

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

FILING DETAILS

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**INTERNATIONAL CO-PROSECUTOR'S REQUEST FOR CLARIFICATION OF THE
TRIAL CHAMBER'S EMAIL OF 10 FEBRUARY 2020 (WITH PUBLIC ANNEXES A-F)**

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Distributed to:

Trial Chamber
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Judge Claudia FENZ
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**All Civil Party Lawyers
in Case 004/2**

I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) respectfully requests clarification of the Trial Chamber’s 10 February 2020 email response to the ICP’s request regarding notification and transfer of the Case 004/2 Indictment and remaining Case File. The Trial Chamber’s email states that “The *Trial chamber* has still not been *formally notified* by the Pre-Trial Chamber of the Considerations. The case file has not been forwarded. It is up to the Pre-Trial Chamber to initiate both actions.”¹ The ICP seeks clarification of the meaning and significance of the language adopted in the Trial Chamber’s email.
2. Additionally, the ICP requests that this request for clarification and all her other filings to the Trial Chamber in Case 004/2 be made available publicly either through the designation of a Case File document number and subsequent notification or, alternatively, being placed on the ECCC’s website, in order to ensure transparency of the proceedings.

II. PROCEDURAL HISTORY

3. On 19 December 2019, the Pre-Trial Chamber notified its public Considerations in this Case. The Pre-Trial Chamber failed to reach the supermajority decision (the affirmative vote of at least four of the five judges) required to overturn the public Indictment. The distribution list for notification of the Considerations included the Trial Chamber Greffier.²
4. On 26 December 2019, in accordance with Internal Rules (“Rules”)³ 39(4), 77(13)(b), 79(1), and 80(1), the ICP filed in hard copy a request to the Trial Chamber for an extension of time to submit her witness and expert list and requesting a trial management meeting.⁴ The ICP understands that this filing was provided to the Trial

¹ Email entitled “Concerning ICP request dated 4 February 2020” sent by the Trial Chamber Greffier and Legal Officer Suy-Hong Lim on behalf of the Trial Chamber on 10 February 2020 at 11:44 a.m. to the Co-Prosecutors and Ao An’s Co-Lawyers, copying the Pre-Trial Chamber Judges as well as the Director and Deputy Director of the Office of Administration (“Trial Chamber Greffier Email, 10 February 2020”). Attached as Annex A.

² **D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“Considerations”). See Email notification from the Case File Officer, 19 December 2019, 4:53 p.m., attached as Annex B. The distribution list also included two Trial Chamber Judges, Judge Claudia Fenz and Judge Martin Karopkin.

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

⁴ See International Co-Prosecutor’s Request for Extension of the Rule 80 Deadline and a Trial Management Meeting, 26 December 2019, which was delivered in hard copy to the Trial Chamber Greffier on 26 December 2019. See also Email entitled “Information” sent by Suy-Hong Lim on behalf

Chamber Greffier.

5. On 31 December 2019, the ICP received Ao An's Request that the Trial Chamber confirm it was not lawfully seised of Case 004/2 or, alternatively, that the Trial Chamber provide guidance as to the filing of preliminary objections and grant Ao An adequate time (at least 60 days) to file his objections.⁵ The ICP filed her response to this Request in hard copy on 6 January 2020.⁶ The ICP understands that this filing was provided to the Trial Chamber Greffier.
6. On 13 January 2020, having received no Trial Chamber order regarding the requested extension of time to file her list, the ICP submitted her Rule 80(1) Witness and Expert list in hard copy in accord with the date of the requested extension.⁷ The ICP understands that this filing was provided to the Trial Chamber Greffier.
7. On 20 January 2020, the ICP received by email from Ao An's Co-Lawyers a submission entitled "Summary of Ao An's Preliminary Objections Under IR 89(1)".⁸
8. On 21 January 2020, the Trial Chamber Greffier sent an email on behalf of the Trial Chamber stating that:

The Chamber [...] is aware of the publicly available Considerations on Appeal against Closing Orders issued by the Pre-Trial Chamber on December 19, 2019 and documents you sent to the Trial Chamber. However, these Considerations have so far not been notified to the Trial Chamber and neither the Indictment nor the Casefile have been forwarded yet.⁹

9. On 4 February 2020, the ICP filed a request in hard copy for the Trial Chamber to

of the Trial Chamber on 21 January 2020 at 1:48 p.m. ("Trial Chamber Greffier Email, 21 January 2020") acknowledging receipt of the documents sent by the parties to the Trial Chamber, attached as Annex C.

