



INTEROFFICE MEMORANDUM

TO: Tony Kranh
Acting Director of ECCC Office of
Administration

Date: 5 February 2020

Knut Rosandhaug
Deputy Director of ECCC Office of
Administration
Co-ordinator of UNAKRT

FROM: Brenda J. Hollis
International Co-Prosecutor 

SUBJECT: Request for Administrative Action in Compliance with Case **004/02, D359/24 & D360/33**, Considerations on Appeals Against Closing Orders, 19 December 2019 (Considerations)

REF: Memorandum from ICP to UNAKRT Co-ordinator: Progress of Case **004/2**, Ao An, 15 January 2020; Memorandum from UNAKRT Co-ordinator to ICP: Case **004/2**, 23 January 2020

I write to request that the Office of Administration take immediate action to forward the Case File 004/2 including the public Co-Investigating Judge's Closing Order (Indictment)¹ to the Trial Chamber ("TC")². As the Pre-Trial Chamber (PTC) did not reach the required supermajority to overturn the Indictment, such action is required by Internal Rules (Rules) 77 (13) (b) and 79 (1) which mandate that the case be sent forward to trial. The instructions in paragraph 687 of the PTC 19 December 2019 Considerations³ simply reflect and implement this fundamental and determinative default position:

"...the Greffier of the Pre-Trial Chamber will forward the present Considerations, the International Co-Investigating Judge's Closing Order (Indictment) and the remaining Case File onward to the Trial Chamber."

It is the ICP's understanding that this administrative transfer of the remaining Case File and Indictment has not been carried out despite the mandate set forth in the above cited Rules and the clear directive in paragraph 687 that the Greffier will do so.

It is also the ICP's understanding that, the Office of Administration may be waiting for the PTC Greffier (national or international) to send an internal, administrative form to it reiterating this instruction before it can take the directed administrative action. To the extent this is correct, the ICP is of the view that the failure of the PTC Greffier to provide such administrative form to the Office of Administration should not delay the forwarding of the remaining Case File and Indictment to the TC in accord with the above cited Rules and the clear instruction/direction provided in paragraph 687. Particularly since the administrative delay is impeding the orderly and expeditious progression of this case to trial.⁴



Given the clear mandate under the Rules and the instructions in paragraph 687, The ICP requests the Office of Administration take immediate action to provide the TC access to the Indictment and remaining Case File of its own motion.⁵

Notwithstanding the clear mandate and instructions, should the Office of Administration remain of the view that submission of an administrative form is essential to forwarding the remaining Case File and Indictment to the TC, the ICP requests that Administration advise the PTC judges and (national or international) Greffier that Administration must have this completed form before the action mandated by the Rules and directed by paragraph 687 can be carried out.⁶ Such clarification will assist in avoiding any further delays.

The ICP is of the opinion that providing this clarification can in no way be considered an "interference with the administration of justice."⁷ Rather, to the extent the lack of such administrative action is impeding the Office of Administration's ability to give effect to the Rules and the directive language of paragraph 687, providing such clarity to the PTC would advance the proper administration of justice, which is a shared responsibility of all Offices at the ECCC.

The ICP is concerned that the current situation has become untenable. Over six weeks have passed since the PTC issued its Considerations on the Ao An case, the consequence of which, as noted above, was to trigger the default position under the ECCC Agreement, ECCC Law and Internal Rules 77(13) (b) and 79 (1) that this case must be sent to trial. Yet the TC has not been provided access to the remaining Case File or Indictment, to the extent a formal transfer of this public document is required. The ICP is concerned that such inaction undermines the legal certainty and transparency afforded by the default position and required by Internal Rule 21(1).

The current impasse renders the status of the case uncertain and far from transparent. The Accused, Parties, the Cambodian public and the international community (including the donors) have no clear knowledge whether Ao An will stand trial or whether the serious charges at issue will be forever in legal limbo.

In this situation, the ICP is of the view that the organs of the Court, including the Office of Administration, must take all necessary action to fulfill our shared responsibility to honor the provisions of the ECCC Agreement, ECCC Law and Internal Rules - as acknowledged in the PTC Considerations, to ensure that the TC, which is seised of this case, is able to progress the case expeditiously to trial.

In summary, the ICP requests that the Office of Administration take the immediate administrative action to give effect to the Rule 77 (13) (b) and 79 (1) and the directive language of paragraph 687 of the Considerations, which gives practical effect to those Rules, including:

- (1) immediately forwarding the remaining Case File and Indictment to the TC on its own initiative pursuant to Rules 69 (3), 77 (13) (b) and 79 (1) and as reflected in the directive contained in paragraph 687 of the Considerations; or
- (2) if an administrative necessity, advising the PTC and its (national and/or international) Greffier of the requirement that the administrative form confirming the directive in paragraph 687 be completed and provided to the Office of



Administration so it can forward to the TC the Case 004/2 Case File and Indictment; and/or

- (3) in the event that the PTC Greffier does not undertake this action, that the Office of Administration on its own initiative provide the TC access to the Indictment and Case File pursuant to Rules 69 (3), 77 (13) (b) and 79 (1) and as reflected in the directive contained in paragraph 687 of the Considerations.

Thank you for your prompt attention to this matter.

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- ¹ D360 Closing Order (Indictment), 16 August 2018, (“Indictment”).
- ² Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Rules”), Rule 9(1): “The Office of Administration shall support the Chambers, the Office of the Co-prosecutors, the Office of the Co-Investigating Judges and Plenary Sessions in the performance of their functions and shall be responsible for their administration and servicing [...]”
- ³ Case 004/2-D359/24 & D360/33 Considerations on Appeals Against Closing Orders, 19 December 2019 (“Considerations”).
- ⁴ Rule 21(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 [...]”
- ⁵ Rule 69(3): “The filing of an appeal against a Closing Order does not prevent access by the Trial Chamber and Civil Party Lead Co-Lawyers to the case file for the purposes of advance preparation for trial”, Rule 77 (13) (b) : “...If the required majority is not attained, the default position of the Chamber shall be as follows:...b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges. (“Co-Investigating Judges” must be read in the context of Rule 1 (2) defining the term as including both acting jointly or each acting individually) and Rule 79 (1): “The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.”
- ⁶ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 (“ECCC Law”), with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), article 30: “The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.”
- ⁷ UNAKRT Co-ordinator Memorandum dated 23 January 2020 para 3.

