

ក្រុមមេធាវីការពារក្តីរបស់លោក អា អាន
AO An Defence Team

14 May 2020

To: Judge KONG Srim, President
 Judge C.N. JAYASINGHE
 Judge SOM Sereyvuth
 Judge Florence Ndepele MUMBA
 Judge MONG Monichariya
 Judge Maureen HARDING CLARK
 Judge YA Narin



Cc: CHEA Leang, National Co-Prosecutor
 Brenda HOLLIS, International Co-Prosecutor
 Civil Party Lawyers in Case 004/2

Re: *Response to International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*

Dear President KONG Srim and other Supreme Court Chamber Judges:

The Co-Lawyers for AO An (*'Defence'*) respond to the *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2 ('ICP Appeal')*.¹ The Defence responds by letter, as for reasons stated herein, the Supreme Court Chamber (*'SCC'*) has not been lawfully seised with Case 004/2, and it would therefore be inappropriate to communicate with the Chamber in accordance with the Practice Direction on Filing of Documents before the ECCC.

As a preliminary issue, the Defence notes that in the *ICP Appeal*, the ICP repeatedly insinuates that the current impasse in Case 004/2 has resulted from a lack of judicial independence and impartiality.² These are serious allegations for which the ICP provides no supporting evidence. The Defence submits that the ICP should be ordered to disclose the evidence on which she relies, or in the alternative, retract her arguments on admissibility and in the grounds of appeal based on these accusations.

The Defence respectfully requests the SCC to disregard the *ICP Appeal*, or in the alternative, to declare it inadmissible and without merit for the following reasons:

- a) The *ICP Appeal* is not admissible on the basis of Internal Rule (*'IR'*) 104(4)(a);
- b) The *ICP Appeal* is not admissible pursuant to the SCC's inherent jurisdiction;

¹ Case No. 004/2/07-09-2009-ECCC-TC/SC, *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2 ('ICP Appeal')*, 4 May 2020.

² *ICP Appeal*, paras 46, 48, fns 69, 72, 90, 91; Press Release from the International Co-Prosecutor dated 4 May 2020.

- c) The Trial Chamber ('TC') did not 'effectively terminate Case 004/2 through its failure to progress the case to trial' and therefore has not erred in law;
- d) The TC did not have justiciable issues before it which required the exercise of its inherent jurisdiction and therefore has not erred in law or abused its discretion;
- e) The TC did not err in law or abuse its discretion by allegedly adding administrative steps not previously required; and
- f) The TC did not err in law and 'effectively terminate Case 004/2 on impermissible grounds'.

The Defence submits this letter in English first with the Khmer translation to follow at the earliest opportunity. The letter was submitted to ITU on 12 May 2020.

A. The ICP Appeal is not admissible on the basis of IR 104(4)(a).

The *ICP Appeal* is inadmissible, as it is not an appeal against a *decision* by the TC that 'effectively terminates the proceedings', as required by IR 104(4)(a). At best, it is an appeal against the 'Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An' ('3 April Statement'), which the TC Judges themselves emphasised was not a decision and had no legal force.³ Alternatively, it is an attempt to again appeal the outcome of the PTC's *Considerations on Appeals Against Closing Orders* ('*Considerations on Appeals*'), which is not permitted or provided for under the ECCC legal framework.⁴

Under the IRs, the parties may only appeal decisions by the TC to the SCC. Under IR 104(4)(a), '*decisions* which have the effect of terminating the proceedings' are subject to immediate appeal.⁵ Similarly, IR 104(1) sets out the standard of review for appeals against *decisions*. As noted by the ICP, in Case 002, the SCC held that a memorandum may be considered a decision if it 'display[s] *indicia* of an authoritative judicial act', regardless of its

³ Trial Chamber, 'Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An' ('3 April Statement'), available at <https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> ('As issuing a formal decision of the Trial Chamber is not possible, the International Judges have agreed to join with their National colleagues to issue this joint statement. Although this statement has no legal force it is hoped that it will provide transparency and clarity to the public and the relevant parties of the case file.').

⁴ 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 27 October 2004 ('*ECCC Law*'), Art. 23 *new* (stating the PTC reviews decisions and orders of the Co-Investigating Judges and that the PTC's appellate decisions (or considerations) are not appealable), Art. 36 *new* (The SCC 'shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court.').