⁵ See Email sent to the Trial Chamber Judges from Göran Sluiter on 31 December 2019 at 3:33 p.m. The Co-Prosecutors and other Defence Co-Lawyers were copied, the Civil Parties were not. Attached to the email was a Letter from the Defence Co-Lawyers to the Trial Chamber Judges, 30 December 2019. See also Trial Chamber Greffier Email, 21 January 2020 acknowledging receipt of the documents sent by the parties to the Trial Chamber.

⁶ International Co-Prosecutor's Response to Ao An's Request Regarding the Seizure of Case 004/2, 6 January 2020. See also Trial Chamber Greffier Email, 21 January 2020 acknowledging receipt of the documents sent by the parties to the Trial Chamber.

⁷ International Co-Prosecutor's Rule 80 Witness and Expert List Submission with Confidential Annex A, 13 January 2020. See also Trial Chamber Greffier Email, 21 January 2020 acknowledging receipt of the documents sent by the parties to the Trial Chamber.

⁸ See Email sent to the Trial Chamber Judges from Kristin Rosella on 20 January 2020 at 5:09 p.m. The Trial Chamber, Co-Prosecutors and Civil Party Lawyers were copied. See also Trial Chamber Greffier Email, 21 January 2020 acknowledging receipt of the documents sent by the parties to the Trial Chamber.

⁹ Trial Chamber Greffier Email, 21 January 2020. This email was sent to the Co-Prosecutors, Ao An's Co-Lawyers, the Pre-Trial Chamber Judges, and the Director and Deputy Director of Administration.

request the Pre-Trial Chamber to take all necessary administrative actions to provide for the immediate transfer of the Indictment and remaining Case File in Case 004/2.¹⁰ The ICP understands that this filing was provided to the Trial Chamber Greffier.

10. In addition to the Trial Chamber Greffier's receipt of a hard copy of the ICP's filings, the ICP has also provided courtesy copies of each of her filings to the Trial Chamber Judges, Ao An's Co-Lawyers, and the Civil Party Lawyers.¹¹ This practice has been necessitated due to the ongoing lack of an assigned Case File number for pleadings before the Trial Chamber in Case 004/2, which prevents the formal notification of any filings.
11. On 10 February 2020, the Trial Chamber responded to the ICP's 4 February 2020 request through an email from the Trial Chamber Greffier to the Co-Prosecutors and Ao An's Co-Lawyers, copying the Pre-Trial Chamber Judges as well as the Director and Deputy Director of the Office of Administration.¹²

III. APPLICABLE LAW

12. Rule 1(2) states:

In particular, unless otherwise specified, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually, whether directly or through delegation

13. Rule 21(1) states:

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 [...].¹³

¹⁰ 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. *See also* Trial Chamber Greffier Email, 10 February 2020 acknowledging receipt of the ICP's Request. This request was made to the extent that further action was deemed necessary for the Trial Chamber to have access to the public Indictment and should the Trial Chamber have considered such administrative transfer of the public Indictment was required.

¹¹ *See* Email entitled "Filing to 004/2/07-09-2009-ECCC/TC Request for Extension of Time and Trial Management meeting" sent by the ICP on 27 December 2019 at 3:36 p.m.; Email entitled "ICP Response to AO An's letter re Seizure of the case by the Trial Chamber" sent by the ICP on 6 January 2020 at 3:56 p.m.; Email entitled "Courtesy copy of ICP IR 80 (1) Submission" sent by the ICP on 13 January 2020 at 2:25 p.m.; Email entitled "Courtesy copy of ICP Request to Trial Chamber to Take Action to Obtain Access to Case 004/2 (Ao An) Indictment and Case File" sent by the ICP on 4 February 2020 at 3:39 p.m. These emails are attached as Annex D.

