



**ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ**

**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

**អង្គជំនុំជម្រះតុលាការកំពូល**

Supreme Court Chamber  
Chambre de la Cour suprême

**ឯកសារដើម**  
**ORIGINAL/ORIGINAL**  
ថ្ងៃ ខែ ឆ្នាំ (Date): 10-Aug-2020, 09:27  
CMS/CFO: Sann Rada

សំណុំរឿងលេខ: ០០៤/២/០៧-០៩-២០០៩-អ.វ.ត.ក/អ.ជ.ស.ដ/អ.ជ.ត.ក

Case File/Dossier N°. 004/2/07-09-2009-ECCC/TC/SC

**Before:** Judge KONG Srim, President  
Judge Chandra Nihal JAYASINGHE  
Judge SOM Sereyvuth  
Judge Florence Ndepele MWACHANDE-MUMBA  
Judge MONG Monichariya  
Judge Maureen Harding CLARK  
Judge YA Narin

**Date:** 10 August 2020  
**Language(s):** Khmer/English  
**Classification:** PUBLIC

**DECISION ON INTERNATIONAL CO-PROSECUTORS' IMMEDIATE APPEAL OF THE TRIAL  
CHAMBER'S EFFECTIVE TERMINATION OF CASE 004/2**

**International Co-Prosecutor**  
Brenda HOLLIS

**Charged Person**  
AO An

**National Co-Prosecutor**  
CHEA Leang

**Co-Lawyers for AO An**  
MOM Luch  
Richard ROGERS  
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**Civil Party Lawyers**  
HONG Kimsuon  
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Nushin SARKARATI  
CHET Vanly  
KIM Mengkhy  
TY Srinna  
VEN Pov  
Laure DESFORGES  
Isabelle DURAND  
Lyma NGUYEN

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively) is seised of the “International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2”.<sup>1</sup>

### **A. INTRODUCTION**

2. The International Co-Prosecutor acting alone lodged this Immediate Appeal against what she characterized as the Trial Chamber’s failure to commence the trial in Case 004/2 following the filing of the *Pre-Trial Chamber’s Considerations* of 19 December 2019<sup>2</sup> in which the required majority of four affirmative votes was not attained (“supermajority”) concerning two separate and conflicting Closing Orders. The Pre-Trial Chamber reached *unanimity* on several issues including “that the Co-Investigating Judges’ issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC” but nevertheless by split opinions found the Closing Order issued by the National Co-Investigating Judge dismissing the case against AO An was valid (the International Judges disagreeing) and the Indictment issued by the International Co-Investigating Judge committing the case to trial was valid (the National Judges disagreeing).<sup>3</sup>

3. The International Co-Prosecutor’s contention is that the case then came before the Trial Chamber by default decision (“*default position*”) pursuant to Rule 77(13)(b) and that the Trial Chamber’s failure to act on the Indictment effectively terminated Case 004/2 against AO An, consequently triggering the filing of this Immediate Appeal.<sup>4</sup>

### **B. PROCEDURAL HISTORY**

4. On 20 November 2008, the International Co-Prosecutor filed a disagreement before the Pre-Trial Chamber, stating that the National Co-Prosecutor disagreed on prosecuting new

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<sup>1</sup> International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective termination of Case 004/2, 4 May 2020, E004/2/1 (“Immediate Appeal”).

<sup>2</sup> The Pre-Trial Chamber, Considerations on Appeals Against Closing Orders, 19 December 2019, D359/24 & D360/33 (“*PTC Considerations*”).

<sup>3</sup> Closing Order Dismissal, D359, 16 August 2018 (“Dismissal Order”); Closing Order (Indictment), D360, 16 August 2018, (“Indictment”); together referred to as “Closing Orders”.

<sup>4</sup> Immediate Appeal, para. 1.

crimes and new suspects identified in a proposed Third Introductory Submission.<sup>5</sup> On 18 August 2009, the Pre-Trial Chamber issued its considerations stating that it had not assembled an affirmative vote of at least four judges on a decision on the disagreement brought before it and that therefore the action of the International Co-Prosecutor should be executed.<sup>6</sup>

5. On 7 September 2009, the International Co-Prosecutor filed the disputed Third Introductory Submission requesting the Co-Investigating Judges to advance the judicial investigation against AO An, *inter alia* for crimes against humanity, genocide, and violations of the Penal Code of the Kingdom of Cambodia 1956 (“CPC”).<sup>7</sup> Six Additional Supplementary Submissions containing further allegations were filed on 15 June 2011,<sup>8</sup> 18 July 2011,<sup>9</sup> 24 April 2014,<sup>10</sup> 4 February 2015,<sup>11</sup> 4 August 2015,<sup>12</sup> and 8 April 2016.<sup>13</sup>

6. Disagreements between the Co-Investigating Judges in this case were registered on 22 February 2013, 5 April 2015, 22 January 2015, 16 January 2017, and 12 July 2018.<sup>14</sup>

7. On 27 March 2015, the International Co-Investigating Judge charged AO An with crimes against humanity and violations of Article 501 and 506 (premeditated homicide) of the CPC.<sup>15</sup> On 14 March 2016, the International Co-Investigating Judge charged AO An with additional crimes against humanity and genocide.<sup>16</sup>

8. On 19 May 2017, the Co-Investigating Judges forwarded Case File 004/2 (“Case File”) to the Co-Prosecutors inviting them to make their final submissions pursuant to Rule 66(4).<sup>17</sup>

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<sup>5</sup> International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Document. No.1.

<sup>6</sup> Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Rule 71, 18 August 2009, D1/1.3, para. 45.

<sup>7</sup> Co-Prosecutors’ Third Introductory Submissions, 20 November 2008, D1, (“Third introductory Submissions”).

<sup>8</sup> Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), Co-Prosecutors’ Supplementary Submissions Regarding Sector 1 Crimes sites and Persecution of Khmer Krom, 15 June 2011, D27, *see also* Case 004, Decision Co-Prosecutors’ Supplementary Submissions Regarding Sector 1 Crimes sites and Persecution of Khmer Krom, 30 June 2011, D27/3.

<sup>9</sup> Case 004, Co-Prosecutor’s Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65.

<sup>10</sup> Case 004, Co-Prosecutor’s Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.

<sup>11</sup> Case 004, Response to Forwarding Order D237, 4 February 2015, D237/1.

<sup>12</sup> Case 004, Response to Forwarding Order and Supplementary Submission Regarding Wat Ta Meak, 4 August 2015, D254/1.

<sup>13</sup> Case 004, Response to Forwarding Order dated 5 November 2015 and Supplementary Submission Regarding the Scope of Investigations into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1.

<sup>14</sup> Confidential Disagreements.

<sup>15</sup> Case 004, Written Record of Initial Appearance of AO An, 27 March 2015, D242.

<sup>16</sup> Case 004, Written record of further appearance of AO An, 14 March 2016, D303.

<sup>17</sup> Forwarding Order pursuant to Rule 66(4), 19 May 2017, D351.

