

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

FILING DETAILS

Case No: 004/2/07-09-2009-ECCC/TC

Party Filing: AO An

Filed to: Trial Chamber

Original language: English

Date of document: 20 January 2020

CLASSIFICATION

**Classification of the document
suggested by the filing party:**

CONFIDENTIAL

Classification by TC:

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

SUMMARY OF AO AN'S PRELIMINARY OBJECTIONS UNDER IR 89(1)

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INTRODUCTION

1. AO An, through his Co-Lawyers (*Defence*), respectfully submits a summary of his preliminary objections pursuant to Rule 89(1) of the Internal Rules (*IR*) at the Extraordinary Chambers in the Courts of Cambodia (*ECCC*).
2. For the avoidance of doubt, the Defence maintains that Case 004/02 should not be regarded as having been forwarded for trial. In its *Considerations on Appeals Against the Closing Orders*,¹ the Pre Trial Chamber (*PTC*) unanimously declared the issuance of separate and opposing closing orders unlawful,² but failed to reach a supermajority on the merits of the Defence and National Co-Prosecutors' (*NCP*) appeals against the International Co-Investigating Judge's Closing Order (Indictment), and on the International Co-Prosecutor's (*ICP*) appeal of the Order Dismissing the Case against AO An (*Dismissal Order*).³ Pursuant to IR 77(13)(a), the Dismissal Order stands, and the case against AO An should be considered as having been lawfully terminated.
3. Nevertheless, mindful of the strict deadline for filing preliminary objections set by IR 89(1) and in the absence of guidance from the Trial Chamber (*TC*) on the validity of and timeframe for filing preliminary objections under IR 89, the Defence hereby proffers a summary of its preliminary objections under IR 89(1)(a) and (b). The submissions are made in summary form on account of the time and page limitations imposed by the IRs and Practice Direction.⁴ The Defence stands ready to expand on these preliminary objections, in writing, should the Defence be provided with adequate time and page extensions for doing so pursuant to IR 39(4) and section 5.4 of the Practice Direction.
4. However, as previously stated in our letter dated 30 December 2019,⁵ the Defence respectfully requests the TC – prior to examining these preliminary objections – to confirm that it has not been lawfully seized of the Case 004/02.
5. In light of the deadline set by IR 89(1), the Defence files this application in English first with the Khmer translation to follow at the earliest opportunity.

¹ Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *Considerations on Appeals Against Closing Orders* (*Considerations on Appeals*), **D359/24 & D360/33**, 19 Dec. 2019.

² *Considerations on Appeals*, para. 124.

³ *Considerations on Appeals*, para. 169.

⁴ Practice Direction on the Filing of Documents Before the ECCC (*Practice Direction*), para. 5.1.

⁵ AO An Defence Team, *Request for confirmation that the Trial Chamber has not been lawfully seized of Case 004/02; in the alternative, request for time extension and guidance for filing preliminary objections under Internal Rule 89* (*Request for Confirmation*), 30 Dec. 2019.

PROCEDURAL HISTORY

6. On 16 August 2018, the Co-Investigating Judges issued two separate and opposing Closing Orders in Case 004/02.⁶
7. On 17 December 2018, the NCP filed her submissions on appeal against the Closing Order (Indictment).⁷ On 20 December 2018, the ICP filed his submissions on appeal against the Dismissal Order.⁸ Also on 20 December 2018, the Defence filed its submissions on appeal against the Closing Order (Indictment).⁹
8. On 19 December 2019, the PTC issued its *Considerations on Appeals*. The PTC unanimously held that the issuance of two separate and opposing closing orders was unlawful,¹⁰ but failed to reach a supermajority on the merits of the parties' submissions on appeal.¹¹
9. On 30 December 2019, the Defence sent a letter to the TC requesting confirmation that the TC has not been lawfully seized of Case 004/02, and in the alternative, seeking time extension and guidance for filing preliminary objections under IR 89.¹²
10. On 13 January 2020, the ICP filed her submission regarding her witness and expert list pursuant to IR 80.¹³

APPLICABLE LAW

11. According to IR 89(1), preliminary objections concerning (a) the jurisdiction of the Chamber; and (b) any issue which requires the termination of prosecution, 'shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible'.
12. IR 77(13)(a) provides that if the required majority is not attained on an appeal against an

⁶ Case No. 004/2/07-09-2009-ECCC-OCIJ, *ICIJ Closing Order (Indictment)*, **D360**, 16 Aug. 2018; Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Dismissing the Case Against AO An ('Dismissal Order')*, **D359**, 16 Aug. 2018.

