

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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INTERNATIONAL CO-PROSECUTOR'S RENEWED REQUEST FOR THE TRIAL
CHAMBER TO TAKE THE NECESSARY ACTIONS TO PROGRESS CASE 004/2 TO
TRIAL INCLUDING ORDERING THE IMMEDIATE TRANSFER OF THE CASE 004/2
CASE FILE TO THE TRIAL CHAMBER

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I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) respectfully renews her request for the Trial Chamber (“TC”) to confirm that it is seised of Case 004/2 and to order the Case File to be immediately transferred to the TC.¹ The ICP renews her request in light of recent information provided to the parties by Judges of the Pre-Trial Chamber (“PTC”), who made clear that no further PTC action will be taken. It is now for the TC to act to progress this case to trial without further delay in accordance with ECCC Law,² the Internal Rules (“Rules”),³ and the mandatory fundamental and determinative default position that sends an Indictment to trial unless overturned by a supermajority of the PTC.

II. PROCEDURAL HISTORY

2. On 19 December 2019, the PTC issued its public Considerations regarding the two separate and conflicting Closing Orders issued in Case 004/2.⁴ The PTC failed to reach the supermajority required to reverse either the Indictment⁵ or the Dismissal Order.⁶ The Considerations were notified to the TC Greffier and two TC judges on that date.⁷
3. The parties subsequently filed several pre-trial pleadings with the TC,⁸ which were followed by an email on 21 January 2020 from the TC Greffier stating that neither the Case File nor the Indictment had been forwarded to the TC.⁹ The ICP and Ao An then made several written submissions to the PTC regarding the status of the transfer of Case 004/2, all of which were made public.¹⁰ To date, no action has been taken on these pleadings.

¹ See the ICP’s original requests in International Co-Prosecutor’s Response to Ao An’s Request Regarding the Seizure of Case 004/2, 6 January 2020 (“ICP’s Seizure Response”), paras 2, 22(i), which was filed in hard copy to the TC; International Co-Prosecutor’s Request that the Trial Chamber Take Action to Obtain Access to the Case 004/2 (Ao An) Indictment and Case File, 4 February 2020 (“ICP Access Request”), which was filed in hard copy to the TC.

² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended on 27 October 2004 (“ECCC Law”), art. 23 new.

³ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”), Rule 77(13)(b).

⁴ **D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“Considerations”).

⁵ **D360** Closing Order (Indictment), 16 August 2018 (“Indictment”).

⁶ **D359** Order Dismissing the Case Against Ao An, 16 August 2018 (“Dismissal Order”).

⁷ See Email notification from the Case File Officer, 19 December 2019, 4:53 p.m., which was previously filed with the TC as Annex B to the International Co-Prosecutor’s Request for Clarification of the Trial Chamber’s Email of 10 February 2020 (with Public Annexes A-F), 13 February 2020. The email notification distribution list also included two TC Judges, Judge Claudia Fenz and Judge Martin Karopkin, and the TC Greffier.

⁸ See Annex A, paras 2-5 for details.

⁹ See Annex A, fn. 12 for details.

¹⁰ See Annex A, fn. 13 for details.

4. On 10 February 2020, the TC Greffier informed the parties by email that although the TC was aware of the publicly available Considerations, it had still not been *formally notified* of them by the PTC, and the Case File had not been forwarded. The email concluded that the PTC had to initiate those actions.¹¹
5. On 12 March 2020, the Co-Prosecutors, Ao An's Co-Lawyers, and the Civil Party Lawyers received via email an Interoffice Memorandum from the International Judges of the PTC, stating "Transfer of Case File 004/2" as the subject.¹² The memo (the "12 March Memo") detailed the procedural stalemating that had been taking place behind the scenes in the PTC and Office of Administration that had not previously been known to the parties.¹³
6. On 16 March 2020, the PTC President issued a Memorandum to the Co-Prosecutors, Ao An's Co-Lawyers, and the Civil Party Lawyers (the "16 March Memo") making clear that in his estimation, the PTC had "already fulfilled its duty in accordance with the law" and no further administrative actions were required to be taken by the PTC.¹⁴
7. The full relevant procedural history is detailed in attached Annex A.

III. APPLICABLE LAW

8. The ICP incorporates by reference the applicable law set out in her original requests to the TC¹⁵ and further detailed below.