On 18 August 2017, the National Co-Prosecutor filed final submissions requesting that all charges against AO An be dismissed on the grounds that he was neither a senior leader of Democratic Kampuchea nor one among those who were most responsible for the crimes under the jurisdiction of the ECCC.<sup>18</sup> On 21 August 2017, the International Co-Prosecutor filed final submissions requesting that AO An be indicted and sent to trial.<sup>19</sup>

9. On 18 September 2017, the Co-Investigating Judges informed the parties that based on disagreements between them, they considered separate and opposing Closing Orders under the applicable law.<sup>20</sup> On 12 July 2018, the Co-Investigating Judges formally registered their disagreement concerning the issuance of separate and opposing Closing Orders.

10. On 16 August 2018, the National Co-Investigating Judge issued his Dismissal Order, dismissing the case against AO An,<sup>21</sup> whilst the International Co-Investigating Judge issued the Indictment, committing AO An to trial.<sup>22</sup>

11. Following respective appeals to the Pre-Trial Chamber filed by the Co-Lawyers for AO An, as well as that by the International Co-Prosecutor against the Dismissal Order and the National Co-Prosecutors against the Indictment,<sup>23</sup> the Pre-Trial Chamber issued its [*PTC*] *Considerations* on the appeals on 19 December 2019, having failed to reach a supermajority on the validity of either of the Closing Orders.<sup>24</sup> On the same day, the *PTC Considerations* were publicly notified and the Case File Officer sent an email notification to the Trial Chamber Judges and Greffier, as well as to the National Co-Investigating Judge since he was the only remaining official in the Office of the Co-Investigating Judges.<sup>25</sup>

12. On 26 December 2019, the International Co-Prosecutor proceeded with her preparations for trial by filing a request before the Trial Chamber for an extension of time to submit a witness and expert list and for a trial management meeting.<sup>26</sup>

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<sup>18</sup> Final Submissions concerning AO An pursuant to Internal Rule 66, 18 August 2017, D351/4.

<sup>19</sup> International Co-Prosecutor's Rule 66 Final Submissions, 21 August 2017, D351/5.

<sup>20</sup> Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, paras 13-16, 18 September 2017, D355/1.

<sup>21</sup> Dismissal Order.

<sup>22</sup> Indictment.

<sup>23</sup> See *PTC Considerations*, para. 17. Against the Indictment: National Co-Prosecutor's Appeal, 17 December 2018, D360/8/1. Against both the Indictment and the Dismissal: International Co-Prosecutor's Appeal, 20 December 2018, D359/3/1; AO An's Appeal, 20 December 2018, D360/5/1.

<sup>24</sup> *PTC Considerations*.

<sup>25</sup> Email Notification from Case File Officer, 19 December 2019.

<sup>26</sup> International Co-Prosecutor's Request for Extension, 26 December 2019.

13. On 31 December 2019, AO An requested the Trial Chamber to confirm whether it was seized of Case 004/2 or to provide guidance to enable him to file preliminary objections, and subsequently grant him adequate time to file his objections.<sup>27</sup>

14. On 13 January 2020, the International Co-Prosecutor submitted a witness and expert list albeit no order had yet been received from the Trial Chamber to her request for extension of time.<sup>28</sup>

15. On 15 January 2020, the International Co-Prosecutor hand-delivered an interoffice memorandum to the Office of Administration (“Administration”) on the progress of Case 004/2, expressing concern that none of the filings transmitted to the Trial Chamber were notified to the parties and requesting Administration to implement necessary steps to progress the case and/or resolve the delay.<sup>29</sup> On 23 January 2020, the Administration responded that it can only implement judicial acts following instructions of the Chambers as communicated by their Greffiers and as such it had “duly completed all its tasks related to this context.”<sup>30</sup>

16. On 20 January 2020, AO An submitted a summary of his preliminary objections to the Trial Chamber by email.<sup>31</sup>

17. On 21 January 2020, the Greffier of the Trial Chamber acknowledged receipt of the documents sent by the parties thus far<sup>32</sup> and noted that neither the *PTC Considerations* nor the Case File and Indictment had been notified or forwarded to the Trial Chamber.<sup>33</sup>

18. On 28 January 2020, AO An filed a hard copy response and a witness and expert list with the Trial Chamber.<sup>34</sup> On the same day, the Records and Archives Unit received two sets of conflicting instructions from two Pre-Trial Chamber’s Greffiers: one to notify the *PTC*

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<sup>27</sup> Email sent to Trial Chamber Judges from Goran Sluiter, 31 December 2019; A letter from the Defence Co-Lawyers to the Trial Chamber Judges on 30 December 2019 and on 21 January 2020 sent email acknowledging receipt of the documents sent by the parties to the Trial Chamber.

<sup>28</sup> International Co-Prosecutor’s Rule 80(1) Witness and Expert List Submission with Confidential Annex A, 13 January 2020.

<sup>29</sup> Interoffice Memorandum, “Progress of Case 004/2, AO An” from ICP to UNAKRT Co-ordinator, 15 January 2020.

<sup>30</sup> Interoffice Memorandum, “Case 004/02” from the Deputy Director of Administration to ICP, 23 January 2020.

<sup>31</sup> Email sent to the Trial Chamber Judges by AO An’s Senior Legal Consultant on 20 January 2020 & Summary of AO An’s Preliminary Objections under Rule 89(1).

<sup>32</sup> See *Documents* D359/36.2 & D360/45.2.

<sup>33</sup> Email from Greffier of the Trial Chamber to the Co-Prosecutors, Co-Lawyers for AO An, PTC Judges, the Director and Deputy Director of Administration, 21 January 2020.

<sup>34</sup> AO An’s Rule 80 Witness and Expert List Submissions with Confidential Annex I and His Response to the International Co-Prosecutor’s Rule 80 Witness and Expert List Submission, 28 January 2020; See also Courtesy email from AO An’s Senior Legal Consultant, 28 January 2020.

*Considerations* to the Trial Chamber,<sup>35</sup> and the other *not* to notify the Trial Chamber but instead to archive the Case File.<sup>36</sup>

19. On 29 January 2020, the President of the Pre-Trial Chamber transmitted an interoffice memorandum to the Chief of the Court Management Section copying the Pre-Trial Chamber Judges and the Directors of the Administration stating that “[t]he personal opinions and decisions of each judge shall have no applicable effect [...] and notification to any person or chamber who is not a party of this case is violating the *unanimous* decision of the Pre-Trial Chamber.”<sup>37</sup> On the same day, the International Judges of the Pre-Trial Chamber transmitted a memorandum to the Administration and the Court Management Section, copying the Pre-Trial Chamber President and National Judges, stating that the President’s Rule 77 powers do not give him authority to instruct the Court Management Section and stated that he acted in contravention of the ECCC legal framework.<sup>38</sup> The International Judges iterated that a supermajority had not been attained to reverse the Indictment and it therefore stood, seising the Trial Chamber of Case 004/2 in accordance to Rule 77(13)(b). Accordingly, the International Judges instructed the Administration to notify the Trial Chamber of the *PTC Considerations*.<sup>39</sup> They added that notification was necessary “in order to prevent the situation of the Pre-Trial Chamber’s decision being unimplemented and the case being in limbo” and in the absence of notification, the Trial Chamber “apparently stays in an exceptional situation where it has not been granted access to the case file and not been able to work on the pending requests.” The International Judges of the Pre-Trial Chamber also stated that it was impossible for a chamber of the ECCC to take judicial action when it is divided about the need to do so.<sup>40</sup>

20. On 31 January 2020, the Administration sent a memorandum to the Pre-Trial Chamber President, copying the Judges, requesting for an “authoritative clarification” on how Records

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<sup>35</sup> Attachment 4 of the 12 March Memo, 28 January 2020, D359/36.4 & D369/45.4.