⁷ Case No. 004/2/07-09-2009-ECCC-OCIJ, *National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/2*, **D360/8/1**, 14 Dec. 2018.

⁸ Case No. 004/2/07-09-2009-ECCC-OCIJ, *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against AO An (D359) ('ICP Appeal')*, **D359/3/1**, 20 Dec. 2018.

⁹ Case No. 004/2/07-09-2009-ECCC-OCIJ, *AO An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/2*, **D360/5/1**, 19 Dec. 2018

¹⁰ Considerations on Appeals, para. 124.

¹¹ Considerations on Appeals, para. 169.

¹² Request for Confirmation.

¹³ Case No. 004/2/07-09-2009-ECCC/TC, *International Co-Prosecutor's Rule 80 Witness and Expert List Submission with Confidential Annex A ('Witness and Expert List')*, 13 Jan. 2020.

order other than an indictment, the default decision of the Chamber shall be that such order shall stand.

13. Article 38 of the Constitution of the Kingdom of Cambodia provides that any cases of doubt shall be resolved in favour of the defendants. The same principle is universally accepted as being enshrined into Article 14(2) of the International Covenant on Civil and Political Rights ('*ICCPR*').
14. According to Article 2(1) of the UN-RGC Agreement, '[t]he present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes [...]'.¹⁴
15. Fair trial rights are enshrined in Article 13 of the UN-RGC Agreement, Articles 33 to 35 new of the Law on the Establishment of the ECCC ('*ECCC Statute*') and IR 21.

SUMMARY OF AO AN'S PRELIMINARY OBJECTIONS

16. The Defence makes the following preliminary objections – in summary form – within the deadline set by IR 89(1):
 - I. THE TRIAL CHAMBER LACKS JURISDICTION OVER CASE 004/02 BECAUSE THE CASE HAS BEEN DISMISSED (IR 89(1)(A)):**
 17. The TC has no jurisdiction to try AO An because the case against him has been dismissed, and the unregulated impasse created by two separate and opposing closing orders must be resolved in AO An's favour, pursuant to the principle of *in dubio pro reo* enshrined in Article 38 of the Constitution of Cambodia and Article 14(2) of the ICCPR.
 18. A Dismissal Order pursuant to IR 67(2) was issued in Case 004/02 on 16 August 2018.¹⁴ The ICP lodged an appeal against the Dismissal Order,¹⁵ however the PTC failed to reach a supermajority on the merits of that appeal.¹⁶ Pursuant to IR 77(13)(a), if the required majority is not attained on an appeal against an order other than an indictment, the default decision of the Chamber shall be that such order shall stand. As such, the Dismissal Order continues to stand unaffected by the appeal.
 19. The fact that the Closing Order (Indictment) may also stand, pursuant to IR 77(13)(b),¹⁷ has no bearing on the continuing validity of the Dismissal Order. Nor can the principle of continuation of the judicial investigation – included in Article 23 new to resolve

¹⁴ Dismissal Order.

¹⁵ ICP Appeal.

¹⁶ Considerations on Appeals, para. 169.

¹⁷ *E.g.*, Witness and Expert List, para. 2.

disagreements over a single closing order – be relied upon to deny the existence and continuing validity of the Dismissal Order.

20. As held by the majority of PTC, the ECCC legal framework is incapable of resolving the impasse of two separate and opposing closing orders.¹⁸ Pursuant to the principle of *in dubio pro reo* enshrined in Article 38 of the Constitution of Cambodia and Article 14(2) of the ICCPR, all impasses and uncertainties must be resolved in AO An's favour.¹⁹ Accordingly, the Dismissal Order must take precedence over the Closing Order (Indictment), and the TC lacks jurisdiction to try Case 004/02.