⁵ The IRs are consistent with Cambodian Criminal Law. See Kingdom of Cambodia Code of Criminal Procedure, Art. 385 ('If the court issues an interlocutory judgment before sentencing, an appeal is admissible immediately if the judgment terminates the proceedings. Otherwise, an interlocutory judgment can only be submitted to the Court of Appeal for examination together with the judgment on the merits.');

Art. 421 ('If a Court of Appeal rendered an interlocutory judgment before sentencing, a request for cassation shall be immediately admissible if this judgment terminated the proceedings [of the Court of Appeal]. Otherwise, an interlocutory judgment can only be submitted for examination by the Supreme Court together with the judgment on the merits.').

form.⁶ While the ICP correctly cited the SCC's ultimate conclusion, she omitted key aspects of its reasoning, especially concerning the relevant *indicia* of an authoritative judicial act.⁷ Based on the Case 002 jurisprudence, a decision, or an authoritative judicial act, is marked by the following factors: (1) whether it 'disposes of a legal matter before it in a definite manner'; (2) whether it contains 'an operative part ("enacting clause" or "disposition") which resolves the substantive and/or procedural issue by creating, altering, dissolving or confirming a law-based relation concerning the parties'; (3) whether it is released in written form to ensure transparency, legal certainty, and 'an effective review process'; and (4) whether it provides 'adequate reasons as a corollary of the accused's fundamental fair trial rights.'⁸

Applying these factors in AO An's case, the 3 April Statement is not 'an authoritative judicial act', and thus, not a decision. While the statement is in writing, it does not 'dispose of a legal matter before it in a definite matter', contain 'an operative part' resolving a substantive or procedural legal issue, or provide full reasoning to support its conclusion.⁹ Rather, as emphasized by the TC itself, the 3 April Statement was a joint statement by the judges to provide 'transparency and clarity' for the public and parties because a formal decision was not possible.¹⁰

Additionally, the ICP relies on the TC's inaction in Case 004/2, such as its failure to authorize electronic filings and notifications or its physical return of the documents filed by parties, to assert that her appeal is admissible.¹¹ However, this argument is equally flawed. As explained in Section C below, this argument is based on the ICP's incorrect assumption that the TC was lawfully seised of the case in the first place and thus obligated to act. She overlooks the fact that Case 004/2 was effectively terminated upon the issuance of the PTC's *Considerations on Appeals* on 19 December 2019.¹² After that date, there were no longer any proceedings in Case 004/2, and no action was required by the TC. The only remaining action was for the Co-Investigating Judges to seal and archive the Case File, pursuant to IR 69(2), as requested by the Defence on 17 March 2020.¹³ Accordingly, neither the TC's alleged inaction nor the 3 April Statement are judicial decisions that may be appealed. The *ICP Appeal* is thus not admissible under IR 104(4)(a) before the SCC.

⁶ *ICP Appeal*, para. 42 (citing Case No. 002/19-09-2007-ECCC-TC/SC, *Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01*, **E163/5/1/13**, 8 Feb. 2013, para. 30; Case No. 002/19-09-2007-ECCC-TC/SC, *Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action* ('*Decision regarding Rule 35 Applications*'), **E176/2/1/4**, 14 Sep. 2012, para. 25).

⁷ *Decision regarding Rule 35 Applications*, para. 25 (emphasis added). For example, the ICP only referenced part of the following quotation: '[A] court's decision must display *indicia* of an authoritative judicial act. In this respect, it is necessary for a judicial decision to *dispose of a legal matter before it in a definite manner*. As such, a judicial decision *should contain an operative part ("enacting clause" or "disposition") which resolves the substantive and/or procedural issue* by creating, altering, dissolving or confirming a law-based relation concerning the parties. Moreover, it is established ECCC practice for decisions open to appeal to be released *in written form*. This practice, although not required by law, serves legal certainty and transparency of proceedings as required by Rule 21 and enables an effective review process. Further, as held by the Trial Chamber on a different occasion, *all judicial decisions - whether oral or written - must comply with a court's obligation to provide adequate reasons* as a corollary of the accused's fundamental fair trial rights.'

⁸ *Decision regarding Rule 35 Applications*, para. 25.

⁹ *Decision regarding Rule 35 Applications*, para. 25.

¹⁰ 3 April Statement.

¹¹ *ICP Appeal*, paras 42-44.

¹² 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.

¹³ Case No. 004/2/07-09-2009-ECCC/OCIJ, *Request to Seal and Archive Case File 004/02* ('*Request to Seal and Archive*'), **D363**, 17 Mar. 2020.