<sup>36</sup> Attachment 3 of the 12 March Memo, 28 January 2020, D359.24 & D360.33.

<sup>37</sup> Attachment 5 of the 12 March Memo, 29 January 2020, D359/36.5 & D360/45.6, p. 2; *See also* President’s Memo concerning notification of Pre-Trial Chamber’s Considerations in Case 004/2, 29 January 2020, D359/34 & D360/43.

<sup>38</sup> Attachment 6 of the 12 March Memo, D359/36.6 & D360/45.6, pp. 1-3, 5; *See also* Pre-Trial Chamber International Judges’ Memorandum concerning notification of the Pre-Trial Chamber’s Considerations in Case 004/2, 29 January 2020, D359/35 & D360/44.

<sup>39</sup> PTC International Judges’ memo, 29 January 2020, D359/35 & D360/44, pp. 5-6.

<sup>40</sup> Pre-Trial Chamber International Judges’ Memorandum concerning notification of the Pre-Trial Chamber’s Considerations in Case 004/2, 29 January 2020, D359/35 & D360/44.

and Archives Unit should implement the contradictory instructions from the Greffiers or alternatively an actionable instruction.<sup>41</sup> To date, this memorandum remains unanswered.

21. On 4 February 2020, the International Co-Prosecutor filed a request to the Trial Chamber to call on the Pre-Trial Chamber to take all necessary administrative actions for the immediate transmission of the Indictment and Case File.<sup>42</sup> On 10 February 2020, the Greffier of the Trial Chamber acknowledged receipt of this request via email.<sup>43</sup>

22. On 5 February 2020, the International Co-Prosecutor sent a memorandum to the Administration, requesting that they take immediate action to forward the Case File to the Trial Chamber in compliance with the *PTC Considerations* and Internal Rules.<sup>44</sup> On 10 February 2020, the Administration replied that it would only implement judicial acts following an instruction from the relevant Chamber.<sup>45</sup>

23. On 10 February 2020, the Trial Chamber Greffier informed the parties via email that, though the Trial Chamber was aware of the publicly notified *PTC Considerations*, it had *still* neither been formally notified of it nor received the Case File, since the Pre-Trial Chamber had to initiate those actions.<sup>46</sup> On 13 February 2020, the International Co-Prosecutor sought clarification of this email from the Trial Chamber and requested it to publicly notify Case 004/2 filings to ensure transparency of the proceedings.<sup>47</sup> No clarification was given by the Trial Chamber.

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<sup>41</sup> Attachment 7 of the 12 March Memo, 31 January 2020, D359/36.7 & D360/45.7.

<sup>42</sup> International Co-Prosecutors' request that the Trial Chamber take action to obtain access to the Case 004/2 (AO An) Indictment and Case File, 4 February 2020 (Annex U1 (English) and U2 (Khmer)).

<sup>43</sup> Attachment 8 of the 12 March Memo, Email from Trial Chamber Greffier and Legal Officer, 10 February 2020, D359/36.8 & 360/45.8.

<sup>44</sup> Interoffice Memorandum "Request for administrative action in compliance with Case 004/2", D359/24 & D360/33, Considerations on Appeals against Closing Orders, 19 December 2019 from ICP Brenda J. Hollis to OA Acting Director Tony Kranh and OA Deputy Director Knut Rosandhaug, 5 February 2020.

<sup>45</sup> Interoffice Memorandum, "Memorandum dated 5 February 2020 regarding case 004/2", from Tony Kranh, Acting Director and Knut Rosandhaug, Deputy Director of Administration, to the International Co-Prosecutor Brenda J. Hollis, 10 February 2020.

<sup>46</sup> Email from Trial Chamber Greffier (copying the PTC Judges and Director and Deputy Director of the Office of Administration), 10 February 2020, D359/36.8 & 360/45.8.

<sup>47</sup> 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.

24. On 11 March 2020, a Khmer translation of the summary of AO An's preliminary objection was sent to the International Co-Prosecutor,<sup>48</sup> who filed a response with the Trial Chamber on 23 March 2020.<sup>49</sup>

25. On 12 March 2020, the International Judges of the Pre-Trial Chamber sent an interoffice memorandum to all the parties to Case 004/2, detailing the judicial and administrative stalemate between the Pre-Trial Chamber and the Administration. They noted that two sets of opposing instructions had been sent to the Records and Archives Unit by the Pre-Trial Chambers: through one Greffier they had directed the Records and Archives Unit to formally notify the Trial Chamber while the National Judges, through another Greffier, had directed the Records and Archives Unit not to notify the Trial Chamber and to archive the case file. The International Judges stated they had done all they could and that their efforts were at an end.<sup>50</sup> The email was copied to the National Judges of the Pre-Trial Chamber and to the Trial Chamber Greffier.

26. On 16 March 2020, the President of the Pre-Trial Chamber issued an interoffice memorandum to all the parties clarifying that the Chamber had "already fulfilled its duties" and was not required to take any further administrative action. The President of the Pre-Trial Chamber stated that only the portion of the *PTC Considerations unanimously* agreed upon have "applicable effect" and that the Opinions of the Judges, National and International, were "personal opinions" with no "applicable effect". He stated that the Pre-Trial Chamber would take no further administrative action to notify the Trial Chamber or to forward the Case File.<sup>51</sup>

27. On 30 March 2020, eight Civil Party Lawyers in Case 004/2 filed a request asking the Pre-Trial Chamber to take necessary measures to safeguard the rights of Case 004/2 Civil Parties.<sup>52</sup>

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<sup>48</sup> Email from Senior Legal Consultant for AO An, "Courtesy Copy of the KH Translation of Ao An's Summary of Preliminary Objections", 11 March 2020.

<sup>49</sup> International Co-Prosecutor's Response to AO An's Summary of Preliminary Objections under Rule 89(1), 23 March 2020.

<sup>50</sup> Interoffice Memorandum from the International Judges of the Pre-Trial Chamber, "Transfer of Case File 004/2" 12 March 2020, D359/36 & D360/45.

<sup>51</sup> President's Memorandum, 16 March 2020, D359/37 & D360/46.

<sup>52</sup> Civil Party Lawyers' request for necessary measures to be taken by the Pre-Trial Chamber to safeguard the rights of Civil Parties to Case 004/2, 30 March 2020, D359/33 & D360/42.



