

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**YIM TITH'S REPLY TO THE INTERNATIONAL CO-PROSECUTOR'S RESPONSE
TO YIM TITH'S REQUEST TO TERMINATE, SEAL AND ARCHIVE CASE 004**

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Mr YIM Tith, through his Co-Lawyers ('the Defence'), hereby submits his *Reply to the International Co-Prosecutor's Response to YIM Tith's Request to Terminate, Seal and Archive Case 004* ('Reply' and 'ICP's Response'). The ICP's Response should be dismissed because the ICP seeks to impermissibly relitigate issues decided by the Pre-Trial Chamber ('PTC') and Supreme Court Chamber ('SCC') without providing cogent reasons to depart from their decisions, repeatedly displaying a fundamental defiance of the Rules, disrespect for and lack of deference to ECCC judicial decisions, and careless disregard of the fair trial rights of Mr. YIM Tith. The Defence requests to file this Reply in English with the Khmer translation to follow.¹

I. PROCEDURAL HISTORY

1. On 17 September 2021, the PTC issued its *Considerations on Appeals Against Closing Orders* in Case 004 ('PTC Considerations').²
2. 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.'³
3. 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.⁴
4. 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*.⁵
5. 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

¹ See Email from the Interpretation and Translation Unit to Defence, 'Translation of Motion,' 15 November 2021.

² *Considerations on Appeals Against Closing Orders*, 17 September 2021, D381/45 & D382/43.

³ Email from the International Co-Prosecutor, 'ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

⁴ Email from the Defence, 'RE: ICP Request for Extension of Time to File Submissions in Case 004,' 23 September 2021.

⁵ *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.

Request to the CIJs') in English, which was notified on 19 October 2021.⁶ The Khmer translation was notified on 25 October 2021.

6. 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 2021.⁷
7. On 1 November 2021, the Defence filed *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*.⁸
8. On 4 November 2021, the ICP filed her Response, which was notified in both English and Khmer on 8 November 2021.⁹

II. THE ICP ERRONEOUSLY CLAIMS THAT THE REQUEST IS INADMISSIBLE

9. The ICP erroneously claims that all legal avenues are not exhausted because 'Yim Tith knew the ICP intended to seise the Supreme Court Chamber [...] with an appeal.'¹⁰ The SCC is not a 'legal avenue for adhering to the ECCC legal framework' because it has no jurisdiction to decide on an appeal of a PTC decision, as reflected in Rule 77(13) and the unanimous PTC Considerations.¹¹ While the SCC has inherent jurisdiction to terminate proceedings in certain, limited circumstances, the imperative that compelled the SCC to exercise this jurisdiction to achieve legal certainty and finality in Case 004/2 does not exist in Case 004 because the OCIJ is now fully functioning.¹² The ICP in her Appeal omitted to brief the SCC that the CIJs are seized

⁶ *YIM Tith's Request to the Co-Investigating Judges to Immediately Terminate, Seal and Archive Case 004*, 18 October 2021, D386.

⁷ *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.

⁸ *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*, 1 November 2021, Doc. No. 2/1 ('YIM Tith's Response').

⁹ *International Co-Prosecutor's Response to YIM Tith's Request to Terminate, Seal and Archive Case 004*, 4 November 2021, D386/1.

¹⁰ ICP's Response, paras 3-4.

¹¹ PTC Considerations, para. 49.

¹² See 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'), paras 57 and 65.

of Case 004 following the issuance of the PTC Considerations.¹³ The SCC, like all judicial bodies in the ECCC, can only exercise its inherent jurisdiction when it is incidental to its primary jurisdiction.¹⁴ The CIJs have *primary* and *exclusive* jurisdiction in accordance with Rule 77(13) and the PTC's unanimous findings.¹⁵ Moreover, the ICP failed to demonstrate cogent reasons for the SCC to depart from its established views in Case 004/2 or any error of law or change of circumstances that could prompt the SCC to revisit any of the issues raised in her Appeal.¹⁶ Whether the Defence knew the ICP intended to seize the SCC is irrelevant.

