



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

INTEROFFICE MEMORANDUM

TO: Office of the Co-Prosecutors, Co-Lawyers for
AO An, All Civil Party Lawyers in Case 004/2

COPY TO: Judge PRAK Kimsan (President), Judge NEY Thol,
Judge HUOT Vuthy, LIM Suy-Hong (Greffier of the Trial Chamber),
HE TONY Kranh (ADOA), Knut ROSANDHAUG (DDOA)

FROM: Judge Olivier BEAUVALLET and Judge Kang Jin BAIK

DATE: 12 March 2020

SUBJECT: **Transfer of Case File 004/2**

I. INTRODUCTION

1. On 19 December 2019, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) delivered its Considerations on Appeal against Closing Orders in Case 004/2, the case against AO An (the “Considerations”). Although the International and the National Co-Investigating Judges issued two separate and conflicting Closing Orders, neither the Indictment nor the Dismissal Order was reversed by a supermajority vote.
2. Following the issuance of the Considerations, the Pre-Trial Chamber received and is seised of the “International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber”, filed by the International Co-





អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Prosecutor on 4 February 2020 (the “Request”),¹ and the “Requests for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02”, filed by the Co-Lawyers for AO An (the “Co-Lawyers”) on 24 February 2020 (the “Co-Lawyers’ Request”)² (collectively, the “Requests”).

3. The International Judges note the current situation where the Pre-Trial Chamber’s issuance of a decision on the Requests is a remote possibility in the foreseeable future and that the Pre-Trial Chamber has consistently held that it will not entertain repetitive requests concerning a specific issue that would result in the Chamber not being able to reach a decision unanimously or with a supermajority vote, when it is to be presumed that the five Judges of the Chamber would follow their previous opinion and reach the same conclusion, rendering the subsequent requests pointless and creating a potential for endless litigation.³ The International Judges reiterate that the supermajority rule and the default position envisaged by the Internal Rules are unique features of the ECCC, which may result in the Chamber not being able to reach a decision on a specific issue.

4. In light of the current situation as well as Internal Rule 21(1), Judges Kang Jin BAIK and Olivier BEAUVALLET (the “International Judges”) consider it imperative to clarify the relevant law and facts concerning the transfer of the Case File 004/2 and provide their opinions on the current situation through this Memorandum.

II. PROCEDURAL HISTORY

5. On 16 August 2018, the National Co-Investigating Judge issued the Order Dismissing the Case against AO An (the “Dismissal Order”)⁴ while the International Co-Investigating Judge issued the Closing Order (Indictment) (the “Indictment”).⁵

¹ Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”) (PTC60), International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber, 4 February 2020, D359/25 and D360/34 (the “International Co-Prosecutor’s Request (D359/25 and D360/34)”).

² Case 004/2 (PTC60), Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02, D359/27 and D360/36 (the “Co-Lawyers’ Request (D359/27 and D360/36)”).

³ See e.g., Case 004/2 (PTC07), Decision on TA An’s Appeal against International Co-Investigating Judge’s Decision Denying Requests for Investigative Actions, 30 September 2014, D190/1/2, para. 20.

⁴ Case 004/2, Order Dismissing the Case against AO An, 16 August 2018, D359.

⁵ Case 004/2, Closing Order (Indictment), 16 August 2018, D360.





អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

6. On 14 December 2018, the National Co-Prosecutor filed an appeal in Khmer against the Indictment.⁶ On 20 December 2018, the Co-Lawyers for AO An (the “Co-Lawyers”) and the International Co-Prosecutor respectively filed appeals in English against the Indictment⁷ and the Dismissal Order⁸ (collectively, the “Appeals”).
7. On 19, 20 and 21 June 2019, the Pre-Trial Chamber conducted a hearing in Case 004/2 to hear the arguments of the Parties in relation to the Appeals.
8. On 19 December 2019, the Pre-Trial Chamber issued its Considerations on Appeals against the Closing Orders in Case 004/2 (the “Considerations”).⁹ A Greffier of the Chamber submitted a filing and notification instruction form, directing the Records and Archives Unit of the Office of Administration (the “RAU”) to file the Considerations as public and to notify the Considerations to the Pre-Trial Chamber, the Office of the Co-Investigating Judges, the Office of the Co-Prosecutors, the Defence for AO An and the Civil Parties in Case 004/2.¹⁰
9. On 21 January 2020, a Greffier of the Trial Chamber, *via* email, informed the parties in Case 004/2 that “[t]he Trial Chamber is aware of the publicly available Considerations [...]. However, these Considerations have so far not been notified to the Trial Chamber [...]”.¹¹
10. On 28 January 2020, a Greffier of the Pre-Trial Chamber, *via* email, instructed the RAU not to notify the Trial Chamber of the Considerations and to archive Case 004/2.¹² On the same day, another Greffier of the Chamber, submitted a form, instructing the RAU to notify the Trial Chamber of the Considerations.¹³