28. Also on 30 March 2020, the International Co-Prosecutor filed a renewed request to the Trial Chamber to progress Case 004/2.<sup>53</sup> On 1 April 2020, AO An responded that he did not consider the Trial Chamber to be lawfully seised of Case 004/2 and that it lacked jurisdiction to adjudicate the renewed request.<sup>54</sup>

29. On 3 April 2020, the Trial Chamber issued a press release.<sup>55</sup> Therein, the Trial Chamber noted that “it had no access to the case file and cannot have access to it, unless and until there is proper notification and transfer of the file” and stated *inter alia* that issuance of a formal decision by the Trial Chamber was “not possible.” It further noted that the Press Release bore “no legal force” but aimed to provide transparency and clarity to the parties and to the public. While the International Judges of the Trial Chamber explained their belief that “an argument could be made that under the unique circumstances of the case the [Trial] Chamber has *inherent authority* to address some of the preliminary issues raised by the parties”, the National Judges informed the parties that all documents and requests filed to the Trial Chamber will be returned, declaring that “there will not be a trial of AO An now or in the future.” On the same day, the Trial Chamber Greffier emailed the Press Release to the parties.<sup>56</sup>

30. On 9 April 2020, the documents filed by the International Co-Prosecutor to the Trial Chamber were returned marked “Return to sender 9-4-2020.”<sup>57</sup>

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<sup>53</sup> International Co-Prosecutor’s renewed request for the Trial Chamber to take 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, 30 March 2020 (“Annex X1 (English) X2 (Khmer)”).

<sup>54</sup> Response to 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, 1 April 2020.

<sup>55</sup> Statement of the Judges of the Trial Chamber of the ECCC regarding Case 004/2 involving AO An, 3 April 2020 (“3 April Press Release” or “Press Release”), (“Attached as Authority 16A (English) and 16B (Khmer)”); See also Email from Greffier of the Trial Chamber, “Email of the Judges of Trial Chamber”, 3 April 2020 (“Annex H”): <https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao>.

<sup>56</sup> 3 April Press Release, p. 2.

<sup>57</sup> Email to OCP “Documents filed in hard copies to TC CF004/2 are returned to OCP this afternoon”, 9 April 2020; See also “Return to Sender” receipts of the filings returned from the TC to the ICP on 9 April 2020.

31. On 4 May 2020, the International Co-Prosecutor filed the Immediate Appeal.<sup>58</sup> On 14 May 2020, AO An filed his response<sup>59</sup> and on 26 May 2020 the International Co-Prosecutor filed a reply.<sup>60</sup>

32. On 29 May 2020, MEAS Muth (Case 003) filed a request for leave to intervene and respond to the Immediate Appeal<sup>61</sup> on the basis that it will invariably impact his case and on 3 June 2020, YIM Tith (Case 004) also filed a similar request stating that he has a legitimate interest to intervene in Case 004/2.<sup>62</sup> On 17 June 2020, the Supreme Court Chamber denied both requests.<sup>63</sup>

33. On 30 June 2020, the Pre-Trial Chamber issued its Considerations on the Appeal against the Order of Admissibility of Civil Party applicants to be heard and/or represented in the case involving AO An, in which it was unable to reach a supermajority.<sup>64</sup> Appending their respective opinions, the National Judges found that all civil party applicants in Case 004/2 shall be rejected<sup>65</sup> whilst the International Judges found that “all Civil Parties who have been found admissible by the International [Co-Investigating Judges] have the right to participate in future proceedings against AO An”.<sup>66</sup>

### **C. IMMEDIATE APPEAL**

34. The International Co-Prosecutor requests the Supreme Court Chamber to admit the Immediate Appeal and to find that the Trial Chamber is seised of Case 004/2 and to order that

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<sup>58</sup> International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020, E004/2/1, notified on 19 May 2020.

<sup>59</sup> AO An’s response to International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s effective termination of Case 004/2, transmitted on 14 May 2020, E004/2/1/1, notified on 26 May 2020 (“Response”).

<sup>60</sup> International Co-Prosecutor’s Reply to AO An’s letter regarding her immediate appeal of the Trial Chamber’s effective termination of Case 004/2, E004/2/1/1/1, 26 May 2020 (“Reply”).

<sup>61</sup> MEAS Muth’s Request for Leave to Intervene and Respond to the International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, E004/2/2, 29 May 2020.

<sup>62</sup> YIM Tith’s Request for Leave to Intervene in Case 004/2 on the jurisdiction of the Supreme Court Chamber, 3 June 2020, E004/2/3.

<sup>63</sup> Decision on MEAS Muth’s Request for Leave to Intervene and Respond to the International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 17 June 2020, E004/2/2/1; Decision on YIM Tith’s Request for Leave to Intervene in Case 004/2 on the Jurisdiction of the Supreme Court Chamber, 17 June 2020, E004/2/4/1.

<sup>64</sup> Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 30 June 2020, D362/6, *see* Disposition, ERN 01647370.

<sup>65</sup> Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 30 June 2020, D362/6, ERN 01647371, paras 41-43.

<sup>66</sup> Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 30 June 2020, D362/6, ERN 01647400, para. 118.

administrative steps be taken to ensure the case proceeds to trial. Specifically, the International Co-Prosecutor requests consideration of the following matters:

*A. Admissibility*

- (i) Accept the immediate appeal pursuant to Rule 104(4)(a) and consider that the Trial Chamber was lawfully seized of Case 004/2 on the grounds that:
  - (a) the Trial Chamber's inaction, including the failure to authorise, notify plus the return of all filings in Case 004/2 amount to acts that effectively terminated proceedings in Case 004/2 against AO An;
  - (b) the 3 April Press Release of the Trial Chamber constituted an appealable decision before the Supreme Court Chamber.
- (ii) Alternatively, the International Co-Prosecutor requests the Supreme Court Chamber to exercise its inherent jurisdiction and determine this immediate appeal.

*B. That the Supreme Court Chamber;*

- (i) order the transfer of Case File 004/2 to the [Trial] Chamber for purposes of this appeal;
- (ii) find that the Trial Chamber is seized of Case 004/2 and order that administrative steps be taken to ensure [i]t hears the case;
- (iii) recognise the serious violations of the rights of the Civil Parties, International Co-Prosecutor and victims;
- (iv) order the judicial determination of previous filings returned by the Trial Chamber in accordance with the laws; and
- (v) publicly issues a fully reasoned decision, provide legal certainty and restore the judicial functions of the Court.

**D. STANDARD OF APPELLATE REVIEW**

35. Pursuant to Internal Rule 104(4)(a), decisions of the Trial Chamber which have the effect of terminating the proceedings, are subject to immediate appeal.

36. In accordance with the standard of appellate review against decisions set out in Rules 104(1) and 105(4), the Supreme Court Chamber shall decide immediate appeals on the following grounds: (a) an error on a question of law invalidating the decision; (b) an error of fact which has occasioned a miscarriage of justice; or (c) a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the International Co-Prosecutor.

### **E. PRELIMINARY REMARKS**

37. In accordance with Rule 108(4) *bis* (b):

“[t]he Supreme Court Chamber shall decide immediate appeals (b) against decisions made pursuant to Internal Rule 104 (4) (a), within three months after the receipt of the items referred to in paragraph 2 of this Rule. In exceptional circumstances, however, the Supreme Court Chamber may extend this period by one further month. If a decision is not issued within the prescribed period, the decision of the Trial Chamber shall stand [...]”