10. The ICP erroneously claims that the CIJs are not seized of Case 004.¹⁷ The PTC has remanded the case to the CIJs following the issuance of their Considerations, having decided not to investigate the case itself or issue its own Closing Order pursuant to its authority as the 'Cambodian Investigation Chamber in the ECCC' or in accordance with the SCC Decision in Case 004/2 after declaring the issuance of two Closing Orders to be illegal.¹⁸ Removing any doubt as to which ECCC body is seized following the issuance of their Considerations, the PTC clarified in Case 003 that the CIJs 'are responsible for processing the case' and for complying with the PTC Considerations 'immediately.'¹⁹ Following the PTC's decision in Case 003, the CIJs made clear that they consider their office to be fully functioning and that it has the power to terminate, seal and archive the case.²⁰
11. The ICP erroneously claims that the CIJs have no inherent jurisdiction.²¹ The Request does not claim that the CIJs have inherent jurisdiction at this stage of the proceedings. Rather, the Defence submits that the CIJs have *primary* and *exclusive* jurisdiction

¹³ YIM Tith's Response, para. 24; PTC Considerations, p. 49, para. 111; 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.

¹⁴ See Case 002, *Decision on Co-Prosecutor's Request for Clarification*, 26 June 2013, E286/2/1/2, para. 12. See also Case 002, *Decision on KHIEU Samphan's Urgent Appeal against the Summary of Judgment Pronounced on 16 November 2018*, 13 February 2019, E463/1/3, para. 17.

¹⁵ Defence Request to the CIJs, paras 7-12; YIM Tith's Response, paras 20-26.

¹⁶ YIM Tith's Response, paras 27-31.

¹⁷ ICP's Response, para. 5.

¹⁸ SCC Decision in Case 004/2, para. 61, citing Case 004/2, *Considerations on Appeals Against Closing Orders*, 19 December 2019, D359/24 & D360/33, para. 30 (noting that the PTC has found that it has the power to issue a new or revised Closing Order and that it fulfils the role of the Cambodian Investigation Chamber in the ECCC, meaning that it 'shall investigate the case itself' when seized of an appeal of a dismissal order). Case 004 Considerations, p. 49.

¹⁹ Case 003 Consolidated Decision, para. 72.

²⁰ Case 003, *Order to File Submissions on Residual Jurisdiction to Terminate Case 003*, 16 September 2021, D273.

²¹ ICP's Response, para. 6.

based on Rule 77(13) and the PTC's unanimous finding that the two Closing Orders were issued unlawfully, meaning that both orders are null and void,²² after which the PTC used its authority as 'the Investigation Chamber in the ECCC' to remand the case to the CIJs to process it in accordance with the PTC Considerations.²³

12. The ICP erroneously claims that the CIJs have no legal authority to dismiss the indictment.²⁴ There is no valid indictment in Case 004. Both Closing Orders were issued illegally.²⁵ Echoing arguments this Defence has made since its Appeal of the Issuance of two Closing Orders,²⁶ the CIJs explained in Case 003 that '[a] procedural error of such an order of magnitude in any decision during the investigations would have inevitably led to its being struck from the case file as void' and that the 'surprising stance taken by the IJs in the Case 003 considerations that this error did not make the COs void in itself is difficult to comprehend [...]'.²⁷ The Defence did not ask the CIJs to 'nullify a valid indictment' as the ICP erroneously claims,²⁸ but to recognise a procedural situation that already exists and to process the case accordingly.
13. The ICP erroneously concludes that the CIJs 'predetermination of whether the case should progress to trial' has disqualified them.²⁹ The ICP does not have the *judicial* authority vested in the PTC by Rule 34(5) to pronounce on the disqualification of the CIJs. She simply declares that the CIJs acted with actual *and* apparent bias when they requested submissions in Case 003 on whether they have residual jurisdiction to terminate the case, without making an application under Rule 34(5) with supporting evidence.³⁰ This is a serious professional accusation, particularly since it accuses the ICIJ and NCIJ not only of giving the appearance of bias, but of actually *being* biased. Disqualification of a judge is not a step to be taken lightly and a high threshold must be satisfied to rebut the presumption of impartiality which 'derives from their oath of

²² Defence Request to the CIJs, paras 14-16.