⁶ Case 004/2, National Co-Prosecutor’s Appeal against the International Co-Investigating Judge’s Closing Order (Indictment), 14 December 2018, D360/8/1.

⁷ Case 004/2, AO An’s Appeal against the International Co-Investigating Judge’s Closing Order (Indictment), 20 December 2018, D360/5/1.

⁸ Case 004/2, International Co-Prosecutor’s Appeal of the Order Dismissing the Case against AO An (D359), 20 December 2018, D359/3/1.

⁹ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33.

¹⁰ Filing and Notification Instruction Form submitted by Ms Kristina O’YOUNG, Greffier of the Pre-Trial Chamber, 19 December 2019 (Annex 1).

¹¹ Email from Mr Suy-Hong LIM, Greffier of the Trial Chamber, 21 January 2020 (Annex 2).

¹² Email from Ms Hyuree KIM, Greffier of the Pre-Trial Chamber, to the International Judges, *forwarding* (i) the CMS’ Request for a Single Final Instruction regarding the Notification of the Considerations and (ii) Ms ROS Bophana’s Instructions to the CMS, 28 January 2020 (Annex 3).

¹³ Notification Instructions for Notification of the Pre-Trial Chamber’s Considerations to the Trial Chamber in Case 004/2, 28 January 2020 (Annex 4).





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

11. On 29 January 2020, Judge PRAK Kimsan, the President of the Pre-Trial Chamber, sent a memorandum to the Chief of Court Management Section (the “CMS”) with all the Judges of the Pre-Trial Chamber as well as the Acting Director and Deputy Director of the Office of Administration copied, stating that individual Judge’s personal opinions or decisions shall have no applicable effect.¹⁴
12. On the same day, the International Judges of the Chamber sent an interoffice memorandum to the Acting Director and Deputy Director of the Office of Administration as well as the Chief of the CMS, with the President and the National Judges of the Chamber copied, stating that the Trial Chamber is seised of Case 004/2 pursuant to Internal Rule 77(13)(b) and that the Office of Administration is currently instructed to notify the Trial Chamber of the Considerations.¹⁵
13. On 31 January 2020, the Office of Administration sent an interoffice memorandum to Judge PRAK Kimsan, the President of the Pre-Trial Chamber, with all the Judges of the Chamber copied, requesting for the Chamber’s authoritative clarification on which of the two opposing instructions concerning notification of the Considerations to the Trial chamber should be implemented, or in the alternative, an actionable instruction.¹⁶ To date, this request remains pending.
14. On 4 February 2020, the International Co-Prosecutor filed the “International Co-Prosecutor’s Request that the Trial Chamber takes Action to Obtain Access to the Case 004/02 (AO An) Indictment and the Case File”.¹⁷
15. On 10 February 2020, the International Co-Prosecutor filed the Request, seeking the Pre-Trial Chamber to take all necessary administrative actions to ensure that the Indictment and remaining Case File 004/2 are immediately and effectively transferred to the Trial Chamber as mandated in the Agreement between the United Nations and the Royal Government of Cambodia

¹⁴ Internal Memorandum issued by Judge PRAK Kimsan, President of the Pre-Trial Chamber, 29 January 2020 (Annex 5).

¹⁵ Interoffice Memorandum issued by Judge Kang Jin BAIK, Judge Olivier BEAUVALLET, International Judges of the Pre-Trial Chamber, 29 January 2020 (Annex 6).

¹⁶ Interoffice memorandum issued by the Office of Administration, 31 January 2020 (Annex 7).