II. THE CONTINUING VALIDITY OF THE DISMISSAL ORDER REQUIRES THE TERMINATION OF PROSECUTION (IR 89(1)(B)):

21. Further or in the alternative, for reasons set forth in the first preliminary objection above, the continuing validity of the Dismissal Order requires the TC to terminate the prosecution. Any other decision would run contrary to the principle of *in dubio pro reo* enshrined in Article 38 of the Cambodian Constitution and Article 14(2) of the ICCPR. This position has been accepted by the majority of judges at pre-trial.²⁰

III. THE TRIAL CHAMBER LACKS PERSONAL JURISDICTION OVER AO AN (IR 89(1)(A)):

22. The TC lacks personal jurisdiction over AO An as he was neither a senior leader of the Khmer Rouge, nor one of those most responsible for crimes during the Democratic Kampuchea ('DK') period.
23. The Court's personal jurisdiction is limited by justiciable criteria, narrowly defined in Article 2(1) of the UN-RGC Agreement as 'senior leaders' and 'those most responsible'. These jurisdictional limitations must be interpreted in light of their ordinary meaning, context and purpose. To convict him, the TC must be satisfied beyond a reasonable doubt that AO An falls into one of these two categories.²¹
24. The ECCC negotiating history²² and the consistent and unambiguous position expressed

¹⁸ Considerations of Appeals, para. 295.

¹⁹ Considerations on Appeals, para. 298 and 301.

²⁰ Considerations on Appeals, para. 298 and 301.

²¹ IR 87(1).

²² E.g., Heder, 'A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia' ('*Heder's Review*') (1 Aug. 2011), pp. 14, 20, attached as App. 1; Scheffer, 'The Negotiating History of the ECCC's Personal Jurisdiction' ('*Negotiating History*') *Cambodia Tribunal Monitor* (22 May 2011), p. 7, attached as App. 2.

by the Royal Government of Cambodia,²³ the NCP,²⁴ the National Co-Investigation Judge ('*NCIJ*')²⁵ and national PTC judges²⁶ require these terms to be interpreted narrowly, namely: (i) the Court's personal jurisdiction should be limited to 'leaders' who set, determine or interpret policy or those indispensable to its implementation; and (ii) the term 'those most responsible' requires a comparative analysis of Khmer Rouge officials' contributions to DK-era crimes, to identify those who played a more significant role in the perpetration of the most serious crimes across the entire territory of the *DK*.²⁷

25. The case against AO An, even when taken at its highest, does not meet the applicable personal jurisdiction criteria to the applicable standard of proof.²⁸ It fails to establish that AO An was a 'leader' who set, determined or interpreted Khmer Rouge policy or was indispensable to its implementation. There is no serious and credible evidence that AO An had any, or any significant, role at Central Zone level (or that even if he had, this would place him within the Court's personal jurisdiction). Moreover, it cannot be reasonably inferred from the evidence that AO An had significant *de facto* decision-making power or involvement in alleged crimes at Sector 41 level. Even taken at its highest, the case against AO An is that he was KE Pauk's subordinate, who in turn was an obedient implementer of orders, directives and policies dictated from the Party Centre. Moreover, the case is heavily undermined by evidential gaps, unreliable witnesses, investigative malpractices and contradictions on issues including the alleged timing of AO An's arrival to the Central Zone, his alleged involvement in Central Zone purges, his alleged position and role in Sector 41, his alleged intent, knowledge and participation in relation to the alleged genocide of the Cham, the policy of forced marriages or crimes

²³ *E.g.*, Statement by Deputy Prime Minister Sok An, Office of the Council of Ministers (citing Statement of the 34th Congress of the 5th Mandate of the Cambodian People's Party, 25-26 April 2009), 2 May 2009, p. 1, attached as App. 3; Sokha & O-Toole, 'Hun Sen to Ban Ki-moon: Case 002 Last Trial at ECCC', *The Phnom Penh Post* (27 Oct. 2010), attached as App. 4.

²⁴ *E.g.*, Case No. 001/18-11-2008-ECCC/PTC, *National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor's Additional Observations ('NCP Further Particulars')*, **D17**, 22 May 2009, paras 10, 13.

²⁵ *E.g.*, Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (Case No. 004/07-09-2009-ECCC/OCIJ), 8 Aug. 2011; Dismissal Order, *disp.*

²⁶ *E.g.*, Case No. 004/07-09-2009-ECCC/OCIJ, *Considerations on Appeal Against Decision on AO An's Fifth Request for Investigative Action ('Considerations on AO An's Fifth Request')*, **D260/1/1/3**, 16 Jun. 2016, paras 27-28; *Considerations on Appeals*, para. 293.

²⁷ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

²⁸ Moreover, the case failed to satisfy a majority of PTC judges to the much lower standard applicable at pre-trial.

alleged at security centres and other crimes sites in Sector 41.²⁹

26. Furthermore, the case against AO An fails to demonstrate that his alleged contribution to Khmer Rouge crimes, if any, was significant enough - in the context of all other Khmer Rouge officials perpetrating atrocities across the entire DK territory – to place him within the Court’s personal jurisdiction.
27. Finally, the case against AO An, even taken at its highest, does not reach the level of gravity that would place him amongst those ‘most responsible’ for Khmer Rouge era crimes.
28. For these reasons, the TC lacks personal jurisdiction to try AO An for crimes alleged in the Closing Order (Indictment).