38. The Supreme Court Chamber observes that because of the unusual circumstances giving rise to the delays in the filing of this Immediate Appeal and response, the appeal was filed on 4 May and notified on 19 May 2020 while the response was transmitted via email on 14 May and formally notified on 26 May 2020, as was the reply. That delay coupled with the complexities and fundamental issues raised in the Immediate Appeal have deemed it necessary to extend by an additional month for the delivery of this decision in accordance with Rule 108(4) *bis* (b) above.

39. The International Co-Prosecutor takes issue with AO An’s Response filed in form of a letter, arguing that it does not conform to the formalities of formal pleadings as envisaged in the Practice Direction.<sup>67</sup> The Supreme Court Chamber considers the International Co-Prosecutor’s submission moot since the Response was subsequently filed and accordingly notified.<sup>68</sup>

### **F. ADMISSIBILITY**

40. The International Co-Prosecutor bases her argument on two alternative pillars in support of her request to admit the Immediate Appeal. First, she relies on Rule 104(4)(a) and secondly, she argues that the Chamber determines this Appeal pursuant to its inherent jurisdiction.

#### *Parties’ Submissions*

41. The International Co-Prosecutor submits that the Trial Chamber was lawfully seised of Case 004/2 once there was no required majority decision impugning the indictment. Her

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<sup>67</sup> Reply, para. 2.

<sup>68</sup> Response.

position that is shared by the International Judges of the Pre-Trial Chamber is that pursuant to Rule 77(13)(b) the case automatically by default decision came into the remit of the Trial Chamber<sup>69</sup> and as a result there were proceedings to terminate. She argues that the Trial Chamber's inaction in failing to determine any attempted filings in Case 004/2 following the issuance of the *PTC Considerations*, followed by their subsequent action in returning all attempted filings combined with the 3 April Press Release all constitute an appealable decision. She argues that the Trial Chamber's inaction equates to a decision within the meaning of Internal Rule 104(4)(a).<sup>70</sup>

42. Alternatively, the International Co-Prosecutor argues that as a consequence of the Trial Chamber's inaction and the 3 April Press Release where *inter alia* the Chamber concluded that it had no authority to make *any* decision regarding Case 004/2<sup>71</sup>, she requests the Supreme Court Chamber to exercise its inherent jurisdiction to decide justiciable issues since it is *now* the sole entity able to maintain the integrity of the proceedings and safeguard the interests of justice. Should the Supreme Court Chamber refuse to intervene, the right to appeal is rendered meaningless, subjecting the parties to "an improperly halted case [with] no recourse."<sup>72</sup> She submits that a reasoned precedent is necessary since potentially similar procedural circumstances will likely arise in Cases 003 and 004.<sup>73</sup> The Supreme Court Chamber must therefore hear this Immediate Appeal pursuant to its inherent jurisdiction "to dispose of [the] legal matter before it in a definite manner", "resolve the substantive and/or procedural issue" and to "ensure a good and fair administration of justice."<sup>74</sup>

43. AO An responds that the Immediate Appeal is inadmissible since it is not an appeal against a decision by a Trial Chamber in accordance with Rule 104(4)(a). He asserts that the Immediate Appeal is in fact against a press release, which the Judges of the Trial Chamber noted had "no legal force" and is therefore not an authoritative judicial act that constitutes a decision.<sup>75</sup> He relies on the Supreme Court Chamber's interlocutory decision of 14 September 2012 which outlines what constitutes a decision and he submits that whilst the press release, is

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<sup>69</sup> Immediate Appeal, para. 50.

<sup>70</sup> Immediate Appeal, paras 41-45.

<sup>71</sup> 3 April Press Release

<sup>72</sup> Immediate Appeal, para. 48.

<sup>73</sup> Immediate Appeal, paras, 48, 58-61.

<sup>74</sup> Immediate Appeal, paras 46-49.

<sup>75</sup> Response, Section A, paras 5-6 *citing* Decision on NUON Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action ("Decision on Rule 35 Applications"), 14 September 2012, E176/2/1/4, para. 25.

in writing, it does not dispose of a legal matter before it in a definitive manner or contain an operative part [...] which resolves the substantive and/or procedural issue by creating [...] or providing full reasoning to support its conclusions.<sup>76</sup> He adds that the Immediate Appeal is an attempt by the International Co-Prosecutor to appeal the *PTC Considerations* which is impermissible under the ECCC legal framework.<sup>77</sup>

44. AO An further rejects as flawed reasoning the International Co-Prosecutor's submission that the Trial Chamber's inaction in Case 004/2 and the alleged failure to authorise electronic filings and notifications, and the return of all filings.<sup>78</sup> His position is that since the Trial Chamber was not lawfully seised of Case 004/2 it had no obligation to act. His case was effectively terminated on the notification of the *PTC Considerations* and therefore the Immediate Appeal is inadmissible and does not support the application of the inherent jurisdiction of the Supreme Court Chamber.<sup>79</sup>

45. The International Co-Prosecutor replies to AO An's submissions repeating that all of the *indicia* of an authoritative judicial act constituting a decision were satisfied by the combination of (i) the Trial Chamber's inaction, (ii) the issuance of the 3 April Press Release making it clear that the inaction would continue and (iii) the physical return of the pleadings to the parties. She argues that these acts disposed of the legal matter before the Trial Chamber in a definitive manner, leaving no doubt that the Trial Chamber would not exercise its jurisdiction to engage with, let alone rule on submissions in Case 004/02.<sup>80</sup> The International Co-Prosecutor adds that the return of the filings constituted the operative part of the decision and the 3 April Press Release provided the written summary and reasons for the Judges' inactions.<sup>81</sup> She rejects entirely any suggestion that she seeks to appeal the *PTC Considerations* and notes that the request for the intervention of the Supreme Court Chamber is to ensure administrative steps are taken for Case 004/2 to proceed to trial in order to resolve the current impasse.<sup>82</sup>

*Admissibility pursuant to Rule 104(4)(a)*

*Deliberations*

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<sup>76</sup> Response, Section A, paras 1-3; *citing* Decision on Rule 35 Applications, 14 September 2012, E176/2/1/4, para. 25.

<sup>77</sup> Response, Section A, para. 1.

<sup>78</sup> Response, Section A, para. 5.

<sup>79</sup> Response, Section B, para. 3.

<sup>80</sup> Reply, para. 3.

<sup>81</sup> Reply, para. 3.

<sup>82</sup> Reply, para. 4.

46. The Supreme Court Chamber is faced with a highly unusual situation fully outlined in the procedural history of Case 004/2.<sup>83</sup> By way of preliminary observation, it is undoubtedly the case that what occurred in the Office of the Co-Investigating Judges and then in the Pre-Trial Chamber was either not predicted by the drafters of the legal framework of the ECCC or if predicted, was not clearly spelled out in any of the Court's operative founding documents. The Chamber observes that while the International Co-Prosecutor and AO An both appear to agree that Case 004/2 is caught in a procedural impasse, they disagree fundamentally as to whether the Trial Chamber has been lawfully seized of Case 004/2.