B. The ICP Appeal is not admissible pursuant to the SCC's inherent jurisdiction.

The ICP incorrectly argues that her appeal is admissible pursuant to the SCC's inherent jurisdiction to 'ensure a good and fair administration of justice', 'guarantee a fair trial', 'properly fulfil the Court's mission', and 'do what is necessary to maintain the integrity of proceedings and respect for justice'.¹⁴

To support her claims, the ICP initially references jurisprudence from other international tribunals, but she does not properly apply this jurisprudence.¹⁵ The Defence submits that even if she had, the circumstances for inherent jurisdiction identified by other international tribunals are not applicable in AO An's case. First, there are no remaining 'legal impediments or practical obstacles' or 'possible gaps in legal proceedings' that the SCC must remedy.¹⁶ As explained above, the PTC effectively terminated the proceedings on 19 December 2019 upon the issuance of the *Considerations on Appeals*. The only remaining action, which the ICP fails to mention in her appeal, is for the Co-Investigating Judges to seal and archive the Case File. The Defence filed its *Request to Seal and Archive Case File 004/2* ('*Request to Seal and Archive*') in March 2020.¹⁷ Second, both the PTC and TC have ensured that 'justice was not only done but was also seen to be done'.¹⁸ The PTC placed its internal memoranda explaining the impasse on the Case File in 12 March 2020,¹⁹ and the TC issued the 3 April Statement specifically to ensure clarity and transparency.

Rather, underlying the ICP's argument for inherent jurisdiction is the insinuation that the current impasse is based on a lack of judicial independence and impartiality of the National Judges on the PTC and TC due to political interference in Case 004/2.²⁰ This insinuation – which explicitly raised judicial 'ethics' and 'integrity' – was repeated multiple times within the *ICP Appeal*, as well as the ICP's recent press release.²¹ No other reasonable interpretation of the ICP's arguments is possible. Yet, despite the gravity of her insinuations, the ICP provides no evidence. Unsupported allegations do not support the application of SCC's inherent jurisdiction. Thus, there are simply no grounds upon which the SCC can admit the *ICP Appeal*.

C. The TC did not 'effectively terminate Case 004/2 through its failure to progress the case to trial' and therefore has not erred in law.

According to the ICP, the TC's failure to 'progress the case to trial' since 19 December 2019 as a result of division in judicial opinions, amounts to an effective termination of Case 004/2, and consequently an error of law. This position is incorrect for the following reasons:

First, the ICP's argument relies on the assumption that the TC was legally seized with Case 004/2, and that the Chamber had the legal authority to progress it to trial or to terminate

¹⁴ *ICP Appeal*, paras 46, 48.

¹⁵ *ICP Appeal*, para. 47.

¹⁶ *ICP Appeal*, para. 47.

¹⁷ *Request to Seal and Archive*.

¹⁸ *ICP Appeal*, para. 47.

¹⁹ *Interoffice Memorandum Dated 12 March 2020 Regarding the Transfer of Case File 004/2* ('12 March 2020 Memorandum'), sent by the International PTC Judges to the parties.

²⁰ *ICP Appeal*, para. 46. For example, in a footnote, the ICP implies that the SCC must exercise its inherent jurisdiction because of alleged interference with the administration of justice in Case 004/2.

²¹ Press Release from the International Co-Prosecutor dated 4 May 2020.

it. The ICP presents this assumption as a legal certainty, whereas it is but one possible interpretation of the unprecedented and unregulated impasse created by the issuance of two separate and opposing closing orders. Despite the ICP's assertions about the unanimous position of the PTC on this matter,²² in reality, the PTC was not able to reach a supermajority decision on the effect and legal consequence of the split decision.²³ In fact, a majority of PTC judges determined that the constitutional principle of *in dubio pro reo* required Case 004/2 to be dismissed in these circumstances.²⁴

Moreover, 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 *Order Dismissing the Case Against AO An* ('Dismissal Order') continues to stand unaffected by the appeal.²⁵ The fact that the *Closing Order (Indictment)*²⁶ may also stand pursuant to IR 77(13)(b) has no bearing on the continuing enforceability of the *Dismissal Order* (particularly in light of the constitutional principle of *in dubio pro reo* and the support of a majority of PTC judges for dismissing the case).²⁷

Notwithstanding the ICP's implication to the contrary, IR 77(13) – or any other provision for that matter – does not create a hierarchy of authoritativeness between indictments and dismissals.²⁸ Consequently, the Defence agrees with the National Judges of the PTC (the majority), National Judges of the TC (the majority), and the National Co-Prosecutor that the TC has not been legally seised of Case 004/2.²⁹ The fact that the TC was unable to reach common ground on a matter that has split opinions within the PTC and the Office of the Co-Prosecutors cannot – *a fortiori* – be regarded as an 'error of law'. After all, the 'default position' at the trial stage, is that a failure to attain a supermajority of judges to advance the case results in the termination of proceedings through acquittal.³⁰

Furthermore, at any rate, the TC's alleged failure to 'progress the case to trial' could not have effectively terminated Case 004/2. The case was effectively terminated by the PTC – a decision that is not appealable.