²³ Defence Request to the CIJs, paras 8-12.

²⁴ ICP's Response, para. 7.

²⁵ Defence Request to the CIJs, para. 39; YIM Tith's Response, paras 27-40.

²⁶ *YIM Tith's Appeal of the Issuance of Two Closing Orders in Case 004*, 2 December 2019, D381/18 & D382/21, paras 37-40. See also *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 8-26.

²⁷ Case 003, *Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber*, 20 May 2021, D270/7 ('CIJs' Decision on Forwarding Case File 003'), para. 21.

²⁸ ICP's Response, para. 7.

²⁹ ICP's Response, paras 8-9.

³⁰ ICP's Response, para. 9; Case 003, *Order to File Submissions on Residual Jurisdiction to Terminate Case 003*, 16 September 2021, D273.

office and the qualifications for their appointment.³¹ The ICP's bald assertions fail to meet this threshold. As both Co-Prosecutors argued when the accused in Case 002 requested the disqualification of all TC judges, 'the *conditio sine qua non* to establish lack of impartiality is to provide evidence that the Judges have demonstrated an extraneous or improper predisposition against the accused, *not genuinely related to the application of the law*.'³² Notably, the ICP did not accuse the CIJs of bias when they requested submissions on the impact of the ECCC's budgetary situation and stated that they were considering staying all proceedings with full prejudice,³³ or when the ICJ requested submissions on other legal issues while indicating his preliminary views on the law.³⁴ The ICP's argument in Case 004 that the CIJs should be prevented from giving effect to the unanimous PTC Considerations is not only ill-founded but usurps the PTC's authority under Rule 34(5), and accordingly must be dismissed.

III. THE ICP ERRONEOUSLY CLAIMS THAT THE REQUEST LACKS MERIT

14. The ICP erroneously claims that the principle of equal treatment does not justify the termination of Case 004.³⁵ Contrary to the ICP's misrepresentations of the Request, the Defence did not submit that there is an 'absolute obligation to retain the reasoning and conclusions of earlier cases.'³⁶ Rather, there is a right to equal treatment in Rule 21(1)(b) which mandates that Mr YIM Tith must be treated equally to Mr AO An such that the same legal issues decided by the SCC in Case 004/2 are equally interpreted and applied in Case 004 since there are no cogent reasons to depart from its analysis.³⁷ The CIJs have accepted the reasoning in the SCC Decision in Case 004/2³⁸ and have

³¹ Case 002, *Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of NUON Chea*, 4 February 2008, C11/29, para. 15.

³² Case 002, *Co-Prosecutors' Joint Response to IENG Thirith, IENG Sary and NUON Chea's Applications for Disqualification of the Judges*, 23 February 2011, E55, para. 3 (emphasis added).

³³ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D249, D355, para. 80.

³⁴ *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs*, 19 April 2016, D306, para. 5: 'Leaving aside the contentious issue about the nexus to an armed conflict under the ECCC's jurisdiction aside ... one could further argue that it would a) seem beyond dispute that a regime which in peace times tried to cleanse its own armed forces of, for example, all soldiers holding a particular ethnicity or faith, would under international customary law be engaging in a variety of crimes against humanity, because the victims' combatant quality merely because they are soldiers would be entirely irrelevant in this context, and that b) there is no reason to think otherwise if such a campaign happened in the course of or otherwise connected to an armed conflict.'

³⁵ ICP's Response, paras 10-16.

³⁶ ICP's Response, para. 14.