47. The Chamber will first consider the admissibility of the Immediate Appeal in the context of the unique history raised herein.<sup>84</sup> The Immediate Appeal is filed pursuant to Rule 104(4)(a) which ensures that an avenue of immediate appeal exists in circumstances where proceedings are terminated without arriving at a judgment and therefore the absence of the Rule would prevent any opportunity for appeal.<sup>85</sup> Rule 104(4)(a) has been interpreted by the Chamber in the past to include decisions to stay proceedings that do not carry a tangible promise of resumption, thereby barring arrival at a judgment on the merits.<sup>86</sup> Emphatically, under Rules 104 and 105, the appellate jurisdiction of the Supreme Court Chamber is limited to appeals against decisions or judgments of the Trial Chamber.

48. The Chamber poses the question whether Case 004/02 was ever before the Trial Chamber? There is no doubt that one interpretation of the default rules contained in Articles 6(4) and 7(4) of the Agreement, Articles 20 new of the ECCC Laws and Internal Rules 77(13)(b) and 79(1) would suggest that the Case File would automatically come before the Trial Chamber following the issuance of the *Pre-Trial Chamber's Considerations*. On this interpretation, the International Co-Prosecutor sought to engage the Trial Chamber by initiating several applications to prepare the case for trial, but to no avail.<sup>87</sup> As the other interpretation

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<sup>83</sup> See Procedural History, *supra*.

<sup>84</sup> The appellate powers of the Supreme Court Chamber are exercised within the limits of the issues appealed *see Duch Appeal Judgment*, para. 15

<sup>85</sup> Decision on KHIEU Samphân's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02 ("Immediate Appeal on Additional Severance"), E301/9/1/1/3, para. 17; *See also* ("Second Severance Appeal Decision"), para. 21 & Decision on the Co-Prosecutor's Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, E163/5/1/13 ("First Severance Appeal Decision"), para. 48 *referencing* to Decision on IENG Sary's appeal against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, E95/8/1/4, para. 9.

<sup>86</sup> *See also* Second Severance Appeal Decision, para. 21 and First Severance Appeal Decision, para. 22 *referencing* to Decision on immediate appeal against the Trial Chamber's order to release the accused IENG Thirith, 13 December 2011, E138/1/7, para. 15.

<sup>87</sup> Immediate Appeal, paras 6-9, 10-30; *See also* Procedural History Section above.

was that the case was at an end and the Case File did not and could not progress further, the Trial Chamber simply stayed silent and eventually issued a public press release for the purpose of providing clarification of its position. The issue before the Supreme Court Chamber is whether, as posited by the International Co-Prosecutor, the Trial Chamber's inaction, including the failure to authorise electronic filings and notifications, followed by the physical return of all the documents to the parties coupled with the 3 April Press Release equates to a *decision* that effectively terminated the proceedings rendering this Immediate Appeal admissible.<sup>88</sup>

49. This issue cannot be answered without first addressing whether the Trial Chamber was ever seized of the indictment and therefore the trial in Case 004/2 against AO An. The steps taken by the International Co-Prosecutor in filing requests to the Trial Chamber as well as requesting the Administration to facilitate the transmission of the Case File to the Trial Chamber stem from her belief that the Trial Chamber had jurisdiction over the Case File and had failed to exercise this jurisdiction. However, the fact remains that the Case File, which remained confidential, was never formally transferred to the Trial Chamber. It remained caught up in conflicting and competing instructions from the Pre-Trial Chamber Judges, which the Administration was not in position to enforce.<sup>89</sup> The International Judges of the Pre-Trial Chamber expressed their concern to prevent their decision to uphold the indictment being unimplemented and the case being "lost in limbo."<sup>90</sup> They expressed their view that the circumstances of this case demonstrate that "it is impossible for a Chamber of the ECCC to take judicial action when it is divided about the need to do so."<sup>91</sup> The National Judges through the President of the Pre-Trial Chamber were equally insistent that Case 004/2 against AO An was concluded in accordance with their decision to support the Dismissal Order.

50. In the normal course of events within the ECCC legal framework, notification and transmission of a Case File to the Trial Chamber is required to enable the Trial Chamber to be seised and take any action.<sup>92</sup> The Trial Chamber has noted "that it has never been formally notified of the case and it has not received the Case File."<sup>93</sup> There is no doubt that the Trial

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<sup>88</sup> Immediate Appeal, paras 41-45.

<sup>89</sup> Two competing and contradictory letters were to Administration and others by the President of the pre-Trial Chamber and by the International Judges, causing Administration to seek clarification as to which of the opposing instructions to implement or alternatively, for actionable instructions. The Pre-Trial Chamber proffered no answer to date and no instruction was agreed on by all the judge of the Pre-Trial Chamber.

<sup>90</sup> Interoffice Memorandum, of the International Judges of the Pre-Trial Chamber, 29 January 2020.

<sup>91</sup> 3 April Press Release.

<sup>92</sup> Article 2 of the Practice Direction governing filings of documents before the ECCC.

<sup>93</sup> 3 April Press Release.



Chamber never *received* the Case File through the proper administrative and procedural mechanisms stipulated within the ECCC legal framework.

51. The Supreme Court Chamber recalls that in the disposition of the *Pre-Trial Chamber Considerations*, the Judges *unanimously* declared the following:

- “**ORDERS** a joinder of the Appeals against both Closing Orders;
- **DECIDES** that the National Co-Prosecutor’s Appeal is admissible;
- **DECIDES** that the International Co-Prosecutor’s Appeal is admissible;
- **DECIDES**, in respect of the Co-Lawyers’ Appeal for AO An, that Grounds 1 to 9, 11, 12(i), 13, 15(i), (16)(ii) thereof are admissible;
- **DECIDES** that the remaining Grounds in the Co-Lawyers’ Appeal for AO An are inadmissible;
- **DECLARES** that the Pre-Trial Chamber may exercise authority over the review of investigative matters;
- **DECLARES** that, subject to the jurisdiction of the ECCC, the ordinary Cambodian courts have full jurisdiction over matter of criminal justice;
- **DECLARES** that the delay in issuing the Closing Orders after the conclusion of the investigations against AO An was unwarranted;
- **DECLARES** that the Co-Investigating Judges erred in assessing the reliability and probative value of the evidence;
- **DECLARES** that the Co-Investigating Judges’ issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC;
- **DECLARES** that it has not assembled an affirmative vote of at least four judges for a decision based on common reasoning on the merits;

In accordance with Internal Rule 77(13), the present Decision is not subject to appeal.

In accordance with the Internal Rule 77(14), this Decision shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the parties by the Greffier of the Pre-Trial Chamber.”<sup>94</sup>

52. Having *unanimously* declared the above findings, the Pre-Trial Chamber ordered no notifications or transfer of the Case File to the Trial Chamber. The disposition and declarations that were *unanimously* agreed to were endorsed by the five Judges of the Pre-Trial Chamber who appended their respective signatures.