²² *ICP Appeal*, para. 51.

²³ *Considerations on Appeals*, paras. 124, 170-302, 304-329.

²⁴ *Considerations on Appeals*, paras. 295-302.

²⁵ Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Dismissing the Case Against AO An* ('Dismissal Order'), **D359**, 16 Aug. 2018.

²⁶ Case No. 004/2/07-09-2009-ECCC/OCIJ, *Closing Order (Indictment)*, **D360**, 16 Aug. 2018.

²⁷ The Defence has consistently presented this argument in filings before the TC and PTC: 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, 30 Dec. 2019; Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02*, **D359/27 & D360/36**, 24 Feb. 2020; Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *Reply to 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*, **D359/31 & D360/40**, 17 Mar. 2020; *Request to Seal and Archive*.

²⁸ In paragraph 52, the ICP argues that 'had the drafters wished to specifically address the effect of the failure of the PTC to overturn a dismissal order, they clearly could have done so in Rule 77(13)(a) but chose not to'. *ICP Appeal*, para. 52. This argument ignores the simple fact that the drafters failed to anticipate the issuance of separate and opposing closing orders. In any event, the wording of IR 77(13)(a) adequately provides for the possibility of a dismissal order confirmed, or not overturned by a supermajority, on appeal.

²⁹ Press Release from the National Co-Prosecutor Regarding the Charged Person AO An in Case 004/2 dated 4 May 2020 ('[...] the Trial Chamber does not have authority to make any decision regarding the case and has stated there will not be a trial of the Charged Person AO An now or in the future.[...]').

³⁰ 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, Phnom Penh, 6 June 2003 ('UN-RGC Agreement'), Art. 4(1)(a); ECCC Law, Art. 14(1)(a); IR 98(4).

Additionally, it is telling that the *ICP Appeal* omits any mention of AO An's *Request to Seal and Archive*.³¹ As set forth in AO An's submission, according to IR 69(2), it falls to the CIJs to decide whether to seal and archive a dismissed case file, or to send a valid indictment up to the Trial Chamber.³² Pending action by the CIJs pursuant to IR 69(2), any action by the TC in Case 004/2 is neither lawful, nor capable of amounting to an 'effective termination'.

D. The TC did not have justiciable issues before it which required the exercise of its inherent jurisdiction, and therefore has not erred in law or abused its discretion.

According to the ICP, the TC's failure to issue a decision on its motions amounted to a 'refusal to exercise its inherent jurisdiction to decide on justiciable issues before it', and constitutes an error of law or an abuse of its discretion.³³ This argument is without merit for the following reasons:

First, for reasons set forth in Section C above, the TC was not legally seised of Case 004/2 and therefore did not have justiciable issues before it.

Second, even if – for the sake of argument – the TC did have justiciable issues before it (a position disputed by the Defence), according to the ICP, its inherent jurisdiction to decide on these issues emanates from its 'power to do what is necessary to maintain the integrity of the proceedings and respect for justice [and] the Judges' ethical obligations'.³⁴ The ICP's multiple references to judicial independence and impartiality,³⁵ and the 'power to deal with interference with the administration of justice'³⁶ clearly insinuate that the current impasse has resulted from the lack of judicial independence and impartiality due to political interference in this case. These serious allegations are made without evidential support. The ICP must disclose the evidence on which she relies to make such allegations or, in the alternative, retract her accusations.

Finally, the ICP further states that 'had the TC correctly applied the law and/or exercised its discretion, Case 004/2 would have progressed to trial', and that its alleged failure to do so 'prejudiced Case 004/2 Parties [and] was so unreasonable and plainly unjust that it amounted to an abuse of discretion'.³⁷ On the contrary, even if the TC did possess an inherent jurisdiction to decide on the ICP's motions (which it did not), it is far from certain that this would have resulted in Case 004/2 progressing to trial. For reasons stated in Section C above, the legality of trial in light of the valid *Dismissal Order* is disputed by a majority of judges at pre-trial and violates Article 38 of the Constitution of Cambodia. In such circumstances, the TC's alleged failure to exercise its (alleged) inherent jurisdiction cannot be qualified as 'so unreasonable and plainly unjust that it amounted to an abuse of discretion'.