IV. THE TRIAL CHAMBER LACKS SUBJECT MATTER JURISDICTION OVER NATIONAL CRIMES COMMITTED BETWEEN 1975 AND 1979 (IR 89(1)(A)):

29. The TC does not have jurisdiction to try AO An for the crime of premeditated homicide under the 1956 Cambodian Penal Code, as the statute of limitations for the prosecution of national crimes committed during 1975-1979 has expired.³⁰ The TC was previously unable to reach a supermajority on this issue, and held that the accused in Cases 001 and 002 could not be prosecuted for national crimes.³¹ National crimes committed in Cambodia during 1975-1979 are subject to a statutory limitation period of 10 years.³² Given that the crimes in the Closing Order (Indictment) were allegedly committed between late 1976 or early 1977 until at least 6 January 1979, the 10-year limitation period expired, at the very latest, on 6 January 1989. There is no evidence to suggest the statutory limitation period was interrupted. Furthermore, if uncertainty over the limitation period exists, any doubt concerning its application to national crimes committed in 1975-1979 must be resolved in AO An’s favour.³³ Consequently, the TC lacks subject matter

²⁹ The Defence stands ready to provide full particulars in relation to each challenge set forth in this paragraph in further submissions should permission for further filings on this matter is granted by the TC.

³⁰ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

³¹ Case No. 001/18-07-2007/ECCC/TC, *Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes*, **E187**, 26 Jul. 2010, paras 27-35, 39-56, attached as App. 5. The Defence concurs with the reasoning of the international Judges in this decision.

³² Royaume Du Cambodge Code Pénal et Lois Penales (1956) (‘1956 Cambodian Penal Code’), Arts 109, 111,112, 114, attached as App. 6; Code of Criminal Procedure of the Kingdom of Cambodia (1964), Art. 37, attached as App. 7; Case No. 001/18-07-2007-ECCC-OCIJ, *Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code*, **E91/6**, 17 Aug. 2009, attached as App. 8; Case No. 001/18-07-2007-ECCC-OCIJ, *Letter from the Office of the Council of Ministers about the 1956 Penal Code of Cambodia*, **E91/6/1**, 19 Aug. 2009, attached as App. 9.

³³ Article 38 of the Constitution of Cambodia.

jurisdiction over national crimes alleged in the Closing Order (Indictment).

V. THE TRIAL CHAMBER LACKS SUBJECT MATTER JURISDICTION OVER CONDUCT CHARGED ON THE BASIS OF JOINT CRIMINAL ENTERPRISE AS A MODE OF LIABILITY (IR 89(1)(A)):

30. The TC does not have jurisdiction to try AO An for conduct charged on the basis of joint criminal enterprise ('JCE') as a mode of liability. JCE did not exist as a mode of liability under customary international law ('CIL') or Cambodian law during 1975-1979. There is a distinct lack of widespread and consistent State practice supporting its existence at the relevant time, whilst there is compelling evidence to the contrary.³⁴ Moreover, there is no legal precedent or State practice supporting the existence of JCE as it has been applied in the Closing Order (Indictment) (*i.e.* lack of a clearly defined JCE group, erroneous expansion of the geographical scope of the JCE, and conflating different common purposes of multiple JCE groups).³⁵ Where there is uncertainty regarding the applicable CIL, the TC must apply the law which favours the accused. As such, the TC lacks subject matter jurisdiction over conduct charged on the basis of JCE in the Closing Order (Indictment).

VI. THE TRIAL CHAMBER LACKS SUBJECT MATTER JURISDICTION OVER CONDUCT CHARGED ON THE BASIS OF PLANNING AS A MODE OF LIABILITY (IR 89(1)(A)):

31. The TC does not have jurisdiction to try AO An for conduct charged on the basis of planning as a mode of liability. Planning did not exist as a mode of liability under CIL or Cambodian law during 1975-1979. There is a distinct lack of widespread and consistent State practice supporting its existence at the relevant time, whilst there is compelling evidence to the contrary.³⁶ As such, the TC lacks subject matter jurisdiction over conduct charged on the basis of planning in the Closing Order (Indictment).

