’²⁸ This international practice should be discounted by the SCC, since none of these procedural circumstances apply to Case 004.²⁹
26. The ICP also argues that the SCC should act without exhausting all available remedies prescribed by the ECCC legal framework.³⁰ To support her argument, the ICP cites the procedures of the European Court of Human Rights (‘ECtHR’), the Inter-American Court of Human Rights (‘IACtHR’), and the US Supreme Court (‘USSC’), without explaining how these sources apply to proceedings at the ECCC.³¹ The legal rules and principles established by the ECtHR, IACtHR and USSC in relation to exhaustion of remedies are not applicable since the ECCC’s legal framework determines the jurisdiction of the Chambers within the ECCC and provides for the exclusive jurisdiction of the CIJs over matters with which they are seized.³² Moreover, the ICP’s submission

²⁵ Case 004 Considerations, para. 111.

²⁶ Case 003, *Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for MEAS Muth Concerning the Proceedings in Case 003*, 8 September 2021, D271/5 and D272/3 (‘Case 003 Consolidated Decision’), para. 72.

²⁷ Case 003 Consolidated Decision, para. 72.

²⁸ ICP’s Appeal, para. 15 (emphasis in original).

²⁹ There are no ‘legal impediments or practical obstacles’ since the OCIJ is fully operational with a National Co-Investigating Judge (‘NCIJ’) and an International Co-Investigating Judge (‘ICIJ’) and legal staff, and it is functionally able to determine the Defence request in accordance with its exclusive jurisdiction.

³⁰ ICP’s Appeal, para. 16.

³¹ ICP’s Appeal, para. 16. The ICP invokes the ECtHR’s and IACtHR’s relationship to their member states and the relationship of US federal courts to states’ courts.

³² Rule 69(2)(b) provides the CIJs with exclusive jurisdiction to forward the Case File to the TC or to seal and archive it. Rule 77(14) provides that all PTC decisions ‘shall be notified to the Co-Investigating Judges,’ who ‘shall immediately proceed in accordance with the decision of the Chamber.’

is baseless. The remedies in Case 004 have not been exhausted since the CIJs have exclusive jurisdiction and are seized with the Defence Request to the CIJs.³³ The procedural circumstances of Case 004 are not analogous to those in the cited US jurisprudence in *Mullins Coal Co v. Clark*.³⁴ The ICP fails to explain how pursuing her remedies in response to the Defence Request to the CIJs or in any appeal against a potentially adverse decision from the CIJs would be a ‘futile gesture.’³⁵ Contrary to her argument on the ‘exhaustion of remedies’, there is no ‘exception’ from following the procedures applicable at the ECCC: the OCIJ is fully functioning and has exclusive jurisdiction to decide on the pending motion in Case 004, as argued above.

ii. The ICP’s Appeal is inadmissible because it seeks to relitigate issues from Case 004/2

27. The legal issues in Grounds A, B and C have been decided upon by the SCC in Case 004/2. The ICP fails to demonstrate cogent reasons for the SCC to depart from its established views in Case 004/2 and fails to establish any error of law or change of circumstances that could prompt the SCC to revisit these legal issues.³⁶
28. In Ground A, the ICP seeks to impermissibly relitigate the question of whether the opposing Closing Orders were issued illegally.³⁷ The SCC has found that ‘[i]n light of the Pre-Trial Chamber’s finding in Case 004/2 that the actions of the Co-Investigating Judges were illegal, it flowed that neither Closing Order was valid.’³⁸ Had the SCC disagreed with the PTC’s finding, it would have corrected the error since it has the power to ‘raise questions *ex proprio motu*’ where legal issues are ‘of general significance to the ECCC’s jurisprudence.’³⁹ The ICP merely repeats arguments she made before the PTC that Rule 1(2) offers a legal basis for the CIJs to issue two Closing Orders,⁴⁰ which the

³³ *Supra*, paras 20-25.

³⁴ *Mullins Coal Co v. Clark*, 759 F.2d 1142, 1146 (4th Cir 1985), cited in ICP’s Appeal, para. 16.

³⁵ ICP’s Appeal, paras 32 and 33. *See also Mullins Coal Co v. Clark*, 759 F.2d 1142, 1146 (4th Cir 1985) (holding that ‘[a] litigant need not exhaust administrative remedies where their pursuit would be a futile gesture’).

³⁶ *Supra*, paras 18-19.

³⁷ ICP’s Appeal, paras 36-44.

³⁸ SCC Decision in Case 004/2, para. 71(v).

³⁹ Case 001 Appeal Judgement, paras 15 and 16.