53. The Supreme Court Chamber notes that notwithstanding the *unanimous* declaration that the actions of the Co-Investigating Judges in producing two separate and conflicting Closing Orders was a nullity, the Judges of the Pre-Trial Chamber provided their Considerations on the validity of the separate and conflicting closing orders. This was undoubtedly a redundant exercise. It became irrelevant that the Pre-Trial Chamber did not

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<sup>94</sup> *PTC Considerations*, Disposition (emphasis added).

attain the supermajority required in the adjudication of the parties' appeals against the conflicting Closing Orders as this part of the Considerations was now superfluous.<sup>95</sup>

54. The Supreme Court Chamber concludes that in light of these findings, the Trial Chamber was in no position to authorise and/or notify electronic filings. Hence the subsequent return of these filings to the parties was inevitable. Accordingly, the Supreme Court Chamber considers the International Co-Prosecutor's submission on the alleged inaction of the Trial Chamber cannot succeed.

55. The International Co-Prosecutor's argument that the 3 April Press Release constituted an appealable decision also falls.<sup>96</sup> The submission regarding the Supreme Court Chamber's decision in Case 002/01, holding that a Trial Chamber memorandum constituted a "decision" because it possessed "*indicia* of an authoritative judicial act, despite lacking solemn form"<sup>97</sup> and finding that "practices departing from judicial formalism and symbolism do not render the acts void"<sup>98</sup>, does not require adjudication. The Chamber nevertheless wishes to state that it draws a clear distinction between Case 002/01, where a reasoned memorandum disposing of issues relating to the scope of trial was delivered and Case 004/2 where a press release, intended to provide clarification to the parties and the public, in a situation relating to two competing Closing Orders which disabled the transmission of the Case File.

56. Furthermore, the Chamber considers the circumstance of Case 002/01 and Case 004/2 are incomparable, particularly in light of the Trial Chamber's unequivocal statement that "issuing a formal decision" was not possible and that the press release had "no legal force".<sup>99</sup> Accordingly, the 3 April Press Release cannot be construed to constitute an appealable decision; such an interpretation would be overreaching.

### *Conclusion*

57. The Chamber finds that for any decision to be authoritative and enforceable, it must of necessity be a decision made by a chamber that has jurisdiction to make such pronouncement and must *inter alia* dispose of a legal issue raised by a party. As the Trial Chamber was never seised of the Case File in Case 004/2, it had no jurisdiction to make any lawful orders. Never

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<sup>95</sup> *PTC Considerations*, para. 169.

<sup>96</sup> Immediate Appeal, para. 45.

<sup>97</sup> *Citing Decision on the Co-Prosecutor's Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01* ("Immediate Appeal on Scope of Case 002/01"), 8 February 2013, E163/5/1/13, para. 30.

<sup>98</sup> Immediate Appeal on Scope of Case 002/01, para. 30.

<sup>99</sup> 3 April Press Release.

having received the Case File, there were no parties before it and no disposition could be delivered by the Trial Chamber. The alleged actions and inaction and the 3 April Press Release, whether separately or jointly, do not constitute an appealable decision. It is reiterated that the Trial Chamber could not effectively terminate the proceedings since it was not formally seised of the Case File. Accordingly, the Chamber considers that the Immediate Appeal does not conform with the provisions of Rule 104(4)(a) and therefore finds it inadmissible on this ground.

*Admissibility in the alternative*

*Deliberations*

58. In the alternative, the International Co-Prosecutor requests the Supreme Court Chamber to exercise its inherent jurisdiction to find the appeal admissible on the basis that “there is an imperative need to ensure a good and fair administration of justice”.<sup>100</sup> The Chamber will now proceed to make its determination on this ground.

59. This is a more challenging issue. The procedural history behind the Immediate Appeal illustrates the extraordinary circumstances that led to the continuing impasse in Case 004/2. Even a cursory analysis of the procedural background of Case 004/2 demonstrates the numerous disagreements that have arisen between the Co-Prosecutors since 2008 and that have then continued for over a decade in the Office of the Co-Investigating Judges, leading to the almost inevitable conflicting closing orders which, ultimately came before the Pre-Trial Chamber.<sup>101</sup> Difficult though those issues were, and the Supreme Court Chamber does not for one moment minimise the extreme difficulty faced by the Pre-Trial Chamber, it was for this body to resolve them. The Supreme Court Chamber recalls the Roman Law maxim *ubi jus, ibi remedium* - where there is a right, there is a remedy; where law has established a right there should be a corresponding remedy for its breach.

60. The Supreme Court Chamber considers that the unique circumstances of Case 004/2 demand that the International Co-Prosecutor, AO An, the Civil Parties and the public have a right to expect and receive legal certainty and clarity in this case. Maintaining a judicial limbo

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<sup>100</sup> Immediate Appeal, paras 46-49.

<sup>101</sup> *PTC Considerations*, para. 169; Pursuant to Rule 77(14), the Opinions of the various members of the Pre-Trial Chambers were attached therein & Disposition.

fundamentally breaches those legitimate expectations. It is for the courts of final instance to provide clarity.

61. It must be recalled that the Pre-Trial Chamber stated that “[i]n the specific case of appeals against closing orders, Internal Rule 79(1) suggests that [it] has the power to issue a new or revised closing order that will serve as a basis for the trial.”<sup>102</sup> Emphasising that [it] “has previously decided that it fulfils the role of the Cambodian Investigation Chamber in the ECCC, which, when seised of a dismissal order as a consequence of an appeal, shall investigate the case by itself.”<sup>103</sup> These explicit findings would lead a reasonable reader to conclude that the Pre-Trial Chamber was aware of its powers to go beyond declaring the illegality of the situation relating to issuance of two conflicting Closing Orders and to issue its own valid closing order. However, it elected not to take that route. The Pre-Trial Chamber, having *unanimously* declared “that the Co-Investigating Judges’ issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC”, should have gone a step further and provided an actual final ruling.

62. In consideration of the abovementioned difficult, unprecedented, and sensitive events, the Supreme Court Chamber recalls that within the ECCC legal framework, the recurring theme of *unanimity* is paramount in the decision-making processes.<sup>104</sup> However, it is recognised that where *unanimity* is unattainable in any of the stages of investigation and prosecution in the Pre-Trial process, there is a *default position* in favour of continuing the investigation or prosecution, whether with the Co-Investigating Judges or the Co-Prosecutors. The ECCC legal framework does not address the possibility of two Closing Orders that are in diametric opposition arrived at by two careful analyses of the actions attributed to the same suspect, the same crime sites and the same temporal phase. The irreconcilable differences of the Co-Investigating Judges on whether AO An should be investigated *at all* led them to formally register several fundamental disagreements and inevitably to the issuance of two separate and conflicting Closing Orders,

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<sup>102</sup> *PTC Considerations*, D359/24 & 360/33, 19 December 2019, para. 30 *citing* Case 004/1 Considerations on Closing Order Appeal, D308/3/1/20, para. 22 *referring* to Case 001, PTC02, Decision on Appeal against Closing Order Indicting KAINING Guek Eav *alias* “Duch”, 5 December 2008, D99/3/42 (“Case 001 Decision on Closing Order Appeal”), para. 40.