IV. SUBMISSIONS

9. The Trial Chamber's continued deferral to possible resolution of this matter by the PTC is no longer viable.¹⁶ The two Memoranda recently issued by the PTC Judges and discussed more fully in attached Annex A indicate that the PTC has, in its view, "fulfilled its duty", and will be taking no further administrative actions regarding the transfer of

¹¹ Email entitled "Concerning ICP request dated 4 February 2020" sent by the TC Greffier and Legal Officer Suy-Hong Lim on behalf of the TC on 10 February 2020 at 11:44 a.m. to the Co-Prosecutors and Ao An's Co-Lawyers, copying the PTC Judges as well as the Director and Deputy Director of the Office of Administration ("TC Greffier Email, 10 February 2020").

¹² Interoffice Memorandum from PTC Judges Beauvallet and Baik, 12 March 2020, ("12 March Memo"). This memo was emailed to the TC Greffier and is also annexed to this Renewed Request along with its eight attachments.

¹³ See Annex A, paras 8-11 for details.

¹⁴ Memorandum from Judge Prak Kimsan to the Office of the Co-Prosecutors, Ao An's Co-Lawyers, and the Co-Lawyers for the Case 004/2 Civil Parties entitled "Re-Confirmation of the Decision on Case File 004/2", 16 March 2020 ("16 March Memo"), para. 5.

¹⁵ International Co-Prosecutor's Request that the Trial Chamber Take Action to Obtain Access to the Case 004/2 (Ao An) Indictment and Case File, 4 February 2020.

¹⁶ See para. 4, *supra*, referencing the TC Greffier's 10 February email on behalf of the TC saying that it was up to the PTC to initiate the action to forward Case File 004/2 to the TC.

Case 004/2.¹⁷

10. Although the PTC President unilaterally blocked the formal notification and physical forwarding of the Case 004/2 Case File to the TC, the ICP reiterates her position that these are merely administrative steps.¹⁸ The ICP reiterates that the TC is lawfully *seised* of Case 004/2 by Rules 77(13)(b) and 79(1) as of 19 December 2019.¹⁹ Formal notification and physical forwarding of the Case File are administrative acts *consequent* to the TC having jurisdiction, not acts that *confer* jurisdiction.
11. In addition, while the TC Greffier's 10 February 2020 email seems to suggest that the TC could only be seised of Case 004/2 if the PTC initiated such administrative steps,²⁰ the ICP has questioned why acts that were sufficient to seise this Chamber in Cases 001 and 002 are inexplicably no longer sufficient in Case 004/2.²¹ To date, she has received no clarification. She submits that such a shift in procedural requirements without notice violates the principles of legal certainty and transparency of the proceedings as well as the fair trial rights guaranteed to *all* parties.²²
12. The ICP incorporates her previous arguments by reference and reiterates that:
 - (i) the Rule 77(13)(b) default position has been triggered because the PTC failed to

¹⁷ See paras 5-6, *supra*. See also Annex A, paras 8-11, 17 (The 12 March Memo revealed that on 28 January 2020, the PTC Judges issued conflicting orders to the Records and Archiving Unit ("RAU") which caused the RAU to seek clarification as to which instructions it should follow. The PTC President stated that notifying any person or chamber who was not a party to the case violated the unanimous decision of the PTC. He then issued the 16 March Memo to say with finality that no further administrative action would be taken.)

¹⁸ See Annex A, paras 8-11, 17 for details. See also 12 March Memo, para. 36, where the PTC International Judges stated, "it is now up to the Trial Chamber to conduct its judicial review on the Case at hand, which is transferred to it from the Pre-Trial Chamber regardless of any clerical tasks accompanying the transfer".

¹⁹ See the ICP's submissions to the TC and PTC discussing this more fully - **TC**: ICP's Seizure Response; ICP's Access Request; International Co-Prosecutor's Response to Ao An's Summary of Preliminary Objections Under IR 89(1), 23 March 2020, ("ICP's Preliminary Objections Response"). **PTC: D359/25 & D360/34** International Co-Prosecutor's Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (Ao An) to the Trial Chamber, 4 February 2020 ("ICP's Administrative Action Request"); **D359/28 & D360/37** International Co-Prosecutor's Reply to Ao An's Response to the ICP's Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (Ao An) to the Trial Chamber, 3 March 2020 ("ICP's Administrative Action Reply"); **D359/30 & D360/39** International Co-Prosecutor's Response to Ao An's Request for Confirmation that All Required Administrative Actions have been Taken to Archive Case File 004/2, 5 March 2020 ("ICP's Archive Response"). See also 12 March Memo, para. 12 and Attachment 6 of the 12 March Memo, particularly pp. 4-6.