⁴⁰ ICP’s Appeal, para. 41, re-asserting arguments made in *International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against YIM Tith (D381)*, 2 December 2019, D381/19, para. 173.

PTC has dismissed in every instance of opposing Closing Orders,⁴¹ even after the SCC prompted the PTC to clarify its views on Rule 1(2).⁴²

29. In Ground B, the ICP seeks to impermissibly relitigate the question of whether the Closing Orders are null and void even if their simultaneous issuance was illegal.⁴³ This is a non-issue, as the SCC has plainly recognised.⁴⁴ The disingenuous attempt to distinguish between an order that has been unlawfully issued, and its legal effects, is sophistry at best.
30. In Ground C, the ICP seeks to impermissibly relitigate the question of whether the indictment was overturned by a supermajority and therefore proceeds to trial.⁴⁵ The SCC already determined in Case 004/2 that where there is no lawfully issued indictment, there is no basis to proceed to trial.⁴⁶ Seeking to do so, according to the SCC's finding in Case 004/2, the ICP 'sidesteps or ignores the consequences of the *unanimous* finding of the Pre-Trial Chamber that the Closing Orders were the results of *unlawful and illegal* actions.'⁴⁷ There is no live issue in Case 004 of whether the indictment was overturned by the PTC in accordance with the supermajority requirement, since the PTC in Case 004 also found *in unanimity* that the issuance of two Closing Orders was illegal, and the consequence of this finding is the same as in Case 004/2: an unlawfully issued indictment does not exist.⁴⁸
31. As the SCC noted, in Case 004/2 the ICP expressly requested the SCC's determination of her Immediate Appeal 'submitting that a reasoned precedent is necessary since potentially similar procedural circumstances will likely arise in Cases 003 and 004.'⁴⁹ Seen in the light of the ICP's position during Case 004/2, the ICP's renewed attempts in

⁴¹ Case 004/2, *Considerations on Appeals Against Closing Order*, 19 December 2019, D359/24 & D360/33, para. 121; Case 003, *Considerations on Appeals Against Closing Orders*, 7 April 2021, D266/27 & D267/35, paras 103 and 104; Case 004 Considerations, paras 109 and 110.

⁴² SCC Decision in Case 004/2, para. 68 (finding that 'whether Rule permits an Investigating Judge to act individually remains to be resolved by the Pre-Trial Chamber.')

⁴³ ICP's Appeal, paras 45-51.

⁴⁴ SCC Decision in Case 004/2, para. 67. The SCC recognised that, due to the impermissibility of issuing separate conflicting Closing Orders, there is no lawful indictment where two Closing Orders have been issued.

⁴⁵ ICP's Appeal, paras 52-57.

⁴⁶ SCC Decision in Case 004/2, para. 67.

⁴⁷ *Ibid* (emphasis in original).

⁴⁸ Case 004 PTC Considerations, p. 49. In this respect, Ground C is really a sub-consideration of Ground B, which in turn is obviated by Ground A.

⁴⁹ SCC Decision in Case 004/2, para. 42, citing Case 004/2, *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, 4 May 2020, E004/2/1, paras 48, 58-61.

Case 004 (and Case 003⁵⁰) to relitigate previously decided issues and to have the SCC disavow its established position is shown to be a disingenuous *volte face*. The ICP provides no cogent reasons, new legal issues, or change of circumstances for the SCC to hear argument on these issues again.⁵¹

V. RESPONSE

i. The ICP requests remedies that were denied in Case 004/2

32. The ICP is requesting the SCC to act on a legal basis that it already ruled out in Case 004/2.⁵² Despite asking for the same remedies that were already denied by the SCC in a reasoned decision in Case 004/2,⁵³ the ICP does not give ‘cogent reasons’ to depart from that decision.⁵⁴ There is no legal error in the SCC’s reasoning in Case 004/2 or change of circumstances that would justify the SCC acting differently in Case 004.

33. In the event the SCC finds the ICP’s Appeal admissible, all grounds of appeal must be denied because: (i) in Grounds A, B and C, the ICP erroneously fails to recognise that the issuance of two Closing Orders is unlawful such that both are null and void; and (ii) in Ground D, the ICP erroneously seeks to appeal an ‘irrelevant’ PTC separate opinion.

ii. Grounds A, B and C: the ICP erroneously fails to recognise that the issuance of two Closing Orders is unlawful such that both are null and void

34. In Grounds A, B and C, the ICP erroneously claims that Case 004 must proceed to trial pursuant to the default position because: (i) the Closing Orders were not illegally issued; (ii) ‘even assuming, *arguendo*, their simultaneous issuance was illegal,’ they are not null and void; and (iii) the indictment was not overturned by PTC supermajority.⁵⁵ As argued by this Defence before the SCC when seeking to intervene in Case 004/2, there is no question over whether the ‘effect’ or ‘consequence’ of the PTC’s unanimous finding is to render the Closing Orders null and void, because the PTC’s unanimous finding is itself

⁵⁰ Case 003, *International Co-Prosecutor’s Response to MEAS Muth’s Request to Terminate Case 003*, 25 October 2021, Doc. 4/1.