¹² Trial Chamber Greffier Email, 10 February 2020.

¹³ Emphasis added.

14. Rule 77(13) states:

A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the **default decision** 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.¹⁴

15. Rule 77(14) states:

All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. Such decisions shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the other parties by the Greffier of the Chamber. The Co-Investigating Judges shall immediately proceed in accordance with the decision of the Chamber.

16. Rule 79(1) states:

The Trial Chamber **shall be seised** by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.¹⁵

17. Paragraph 687 of the Considerations states:

In light of the clear terms of Internal Rule 77(13)(b), the inability of the Pre-Trial Chamber to reach a decision by a majority of at least four judges does not prevent the Indictment, along with the supporting Case File, from being transmitted to the Trial Chamber so that it may commence trial proceedings against Ao An. Consistent with this provision, 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.

18. Article 12(2) of the ECCC Agreement¹⁶ states:

The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion

¹⁴ Emphasis added.

¹⁵ Emphasis added.

¹⁶ 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 ("ECCC Agreement").

of the Chamber concerned and where publicity would prejudice the interests of justice.

19. Article 2.1 of the Practice Direction on Filing of Documents states:

Any filing of documents before the ECCC, and any communication from or to the person entitled to file a document, **shall be made directly to the greffier** of the Office of the Co-Investigating Judges, or the Chambers, as appropriate (hereinafter the “relevant greffier”), through the Case File Officer.¹⁷

IV. SUBMISSIONS

20. The Trial Chamber’s 10 February 2020 email raises two issues for which the ICP respectfully requests clarification, regarding (i) notification of the Pre-Trial Chamber’s Considerations, and (ii) transfer of the Case 004/2 Case File from the Pre-Trial Chamber to the Trial Chamber. Additionally, the ICP respectfully suggests that the continued progress of this case through informal communications that are not available to the public raises a fundamental issue of transparency of the proceedings.

A. Notification of the Pre-Trial Chamber’s Considerations

21. The ICP notes that on 17 January 2011, the Trial Chamber issued an order to file material in preparation for trial in Case 002.¹⁸ In that Order, the Trial Chamber held it was seised of that case as of 13 January 2011, the date the Pre-Trial Chamber’s decisions on the appeals against the Case 002 Closing Order were notified through the Case File Officer. Each of these formal email notifications included the Trial Chamber Greffier in the distribution list, but not the Trial Chamber judges.¹⁹
22. With regard to notification,²⁰ the ICP finds instructive the language of article 2.1 of the Practice Direction on Filing of Documents,²¹ which states in relevant part that any filing of documents before the ECCC shall be made directly to the Greffier of the

¹⁷ Emphasis added.

¹⁸ Case 002-E9 Order to File Material in Preparation for Trial, 17 January 2011.

¹⁹ See notification lists of: Case 002-D427/1/26 Decision on Ieng Sary’s Appeal Against the Closing Order, 13 January 2011 at 1:58 p.m.; Case 002-D427/2/12 Decision on Ieng Thirith and Nuon Chea’s Appeal Against the Closing Order, 13 January 2011 at 2:00 p.m.; Case 002-D427/3/12 Decision on Ieng Thirith and Nuon Chea’s Appeal Against the Closing Order, 13 January 2011 at 2:02 p.m.; Case 002-D427/4/14 Decision on Khieu Samphan’s Appeal Against the Closing Order, 13 January 2011 at 2:11 p.m., attached as Annex E.

²⁰ The ICP queries whether the failure to notify all of the Trial Chamber judges in this case is due to the simple matter of completing an administrative form providing access to the case file. See Request for Access to Case File and Zyimage, attached as Annex F.

²¹ Extraordinary Chambers in the Courts of Cambodia, Practice Direction ECCC/01/2007/Rev.8, Filing of Documents Before the ECCC, Practice Direction.

Chamber, through the Case File Officer. From this, it seems that the Greffier is the formal conduit for notification to the judges of the Trial Chamber. The ICP notes that, consistent with this role, it was the Trial Chamber Greffier who sent both the 21 January 2020 and the 10 February 2020 emails on behalf of the Trial Chamber.