VII. THE TRIAL CHAMBER LACKS SUBJECT MATTER JURISDICTION OVER CONDUCT CHARGED ON THE BASIS OF SUPERIOR RESPONSIBILITY AS A MODE OF LIABILITY (IR 89(1)(A)):

32. The Trial Chamber does not have jurisdiction to try AO An for conduct charged on the basis of superior responsibility as a mode of liability. Superior responsibility – as

³⁴ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

³⁵ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

³⁶ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

applicable to civilian commanders outside the context of an international armed conflict – did not exist as a mode of liability under CIL or Cambodian law during 1975-1979. There is a distinct lack of widespread and consistent State practice supporting its existence at the relevant time, whilst there is compelling evidence to the contrary.³⁷ Moreover, there is no legal precedent or State practice supporting the existence of superior responsibility as it has been applied in the Closing Order (Indictment) (*i.e.* omission of the causation requirement and incorrect *mens rea* threshold).³⁸ Where there is uncertainty regarding the applicable CIL, the TC must apply the law which favours the accused. As such, the TC lacks subject matter jurisdiction over conduct charged on the basis of superior responsibility in the Closing Order (Indictment).

VIII. THE TRIAL CHAMBER LACKS SUBJECT MATTER JURISDICTION OVER THE CRIME OF OTHER INHUMANE ACTS AS DEFINED IN THE CLOSING ORDER (INDICTMENT) (IR 89(1)(A)):

33. The TC does not have jurisdiction to try AO An for conduct qualified as other inhumane acts in the Closing Order (Indictment), as the definition applied has no basis in CIL or Cambodian law during 1975-1979. The definition omits the need to demonstrate ‘underlying criminality’ of the conduct, as well as expressly rejecting the need to stipulate the element of the alleged offence. Moreover, the definition fails to apply the correct *mens rea*. This definition defies applicable CIL and the principle of legality.³⁹ As such, the TC lacks subject matter jurisdiction over conduct charged as other inhumane acts in the Closing Order (Indictment).

IX. THE TRIAL CHAMBER LACKS SUBJECT MATTER JURISDICTION OVER THE CRIME OF FORCED MARRIAGE (IR 89(1)(A)):

34. The TC does not have jurisdiction to try AO An for the crime of forced marriage charged as an other inhumane act. Forced marriage did not exist as a crime under CIL or Cambodian law during 1975-1979. The Closing Order (Indictment) fails to demonstrate the underlying criminality of forced marriage, fails to distinguish it from arranged marriage, fails to show that forced marriage is of a similar nature and gravity to other crimes against humanity, and incorrectly conflates distinct acts of forced marriage and

³⁷ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

³⁸ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

³⁹ The Defence stands ready to provide full particulars in relation to these arguments in further submissions should permission for further filings on this matter is granted by the TC.

rape to elevate the perception of gravity related to forced marriage.⁴⁰ As such, the TC lacks subject matter jurisdiction over conduct charged as forced marriage in the Closing Order (Indictment).

X. THE TRIAL CHAMBER LACKS SUBJECT MATTER JURISDICTION OVER THE CRIME OF GENOCIDE AS DEFINED IN THE CLOSING ORDER (INDICTMENT) (IR 89(1)(A)):

35. The Trial Chamber does not have jurisdiction to try AO An for the crime of genocide as it is defined in the Closing Order (Indictment). The Closing Order (Indictment) omits the requirement of contextual elements for the crime of genocide. It also applies an incorrect *mens rea* (i.e. failing to require the perpetrator to define the targeted group positively to satisfy the ‘as such’ element). This is inconsistent with CIL or Cambodian law during 1975-1979.⁴¹ Consequently, the TC lacks subject matter jurisdiction over conduct charged as genocide in the Closing Order (Indictment).

XI. FAIR TRIAL VIOLATIONS THROUGHOUT THE INVESTIGATION REQUIRE THE TERMINATION OF PROSECUTION (IR 89(1)(B)):

36. AO An’s fair trial rights have been egregiously violated throughout these proceedings. In assessing the overall fairness of proceedings, judges have a duty to consider individual fair trial violations in the overall context of the entire investigative stage, as well as the cumulative impact of all violations on AO An’s ability to receive a fair trial.⁴²

37. AO An was excluded from accessing or participating in the investigation for years. During this time, whilst the ICP enjoyed the full spectrum of participatory rights and was able to shape the investigation and build his case against AO An, the latter enjoyed no rights at all. When, in February 2012, following a leak and public discussion of his alleged crimes, AO An was finally informed of his prosecution at the ECCC, he had to

⁴⁰ The Defence stands ready to provide full particulars in relation to these arguments in further submissions should permission for further filings on this matter is granted by the TC.