²⁰ See para. 4, *supra*.

²¹ International Co-Prosecutor's Request for Clarification of the Trial Chamber's Email of 10 February 2020 (with public annexes A-F), 13 February 2020, paras 20-26, 29, which was filed in hard copy with the TC Greffier.

²² See e.g. 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 ("ECCC Agreement"), art. 12(2); ECCC Law, art. 33 new; Rule 21(1).

- attain the supermajority required to overturn the Indictment;²³
- (ii) Rule 77(13)(b) prevails over the general terms of the default set out in Rule 77(13)(a) because of the *lex specialis* doctrine and its consistency with the default position enshrined in the ECCC Agreement and ECCC Law;²⁴
 - (iii) the *in dubio pro reo* principle is inapplicable to the case at hand;²⁵ and
 - (iv) The PTC unanimously stressed that the default position “cannot be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions” or by “taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless.”²⁶ The unanimous panel further explained that the purpose of the default position was to secure “effective justice” and to “avoid procedural stalemates that would, *inter alia*, hamper the effectiveness of proceedings.”²⁷
13. Regrettably, the 12 March Memo and the 16 March Memo demonstrate that the PTC President has intentionally prevented the administrative action of forwarding the Case File to the TC, which is seised of the case. Such action cannot, however, circumvent the application of the default position—to allow this would allow the PTC inaction to render a “manifestly unreasonable legal result”.²⁸ The ICP therefore renews her request that the TC act in accord with its seizure of this case by ordering that the Case File be immediately transferred to the TC.
14. As previously set out, the TC is ethically obliged by the ECCC’s Code of Judicial Ethics and the UN’s Basic Principles on the Independence of the Judiciary to decide the

²³ ICP’s Seizure Response, paras 9-15; ICP’s Access Request, para. 24; **D359/25 & D360/34** ICP’s Administrative Action Request, para. 23; **D359/28 & D360/37** ICP’s Administrative Action Reply, paras 2-5; **D359/30 & D360/39** ICP’s Archive Response, paras 12-15; ICP’s Preliminary Objections Response, paras 8-10.

²⁴ **D359/25 & D360/34** ICP’s Administrative Action Request, paras 2, 25; **D359/28 & D360/37** ICP’s Administrative Action Reply, para. 3; **D359/30 & D360/39** ICP’s Archive Response, para. 13; ICP’s Access Request, para. 24; ICP’s Seizure Response, para. 10; ICP’s Preliminary Objections Response, para. 10.

²⁵ ICP’s Seizure Response, paras 16-19; **D359/28 & D360/37** ICP’s Administrative Action Reply, paras 6-8; **D359/30 & D360/39** ICP’s Archive Response, para. 16; ICP’s Preliminary Objections Response, paras 12-15.

²⁶ **D359/24 & D360/33** Considerations, para. 112. *See also* ICP’s Seizure Response, para. 10; **D359/25 & D360/34** ICP’s Administrative Action Request, para. 26; ICP’s Preliminary Objections Response, para. 9.

²⁷ **D359/24 & D360/33** Considerations, para. 111.

²⁸ **D359/24 & D360/33** Considerations, para. 112.

justiciable issue before it,²⁹ independent and free of outside influence.³⁰

15. Supreme Court Chamber (“SCC”) jurisprudence also mandates the TC to act. The SCC has stated that in order to guarantee a fair trial and properly fulfill the Court’s mission, all ECCC judicial organs must, *at all times*, have the power to do what is necessary to maintain the integrity of proceedings and respect for justice.³¹ Other international criminal tribunals also recognise a chamber’s power to exercise its inherent jurisdiction to decide a matter in the absence of a statutory provision, including when no court has the power to pronounce on the matter due to “legal impediments or practical obstacles”, when it is necessary to remedy possible gaps in legal proceedings, or when the Court needs to ensure that justice is not only done but is also *seen* to be done.³² As all of these circumstances are applicable to the situation at hand in Case 004/2, the TC must exercise

²⁹ This has already been set out in detail in ICP’s Seizure Response, para. 15. *See also* the email entitled “Information” sent by Suy-Hong Lim on behalf of the TC on 21 January 2020 at 1:48 p.m. acknowledging receipt of the documents sent by the parties to the TC.