⁵¹ *Supra*, paras 18-19.

⁵² ICP’s Appeal, paras 2-5.

⁵³ Case 004/2, *International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2*, 4 May 2020, E004/2/1, paras 48, 58-61.

⁵⁴ *Supra*, paras 18-19.

⁵⁵ ICP’s Appeal, paras 36-57, esp. para. 45.

*a finding that no valid indictment on which to proceed to trial exists.*⁵⁶ The SCC's Decision in Case 004/2 echoed this position, finding that '[a] void act cannot create a lawful consequence or result. It therefore logically follows that the source action - each Closing Order - was of no legal effect.'⁵⁷

35. The PTC found that the CIJs' issuance of two Closing Orders in Case 004 was illegal, and that Rule 1(2) did not provide a legal basis to deviate from the requirement in Rule 67(1) to issue a single Closing Order.⁵⁸ The PTC considered that the CIJs' issuance of two Closing Orders was not a mere procedural error but '[m]ore than a violation of the fundamental principles of the ECCC legal framework.'⁵⁹
36. 'Unlawfully issued' in the PTC finding is synonymous with 'null and void'. The Defence has raised this argument before both the PTC and the SCC.⁶⁰ Indeed, all the SCC judges have recognised the trite point of law: a judicial order with no legal basis is a nullity, meaning, in other words, that to all intents and purposes it no longer exists.⁶¹ The ICP provides no cogent reasons for the SCC to depart from this finding, merely re-asserting that Rule 67(1) must be read in context and conjunction with Rule 1(2), '[m]eaning implicitly that each [CIJ] could issue a closing order.'⁶² The SCC had considered Rule 1(2) in Case 004/2, finding that 'whether Rule 1(2) permits an Investigating Judge to act individually remains to be resolved by the Pre-Trial Chamber.'⁶³ In the subsequent considerations in Cases 003 and 004, the PTC confirmed that Rule 1(2) does not permit the CIJs to act individually and issue two Closing Orders.⁶⁴

⁵⁶ Case 004/2, *YIM Tith's Request for Leave to Intervene in Case 004/02 on the Jurisdiction of the Supreme Court Chamber*, 3 June 2020, E004/2/3, paras 15-19. See also *YIM Tith's Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004*, 18 October 2021, D386, paras 14-17.

⁵⁷ Case 004/2 Decision, para. 67.

⁵⁸ Case 004 Considerations, para. 110.

⁵⁹ *Contra* ICP's Appeal, paras 22 to 23, 45 to 49. See Case 004 Considerations, para. 114.

⁶⁰ *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, paras 12-26; Case 004/2, *YIM Tith's Request for Leave to Intervene in Case 004/02 on the Jurisdiction of the Supreme Court Chamber*, 3 June 2020, E004/2/3, paras 15-19.

⁶¹ SCC Decision in Case 004/2, paras 54 and 67.

⁶² ICP's Appeal, para. 41, re-asserting arguments made in *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against YIM Tith (D381)*, 2 December 2019, D381/19, para. 173.

⁶³ SCC Decision in Case 004/2, para. 68.

⁶⁴ Case 003, *Considerations on Appeals Against Closing Orders*, 7 April 2021, D266/27 & D267/35, paras 103 and 104; Case 004 Considerations, paras 109 and 110.