23. Further, despite there being no requirement under Rule 77(14) for the Pre-Trial Chamber to notify the Trial Chamber, the Trial Chamber Greffier was among those on the distribution list of the formal 19 December 2019 email notification of the Considerations sent by the Case File Officer,²² just as appears to have been the case in Case 002, referenced above.
24. In light of the prior practice of this Chamber, the Practice Direction, and the Trial Chamber Greffier sending information on behalf of the Trial Chamber, the ICP requests clarification of:
- (i) What additional notification the Trial Chamber requires in this case beyond the formal email notification of the Considerations provided to the Trial Chamber Greffier on 19 December 2019?

B. Transfer of the Case 004/2 Case File

25. In Case 001, the Trial Chamber noted that “it will not be formally seized of the case until **the decision of the Pre-Trial Chamber on the appeal against the Closing Order**”.²³ The ICP further notes that the Trial Chamber held²⁴ that it was seized of Case 002 following *resolution of all appeals against the Closing Order, i.e.,* the appeals of Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan. In light of this, the ICP requests clarification of the Trial Chamber’s position on the significance of the transfer of the Case File to the Trial Chamber’s being seized of this case pursuant to Internal Rules 77(13) (b) and 79(1), given the Pre-Trial Chamber’s failure to achieve

²² See Annex B.

²³ Case 001-D99/3/5 Decision on Trial Chamber Request to Access the Case File, 11 September 2008 (emphasis added). The Trial Chamber had already been granted access to the case file while appeal of the Closing Order in that case was ongoing before the Pre-Trial Chamber. To the ICP, this connotes that seisin is determined by the completion of the pre-trial appellate process and is not based on a formal transfer of the indictment. See also Case 001-E5 Notification of a Trial Management Meeting and Order to the Parties to File Additional Materials, 11 December 2008, EN 00250118; Case 001-E188 Judgement, 26 July 2010, para. 37.

²⁴ Case 002-E313 Case 002/01 Judgement, 7 August 2014, para. 23; Case 002-E465 Case 002/02 Judgement, 16 November 2018, para. 33.

a supermajority required to overturn the Indictment.²⁵

26. Specifically, the ICP requests clarity on the following:
- (ii) Is it the position of the Trial Chamber that it is not seised of Case 004/2 until it is in receipt of the Case File, either through electronic access or otherwise? If the answer to this question is affirmative, then
 - (iii) what distinguishes the present case from Cases 001 and 002, where the Trial Chamber held it was seised as of the date of the Pre-Trial Chamber decisions on the appeals against the Closing Order? And finally,
 - (iv) is it the Trial Chamber's position that it has no authority (formal or inherent) to order the transfer of the Case File, to request the Pre-Trial Chamber to forward the Case File and/or take action to move the case forward?

C. Transparency of the current litigation before the Trial Chamber

27. As no case number has been assigned to the Case 004/2 proceedings before the Trial Chamber, filings to date have either been delivered in hard copy to the Court Management Section, with courtesy copies sent to the Parties, or they have solely been communicated to the Parties via email. The ICP suggests that this practice has resulted in a lack of transparency, as the Cambodian public and international community are not being kept informed of the ongoing process.
28. The ICP respectfully submits that, as the confidential investigations have been completed and the Indictment and Considerations of the Pre-Trial Chamber have been issued publicly, 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 Trial Chamber provide to CMS a case number for this case²⁶ 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.

²⁵ See **D359/24 & D360/33** Considerations, para. 687.

²⁶ 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).

V. RELIEF REQUESTED

29. For the foregoing reasons, the International Co-Prosecutor respectfully requests clarification of the Trial Chamber's email as set out in points (i)-(iv) in paragraphs 24 and 26 above, and that the ICP's filings to the Trial Chamber in Case 004/2 be made publicly available.

Respectfully submitted,

Date	Name	Place	Signature
13 February 2020	Brenda J. HOLLIS International Co-Prosecutor	 Phnom Penh	