

30 December 2019

To: Judge NIL Nomm, President
Judge YA Sokhan
Judge YOU Ottara
Judge Claudia FENZ
Judge Martin KAROPKIN

Cc: CHEA Leang, National Co-Prosecutor
Brenda HOLLIS, International Co-Prosecutor

Re: *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.*

Dear President NIL Nomm and Trial Chamber Judges:

The Co-Lawyers for AO An (*'Defence'*) respectfully request the Trial Chamber to confirm that it has not been seized of Case 004/02 because the attempt by the minority of the Pre-Trial Chamber (*'PTC'*) Judges to forward Case File 004/2 was unlawful.

On 19 December 2019, in the *Considerations on Appeals Against Closing Orders* (*'Considerations on Appeals'*), the two International PTC Judges ordered the PTC Greffier to forward Case File 004/2 to the Trial Chamber and found that the Trial Chamber was seised solely on the basis of the *Closing Order Indictment* under Internal Rule 77(13)(b).¹

Acting unilaterally, the International PTC Judges are attempting to circumvent ECCC law and their national counterparts to unlawfully continue the proceedings against AO An.² In the *Considerations on Appeals*, the PTC unanimously decided that the issuance of two separate closing orders violated the ECCC legal framework and 'created an unprecedented legal

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, paras 687, 694.

² See also the Press Release of the National Co-Prosecutor: 'The National Co-Prosecutor is of the view that the International Co-Investigating Judges' Closing Order (Indictment) is illegal based on the effect of the Pre-Trial Chamber's decision, **declaring that "the Co-Investigating Judges' issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC"**. In the above Pre-Trial Chamber's decision which is unanimously declared on the Charged Person **AO An**, the National Co-Prosecutor noted that the Pre-Trial Chamber did not order that the Greffier of the PTC forwards the decision or this casefile, whereas in the previous PTC's decisions it ordered that the decision or the casefile be forwarded by the Greffier.' (<https://eccc.gov.kh/sites/default/files/media/INTERNATIONAL%20AND%20NATIONAL%20OCP%27S%20STATEMENT%2024%20DEC%202019.pdf>)

predicament'.³ The PTC failed to reach a supermajority decision on the merits of the appeals against the two closing orders – *i.e.* on whether or not the ECCC has jurisdiction to prosecute AO An for the alleged crimes. There is no rule or legal mechanism to resolve this unprecedented legal predicament, and thus, the case against AO An must be dismissed pursuant to the presumption of innocence and the principles of *in dubio pro reo* and legal certainty, as embodied in Article 38 of the Constitution of the Kingdom of Cambodia.

Although the International PTC Judges joined the unanimous decision concerning the illegal issuance of two closing orders, they issued a separate opinion on personal jurisdiction and attempted to seize the Trial Chamber based on the *Closing Order Indictment*. Completely ignoring the fact that the PTC had not reached a supermajority to reverse either the *Closing Order Indictment* or the *Closing Order Dismissal* or to confirm personal jurisdiction, the International PTC Judges unilaterally instructed the PTC Greffier to forward Case File 004/2 to the Trial Chamber, in the belief they were authorized to do so under Internal Rule 77(13)(b). However, the PTC International Judges reliance on Internal Rule 77(13)(b) is misplaced, as this rule concerns a situation where there is *only one* closing order. Here, we have two closing orders, with one closing order dismissing the case against AO An and benefiting from the support of a majority of judges at this point. It must also be mentioned that Internal Rule 79(1) refers to the Trial Chamber being seized by the PTC. Again, the PTC has *not* seized the Trial Chamber of the case.

The minority of PTC Judges cannot simply overlook the disposition of the majority of the PTC Judges, who annulled the *Closing Order Indictment* and held that the Court lacks jurisdiction to prosecute AO An.⁴ Sending AO An's case for trial despite the majority of judges holding that the Court lacks jurisdiction would be a gross violation of AO An's presumption of innocence. This decision cannot be made by two international judges alone. The Trial Chamber is therefore requested to confirm that it has not been validly seized of Case 004/02. In the alternative, it is submitted that if the Trial Chamber should not accept to be seized of a case that is *not* forwarded by the PTC, but by a minority of two International Judges with no power under the law to do so, then, in that scenario, the Trial Chamber could also simply refuse to take any action at all. This, paradoxically, could also consist of ignoring the present letter (since the Trial Chamber is not seized of the case).

In the event that the Trial Chamber would nevertheless consider itself seized of the case, the Defence requests guidance on the next steps. As there is no final decision by a supermajority on either closing order, it is unclear what the timeframe will be for preliminary objections. Under Internal Rule 89, the parties have '30 days after the Closing Order becomes final' to submit preliminary objections.

The Defence hereby informs the Trial Chamber of its intention to file a wide range of preliminary objections, in the unfortunate event the Trial Chamber would consider itself seized of the case. A considerable, but not exclusive, part of these preliminary objections will go to

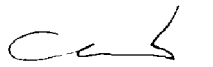
³ *Considerations on Appeals*, para. 89.

⁴ *Considerations on Appeals*, para. 302.

challenge the ECCC's personal jurisdiction. It is suggested that it may be in the interests of justice to single out the preliminary objections on personal jurisdiction, with a separate timeframe, and allow the Defence to proceed with other preliminary objections, again with a separate timeframe, if and when the personal jurisdiction of the ECCC in the present case would be confirmed. The Defence requests an adequate and realistic timeframe of at least 60 days to make submissions on personal jurisdiction. The Defence reserves its right to raise all remaining preliminary objections in a timely manner if personal jurisdiction would be confirmed by a supermajority of the Trial Chamber Judges.

Concluding, the Defence requests:

- a. The Trial Chamber to confirm it has not been lawfully seized of the case against AO An, as the case has not been forwarded by the PTC.
- b. Strictly in the alternative, to provide guidance to the Defence as to the filing of preliminary objections pursuant to Internal Rule 89, to focus the preliminary objections first on the matter of personal jurisdiction (without prejudice to the Defence's right to file other preliminary objections), and to grant the Defence adequate time, at least 60 days, to file its personal jurisdiction objections.



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