<sup>103</sup> *PTC Considerations*, para. 30 *citing* Case 004/1 Considerations on Closing Order Appeal, D308/3/1/20, para. 22 *referring* to Case 001 Decision on Closing Order Appeal, paras 41-42.

<sup>104</sup> Art. 4 of the Agreement; Articles 14 new of the ECCC Law; Rules 98 (4), 101(2), 111(6), 112(3), 12 ter (3), 39(5), 71(3), 72(3) of the Internal Rules.

one to dismiss the case and the other to indict AO An. These seemingly rigid and strongly held differences have led to the current impasse in Case 004/2.

63. The Chamber notes that a combined reading of Rule 2,<sup>105</sup> as well as Articles 20 *new*, 23 *new*, and 33 *new* of the ECCC Law, and the Preamble to the Agreement, permits the Chamber to seek guidance from international standards where the ECCC legal framework falls short in dealing with a particular matter, or if there is uncertainty regarding their interpretation or application.<sup>106</sup>

64. As previously mentioned, it is a general rule of law that it is undesirable for legal issues to remain unresolved. A final court, as the Supreme Court Chamber, has a duty to bring clarity and finality to such situations. Legal stalemates are indicative of failure of the judicial system to provide remedies. Given that the International Co-Prosecutor is acting without either the support or opposition of her National counterpart in this Immediate Appeal magnifies the legal impasse which has dogged every step of the investigatory process of Case 004/2 against AO An. This once again illustrates that the current legal framework of the ECCC does not discernibly address this matter. The Supreme Court Chamber considers that it is its obligation as both the appellate Chamber and the Court of final instance<sup>107</sup> to provide legal remedies and make final determination in cases where statutes or laws are silent or unclear. It is the function of a court of final instance to provide legal certainty to the parties. For this reason, the Supreme Court Chamber will consider this Immediate Appeal.

### *Conclusion*

65. The Supreme Court Chamber thus deems it necessary to provide legal certainty and clarity to the crucial legal matters revealed in the Immediate Appeal that the ECCC legal compendium does not address specifically. In the particular circumstances of Case 004/2 against AO An, the Chamber considers that resolution is a superior necessity and will therefore exercise its discretion in the interest of justice and fairness and admit the Immediate Appeal solely to ensure that legal certainty and finality are achieved in the determination of this case

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<sup>105</sup> Rule 2 provide guidance in circumstances “where in the course of proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 *new*, 23 *new*, 33 *new* or 37 *new* of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedure laws. [...]”

<sup>106</sup> The Agreement, Preamble.

<sup>107</sup> ECCC Law, Article 9 *new*.

and to uphold the integrity of the institution of the ECCC. Accordingly, the Chamber will now address the relevant grounds of appeal.

### G. MERITS

66. The International Co-Prosecutor submits that the Trial Chamber erred in law by failing to progress the trial of AO An since the issuance of the *PTC Considerations* on 19 December 2019, thus effectively terminating Case 004/2. She argues that since the Pre-Trial Chamber failed to attain the required majority, the *default position* was triggered.<sup>108</sup>

67. The argument proposed by the International Co-Prosecutor is that in the absence of agreement and a supermajority in favour of dismissal, the *default position* operates. This argument sidesteps or ignores the consequences of the *unanimous* finding of the Pre-Trial Chamber that the Closing Orders were the results of *unlawful and illegal actions*. A void act cannot create a lawful consequence or result. It therefore logically follows that the source action – each Closing Order - was of no legal effect.

68. The International Co-Prosecutor's submission that the *default position* is governed by Rule 77(13)(b) which, as *lex specialis* relating to Indictments, prevails over the general Rule 77(13)(a) regarding orders "other than an indictment" cannot be determined in a vacuum.<sup>109</sup> It remains a core issue that could only have been resolved by the Pre-Trial Chamber. Similarly, whether Rule 1(2) permits an Investigating Judge to act individually remains to be resolved by the Pre-Trial Chamber.<sup>110</sup> While undoubtedly the purpose of the ECCC Agreement and ECCC Law is to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes",<sup>111</sup> this must be conducted within the confines of the law. While the Supreme Court Chamber accepts that the objective of the disagreement settlement mechanism is to "prevent a deadlock from derailing the proceeding from moving to trial,"<sup>112</sup> the issue in Case 004/2 is whether the case can go to trial in the absence of a valid Closing Order, indictment. The answer is an unequivocal no.

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<sup>108</sup> Immediate Appeal, para. 50.

<sup>109</sup> Immediate Appeal, para. 52.

<sup>110</sup> Immediate Appeal, paras 54-55.

<sup>111</sup> Immediate Appeal, para 56 *referencing* Article 1 of ECCC Agreement & Article 1 of the ECCC Law.

<sup>112</sup> Immediate Appeal, para. 56 *citing* para. 323 Opinion of the International Judges of the Pre-Trial Chamber.

69. The Supreme Court Chamber recalls that the Introductory Submissions and both the Closing Orders reveal the extent and breadth of the cruelty of the CPK policies during the relevant period. Notwithstanding agreement in relation to the great numbers of victims in the central zone there was no agreement after thirteen years of investigations that AO An was within the jurisdiction of the Court. The Chamber considers that in the absence of a definitive and enforceable indictment against AO An, Case 004/2 against him should be terminated before the ECCC.

### *Conclusion*

70. For the foregoing reasons, the Supreme Court Chamber considers that the Trial Chamber was never seised of Case 004/2 and as such did not err in failing to progress the trial against AO An in accordance with Rule 77(13)(b), governing the *default position*. Further, the Trial Chamber had no power to act or to decide any issues brought to its attention. All other enumerated grounds in the International Co-Prosecutor's appeal are consequently also rejected.

## **H. SUMMARY**

71. In view of the Chamber's observations of the need for certainty and finality on the important matters revealed by the Immediate Appeal regarding Case 004/2 against AO An, the Chamber holds as follows:

- i. A Trial Chamber is lawfully seised of a case where the Pre-Trial Chamber transmits the relevant Case File in accordance with the ECCC legal framework.
- ii. The jurisdiction of the Trial Chamber is activated when it is seised of an enforceable indictment issued by the Co-Investigating Judges or the Pre-Trial Chamber.
- iii. Parties in this case are entitled to a final determination of their cases.
- iv. The Press Release by the Judges of the Trial Chamber in Case 004/2 does not constitute an enforceable or appealable judicial decision.
- v. In light of the Pre-Trial Chamber's finding in Case 004/2 that the actions of the Co-Investigating Judges were illegal, it flowed that neither Closing Order was valid.
- vi. In the absence of a definite and enforceable indictment, the case against AO An is hereby terminated before the ECCC.

**I. DISPOSITION**

For the foregoing reasons, the Supreme Court Chamber:

**FINDS** the Immediate Appeal to be admissible for the clarification of certain issues as per Section H above;

**DISMISSES** the Immediate Appeal.

**Phnom Penh, 10 August 2020**

**President of the Supreme Court Chamber**



**KONG Srim**