³⁰ ECCC Law, art. 10 new.

³¹ Case 002-E116/1/7 Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber’s Decision on Fairness of Judicial Investigation, 27 April 2012, para. 30 (the SCC also stated that it was “internationally firmly established” that the power to deal with “interference with the administration of justice” accrues to any court “by virtue of its judicial role”).

³² *See e.g. In the Matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, Appeals Chamber, 10 November 2010, paras 45 (“[Inherent jurisdiction] can, in particular, be exercised when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles. The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.”), 46, 48 (“The practice of international judicial bodies shows that the rule endowing international tribunals with inherent jurisdiction has the general goal of remedying possible gaps in the legal regulation of the proceedings.”); *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, Trial Chamber, 3 July 2003, paras 112, 114 (The Trial Chamber affirmed that while it was not required to take any further action, it had an overarching interest and commitment to ensure that “justice is not only done but justice is seen to be done”. It therefore ordered special steps to be taken that would fully represent the accused’s interests.); *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, Trial Chamber, 27 May 2005, paras 9 (“The Tribunal’s Chambers have consistently affirmed the Tribunal’s inherent power, which exists independently of any statutory reference, to punish conduct which tends to obstruct, prejudice or abuse the Tribunal’s administration of justice. This power is necessary to ensure that the Tribunal’s exercise of jurisdiction is not frustrated and its basic judicial functions are safeguarded.”), 10-12 (and the jurisprudence cited therein), 13 (“judges of this Tribunal exercise the inherent power to take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect for justice”); *Prosecutor v. Blaškić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997, paras 33, 35 (a Court’s inherent power to make a judicial determination necessary for the exercise of its primary jurisdiction is closely related to the Court’s ability to discharge the mission entrusted to it); *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, Appeals Chamber, 3 November 1999, para. 76 (“It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice [...]. The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused’s rights; to deter future misconduct; and to enhance the integrity of the judicial process.”); *The Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Severance of Andre Rwamakuba and Amendments of the Indictment, Trial Chamber, 7 December 2004, para. 22.



its inherent jurisdiction “to dispose of [the] legal matter before it in a definite manner” and resolve the “substantive and/or *procedural* issue”.³³

16. Indeed, it is in the interests of justice for the TC to decide this issue and move this case to trial, as inaction would result in a *de facto* stay of proceedings that would effectively terminate the case without explanation and out of the public eye. Such a basis for termination is not allowed under Cambodian and French procedural law or international jurisprudence.³⁴
17. Finally, as no case number has been assigned to the Case 004/2 proceedings before the TC, filings to date have either been delivered in hard copy to the Court Management Section (“CMS”), with courtesy copies sent to the parties, or they have solely been communicated to the parties via email. The ICP respectfully submits that the principle of transparency and publicity should apply, as recognised in Article 12(2) of the ECCC Agreement and Rule 21(1), to promote the credibility of the Court’s process. Given the significance of the issues involved and the rightful public interest in the progress of these cases, the ICP reiterates her request that the TC allow CMS to establish a case number for this case³⁵ so that filings can be formally notified to the public or, in the alternative, that all of the ICP’s submissions to date be made publicly available through the ECCC’s website.

V. RELIEF REQUESTED

18. For the foregoing reasons, the International Co-Prosecutor respectfully requests that the Trial Chamber confirm its jurisdiction over this case and act to move it to trial expeditiously by ordering the immediate transfer of the Case File and making the ICP’s filings publicly available.

Respectfully submitted,

Date	Name	Place	Signature
30 March 2020	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh 	

³³ Case 002-**E176/2/1/4** Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 September 2012, para. 25 (emphasis added).

³⁴ As discussed more fully in **D359/28 & D360/37** ICP’s Administrative Action Reply, para. 10; ICP’s Preliminary Objections Response, para. 15.

³⁵ International Co-Prosecutor’s Request that the Trial Chamber Take Action to Obtain Access to the Case 004/02 (Ao An) Indictment and Case File, 4 February 2020, para. 30(c).