⁴¹ The Defence stands ready to provide full particulars in relation to this argument in further submissions should permission for further filings on this matter is granted by the TC.

⁴² See *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, *Redacted Decision on the ‘Defence Application Seeking a Permanent Stay of the Proceedings’*, 7 Mar. 2011, paras 165–166, attached as App. 10; *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006*, 14 Dec. 2006, para. 28, attached as App. 11; *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, *Decision on ‘Defence Request for Leave to Appeal the “Decision on Defence Request for Relief for Abuse of Process”*’, 24 Jul. 2015, para. 12, attached as App. 12; *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, *Decision*, 3 Nov. 1999, paras 73, 76-77, attached as App. 13; *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 Oct. 2002, para. 111, attached as App. 14; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, *Reasons on the Defence Motion for Stay of the Proceedings for Abuse of Process*, 3 Feb. 2009, para. 4, attached as App. 15.

wait another three years before he learned of the exact nature and cause of the charges against him. One Court official informed him of his right to be represented by counsel of his choice, whilst another arbitrarily denied him that right for four and a half months. When he was finally granted access to his case file, AO An found that the case theory was already formed and most of the evidence to support it had been collected, leaving him with a mere illusion of participation in the investigation.

38. Whilst the supermajority rule allowed a minority of judges to push the case forward – effectively rendering his presumption of innocence meaningless – AO An set about attempting to establish his innocence. His attempts to obtain exculpatory evidence were frustrated by a judge who, pressured by a chronic lack of funding and donor pressure to conclude the investigation, found that such evidence did not fit into his already established theory of the case. All attempts to appeal against such denials were frustrated by a blanket rejection of all appeals relating to investigative requests by the PTC's three national judges. Meanwhile, witness evidence on the case file had already been contaminated by careless or biased investigators, or by the witness' examination at trial in Case 002. At the end of the investigation, AO An was presented with two contradictory Closing Orders, and was left to guess the nature and cause of the charges against him.⁴³ Furthermore, as unanimously confirmed by the PTC, the CIJs failed to conclude the investigative stage within a reasonable time.⁴⁴
39. The accumulated weight of this catalogue of errors clearly amounts to 'unfairness rising to miscarriage of justice'.⁴⁵ Whilst each violation undermines AO An's ability to receive a fair trial, the *cumulative impact* of these violations undermines the fairness and integrity of proceedings in a manner that is egregious and irreparable, rendering a fair trial at the ECCC impossible.⁴⁶
40. For these reasons, the TC is called upon to uphold AO An's fair trial rights and the integrity of these proceedings by terminating the prosecution.

CONCLUSION AND REQUEST

⁴³ The Defence stands ready to provide full particulars in relation to these points in further submissions should permission for further filings on this matter is granted by the TC.

⁴⁴ Considerations on Appeals, paras 62, 72.

⁴⁵ *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-3636-Anx3, *Concurring Separate Opinion of Judge Eboe-Osuji*, 14 Jun. 2018, para. 89, attached as App. 16.

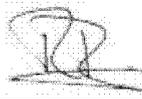
⁴⁶ Case No. 002/19-09-2007-ECCC/SC(08), *Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation*, **E116/1/7**, 27 Apr. 2012, para. 27, attached as App. 17.

41. Contrary to the ICP's assertions, the ECCC legal framework does not provide a clear resolution to the existence of separate and opposing closing orders following the PTC's failure to reach a supermajority of the merits of the parties' appeals. In such cases of unregulated doubt, the case must always be resolved in AO An's favour in accordance with Article 38 of the Constitution of Cambodia. Consequently, the Defence respectfully requests the TC to bring this matter to a definitive conclusion by confirming that it has not been lawfully seized of the case against AO An.
42. Failing that, the Defence invites the TC to consider this summary of its preliminary objections under IR 89(1), and requests the TC to grant the Defence a time extension of 60 days and a page extension of 120 pages to set out the full arguments under each objection.
43. The Defence respectfully submits that the preliminary objections set forth in this submission reveal patent defects, requiring immediate examination and decision by the TC. Deferring the decision on these preliminary objections to the end of trial proceedings would be contrary to the interests of justice and an affront to judicial economy.

Respectfully submitted,



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Signed 20 January 2019, Phnom Penh, Kingdom of Cambodia