³⁷ Defence Request to the CIJs, paras 13-17, esp. para. 16; YIM Tith's Response, paras 27-42.

³⁸ CIJs' Decision on Forwarding Case File 003, para. 21.

previously stated that they ‘feel bound, by reason of practical judicial deference to the Court’s supreme appellate body, to follow the substance of SCC case law unless there are exceptional reasons for a disagreement and for taking an openly dissenting stance.’³⁹ No such reasons exist for the CIJs to deny Mr YIM Tith equal treatment and application of the SCC’s reasoning in Case 004/2.

15. The ICP erroneously claims that there are clear and cogent reasons to depart from the SCC Decision in Case 004/02.⁴⁰ The ICP simply repeats arguments that have been dispensed with by the CIJs,⁴¹ PTC,⁴² and SCC⁴³ without explaining why their rejection constituted an error.⁴⁴ 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 *a finding that no valid indictment on which to proceed to trial exists*.⁴⁵ Having declared the issuance of two Closing Orders to be a nullity, the PTC judges’ separate opinions in Case 004 are ‘irrelevant,’ ‘a redundant exercise,’ and ‘superfluous.’⁴⁶ The ICP provides no cogent reasons for the CIJs to depart from the SCC’s decision that the Closing Orders are null and void and consider whether their illegal issuance ‘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

³⁹ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10.

⁴⁰ ICP’s Response, paras 17-28.

⁴¹ In claiming that the case goes to trial based on what the PTC unanimously described as the ‘fundamental and determinative’ default position intrinsic to the ECCC legal system, the ICP re-asserts arguments advanced before the CIJs in Case 003, *International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber*, 19 April 2021, D270, para. 16. ICP’s Response, paras 29-31. CIJs’ Decision on Forwarding Case 003, paras 22-23, 25, 35 and 36.

⁴² In claiming that the issuance of two Closing Orders were not issued illegally, the ICP re-asserts her appellate argument 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.’ *International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against YIM Tith (D381)*, 2 December 2019, D381/19, para. 173. ICP’s Response, paras 18-20. Case 004 Considerations, paras 111 and 112.

⁴³ In claiming that the case proceeds to trial pursuant to the default position *even if* the Closing Orders were not issued illegally, the ICP re-asserts arguments advanced before the SCC in 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 50-57. ICP’s Response, paras 29-31. SCC Decision in Case 004/2, para. 68.

⁴⁴ ‘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’ such as repetition of arguments without a demonstration of why their rejection constituted an error. Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 20; ICTY Appeals Chamber, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, ‘Judgement’, 9 December 2015, para. 22.

⁴⁵ SCC Decision in Case 004/2, para. 67. 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.

⁴⁶ SCC Decision in Case 004/2, paras 53, 67 (emphasis in original).

proportionality of any remedy to the alleged harm.⁴⁷ There is no valid indictment in Case 004.



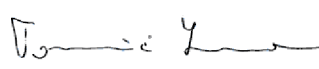
IV. CONCLUSION

16. The ICP has been attempting for 15 years to prosecute Mr YIM Tith without the consent and backing of her colleague, the National Co-Prosecutor, and by all means necessary to force the agenda of the international component of the Office of the Co-Prosecutors. Her indefatigable insistence that Case 004 progresses to trial improperly disputes decided legal issues, which, unfortunately, shows a fundamental defiance of the Rules, disrespect and lack of deference to ECCC judicial decisions, and careless disregard of the fair trial rights of Mr YIM Tith. Her response, which accuses the CIJs of being biased, is simply unprofessional and unbecoming of the role of the ICP as defined in Article 6 of the Agreement and Article 21 *new* of the Establishment Law. Put simply, it is time to stop.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to:

1. **DISMISS** the ICP's Response; and
2. **GRANT** the Request to terminate, seal and archive Case 004 with immediate effect.

Respectfully submitted,

SO Mosseny

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Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 15th day of November 2021.

⁴⁷ YT Response to ICP Appeal, paras 18-19.