³¹ *Request to Seal and Archive*.

³² According to IR 69(2)(b), 'if a Dismissal Order is issued, the case file shall be archived'. Whilst IR 69(2)(b) explicitly applies to the situation where no appeal has been lodged against a dismissal order, there is no equivalent provision for the situation where a dismissal order is confirmed or not overturned on appeal (*i.e.* either by a supermajority of the PTC or as a result of the PTC having failed to attain one). Logic, dictates that in such circumstances the case file must be sealed and archived in accordance with IR 69(2)(b).

³³ *ICP Appeal*, para. 59.

³⁴ *ICP Appeal*, para. 59.

³⁵ *ICP Appeal*, para. 48 and fns 69, 72, 91.

³⁶ *ICP Appeal*, fn 90.

³⁷ *ICP Appeal*, para. 61.

E. The TC has neither erred in law nor abused its discretion by adding administrative steps in Case 004/2 that were not previously required.

The TC did not fail to ‘follow the correct procedural law’ or arbitrarily impose ‘administrative steps not previously required’, and thus it did not err in law or abuse its discretion.³⁸ The ICP relies on one single filing to assert that the TC was seised of Case 002 pursuant to the ‘Decisions on Appeal Against the Closing Order by Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan, rendered by the [PTC] on 13 January 2011’ and that no other previous steps were taken in Case 002 to forward the case file.³⁹ The reality is that the steps taken in Case 002 are not fully known.

Regardless, in addition to the ICP’s lack of support, the problem with her argument is that the two cases are easily distinguishable. In Case 002, there was only one closing order, and it was affirmed by a supermajority on appeal. In Case 004/2, there are two separate, opposing closing orders, neither of which were overturned by a supermajority on appeal. The *Dismissal Order* stands under IR 77(13)(a). Even if the *Closing Order (Indictment)* also stands under IR 77(13)(b), it does not impact the validity of the *Dismissal Order*. As much as the ICP wants to wish the *Dismissal Order* away, she cannot. This order and the views of the majority of PTC Judges cannot simply be ignored and cast aside, and the ICP’s presumptions about the alleged steps in Case 002 concerning the TC’s seizure and forwarding of the case file are not sufficient to demonstrate an error of law or abuse of discretion.

F. The TC did not ‘effectively terminate Case 004/2 on impermissible grounds’, and therefore has not erred in law in this respect.

The TC did not effectively terminate Case 004/2 on ‘impermissible grounds.’⁴⁰ In fact, it did not terminate the case on any grounds because there was no case to terminate. Case 004/2 was effectively terminated when the PTC issued its *Considerations on Appeals*, which have *res judicata* effect, as they are final and not subject to appeal.⁴¹ As the ICP noted in her appeal, *res judicata* is one of the grounds pursuant to which a criminal action may be extinguished under Cambodian law.⁴² Therefore, the TC has not committed any error of law in this respect.

³⁸ *ICP Appeal*, paras 62, 69.

³⁹ *ICP Appeal*, para. 63.

⁴⁰ *ICP Appeal*, paras 71-76.

⁴¹ *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, *Judgement*, 23 May 2005, para. 202 (‘This doctrine refers to a situation when “a final judgement on the merits” issued by a competent court on a claim, demand or cause of action between parties constitutes an absolute bar to “a second lawsuit on the same claim” between the same parties.’); *See Zolotukhin v. Russia* (App. no. 14939/03), ECtHR, *Judgment*, 10 Feb. 2009, para. 107 (A decision is final ‘if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them’); *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment*, ICJ, 17 Mar. 2016, paras 58-60 (‘The Court recalls that the principle of *res judicata* [...] is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal.’).

⁴² *ICP Appeal* para. 74.

For the foregoing reasons, the Defence respectfully requests the SCC to disregard the *ICP Appeal*, as the Chamber has not been legally seised of Case 004/2 and therefore has no authority to entertain the arguments and requests therein. Further, or in the alternative, the Defence respectfully requests the SCC to declare the *ICP Appeal* inadmissible, and the alleged grounds of appeal without merit.

Sincerely yours,



MOM Luch



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