37. The SCC has already decided that the default position cannot apply absent a valid indictment.⁶⁵ More specifically, the SCC found that the argument proposed by the ICP that a ‘default position’ applies to progress the case in the absence of a supermajority in favour of dismissal ‘sidesteps or ignores the consequences of the *unanimous* finding of the Pre-Trial Chamber that the Closing Orders were the results of *unlawful and illegal actions*.’⁶⁶ Based on the PTC’s unanimous finding in Case 004 and the SCC’s unanimous holdings of law in Case 004/2, there is no lawful indictment in Case 004. The ICP provides no cogent reasons for the SCC to depart from this finding and now consider that a case can go to trial on an illegally issued (null and void) indictment.
38. The SCC also decided that the appropriate remedy in such a case is that it must be terminated. It considered that ‘there was no agreement after thirteen years of investigations that AO An was within the jurisdiction of the Court’ and ‘in the absence of a definitive and enforceable indictment against AO An, Case 004/2 against him should be terminated before the ECCC.’⁶⁷ The ICP provides no cogent reasons for the SCC to depart from this finding and to go on to consider in Case 004 whether the two Closing Orders ‘occasioned a miscarriage of justice’ or ‘grossly unfair outcome in the proceedings’ and factors such as the gravity of the crimes, the social costs of preventing the case from proceeding, the interests of all parties, and the proportionality of any remedy to the alleged harm.⁶⁸
39. The ICP makes this submission by misrepresenting or misleading with inapposite jurisprudence. First, the ICP erroneously relies on the standard of review for curable procedural errors in a trial judgment,⁶⁹ ignoring the unanimous PTC findings that the CIJs ‘manifest’ errors in issuing two Closing Orders ‘jeopardised’ and ‘undermined’ the entire legal framework of the ECCC.⁷⁰ The ICP further erroneously relies on inapposite case law from the ECtHR on determining the ‘fairness of proceedings’ and common law jurisprudence from the US on the suppression of evidence, misrepresenting these cases as ‘jurisprudence’ that is applicable at the ECCC in determining the appropriate remedy

⁶⁵ SCC Decision in Case 004/2, para. 67.

⁶⁶ SCC Decision in Case 004/2, para. 67 (emphasis in original).

⁶⁷ SCC Decision in Case 004/2, para. 69.

⁶⁸ ICP’s Appeal, para. 46.

⁶⁹ ICP’s Appeal, para. 22, citing the SCC’s standard of appellate review in Case 002/01, *Appeal Judgement*, 23 November 2016, F36, para. 100.

⁷⁰ Case 004 Considerations, paras 111, 112, and 114.

for the illegally issued Closing Orders.⁷¹ Lastly, she misleadingly cites case law holding that cases should only be terminated for abuse of process in exceptional cases of ‘*egregious violations*’.⁷² Contrary to the ICP, the lack of a final determination to the 15-year investigation of Mr YIM Tith’s case, in which there is no agreement among the Co-Prosecutors, CIJs, or PTC judges over whether he falls within the ECCC’s personal jurisdiction, raises ‘grave consequences’ for his fair trial rights, making termination the appropriate remedy.⁷³

40. The ICP provides no cogent reasons for the SCC to depart from its legal reasoning in Case 004/2 that means there is no indictment in Case 004.⁷⁴ Grounds A, B and C must be dismissed.

iii. **Ground D: the ICP erroneously seeks to appeal an ‘irrelevant’ PTC separate opinion**

41. In Ground D, the ICP seeks to appeal the National PTC judges’ separate opinion in claiming that Case File 004 is not illegal.⁷⁵
42. The SCC already found that having declared the issuance of two Closing Orders to be the results of ‘*unlawful and illegal actions*,’ the PTC judges’ separate opinions were ‘irrelevant,’ ‘a redundant exercise,’ and ‘superfluous.’⁷⁶ The ICP provides no cogent reasons for the SCC to depart from its legal reasoning. Ground D must be dismissed as irrelevant.⁷⁷

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to:

⁷¹ ICP’s Appeal, para. 23, fn. 44, citing *inter alia Ibrahim and others v the United Kingdom*, ECtHR Application Nos. 50541/08, 50571/08, 505373/08, 40351/09, Judgment, 13 September 2016, para. 252 and *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

⁷² ICP’s Appeal, para. 50, fn. 92, citing *inter alia Case 002, Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1)*, 10 August 2010, D264/2/6, para. 28.

⁷³ Case 003, *Decision on International Co-Prosecutor’s Request to Forward Case File 003 to the Trial Chamber*, 20 May 2021, D270/7, paras 25-27. *See also* SCC Decision in Case 004/2, para. 69.

⁷⁴ *Supra*, paras 18-19.

⁷⁵ ICP’s Appeal, paras 58-71.

⁷⁶ SCC Decision in Case 004/2, paras 53, 67 (emphasis in original).

⁷⁷ *Supra*, paras 18-19.

1. **DECLINE** to exercise its inherent jurisdiction over Case 004 since the CIJs currently have exclusive jurisdiction.
2. **DISMISS** the ICP's Appeal *in limine*.

In the alternative:

3. **FIND** Grounds A, B and C inadmissible since they seek to impermissibly relitigate previously decided issues and are inadmissible pursuant to Rules 104(1) and 105(4).
4. **FIND** that Ground D is irrelevant and is inadmissible pursuant to Rules 104(1) and 105(4).
5. **DISMISS** the ICP's Appeal *in limine*

Respectfully submitted,



SO Mosseny

Suzana TOMANOVIĆ

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 1st day of November 2021.