¹⁷ Case 004/2, International Co-Prosecutor’s Request that the Trial Chamber takes Action to Obtain Access to the Case 004/02 (AO An) Indictment and the Case File, 4 February 2020.





អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

(the “Agreement”), the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (the “ECCC Law”) and Internal Rules.¹⁸

16. On the same day, a Greffier of the Trial Chamber, *via* email, informed the parties in Case 004/2 that “[t]he Trial Chamber is aware of the publicly available Considerations [...]” However, “[t]he Trial Chamber has still not been formally notified by the Pre-Trial Chamber of the Considerations” and the “case file has not been forwarded. It is up to the Pre-Trial Chamber to initiate both actions.”¹⁹

17. On 18 February 2020, the Co-Lawyers filed the “Response to International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber” (the “Co-Lawyers’ Response”),²⁰ requesting the Pre-Trial Chamber to deny the relief requested by the International Co-Prosecutor.²¹

18. On 24 February 2020, the Co-Lawyers filed their Request, seeking the Pre-Trial Chamber’s confirmation that all required administrative actions have been taken to archive Case File 004/2.²²

19. On 3 March 2020, the International Co-Prosecutor filed her reply to the Co-Lawyers’ Response.²³

20. On 5 March 2020, the International Co-Prosecutor filed her response to the Co-Lawyers’ Request.²⁴

III. APPLICABLE LAW

21. Internal Rule 77(14) states that:

¹⁸ International Co-Prosecutor’s Request (D359/25 and D360/34), paras 1, 25, 29.

¹⁹ Email from Mr Suy-Hong LIM, Greffier of the Trial Chamber, 10 February 2020 (Annex 8).

²⁰ Case 004/2 (PTC60), Response to International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber, filed 18 February 2020 and notified 19 February 2020, D359/25 and D360/34 (“Co-Lawyers’ Response (D359/26 and D360/35)”).

²¹ Co-Lawyers’ Response (D359/26 and D360/35), paras 1, 29.

²² Co-Lawyers’ Request (D359/27 and D360/36).

²³ Case 004/2 (PTC60), International Co-Prosecutor’s Reply to AO An’s Response to the ICP’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber, 3 March 2020, D359/28 and D360/37 (“International Co-Prosecutor’s Reply (D359/28 and D360/37)”).

²⁴ Case 004/2 (PTC60), International Co-Prosecutor’s Response to AO An’s Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02, filed 5 March 2020 and notified 12 March 2020, D359/30 and D360/39 (“International Co-Prosecutor’s Response (D359/30 and D360/39)”).





អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

[s]uch 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.

22. Internal Rule 77(13) provides, in relevant part:

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.

23. Internal Rule 69 states:

1. Where an appeal is filed against a Closing Order, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Pre-Trial Chamber as provided in Rule 77.
2. Where no appeal is filed against a Closing Order, the Co-Investigating Judges shall seal the case file, and:
 - a) If an Indictment is issued, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Trial Chamber to allow a date for trial to be set; or
 - b) If a Dismissal Order is issued, the case file shall be archived after the expiry of the time limit for appeal.

24. The International Judges find that the basic rules for notification of Pre-Trial Chamber's decision on appeals against closing order are enshrined in Internal Rules 69 and 77(14). Internal Rule 77(14) provides that the Pre-Trial Chamber's decision on appeals against closing order shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the other parties. In light of past practice, the International Judges consider that Internal Rule 69 contemplates ordinary circumstances concerning transfer of Case File according to which upon notification of the Pre-Trial Chamber's decision on appeals against a closing order pursuant Internal Rules 77(13) and (14), the Greffier of the Office of the Co-Investigating Judges would normally forward the case file to the Greffier of the Trial Chamber in accordance with Internal Rule 69(2)(a).





អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

IV. DISCUSSION

1. Introduction

25. The International Judges recall that the Chamber, in its Considerations, has unanimously declared the illegality of the Co-Investigating Judges' simultaneous issuance of two separate Closing Orders.²⁵ However, the Judges of the Chamber reached different conclusions regarding the consequences of such anomaly.²⁶ While the National Judges considered that only the Dismissal Order should be upheld,²⁷ the International Judges found that only the Indictment stands as the Dismissal Order is *ultra vires*, void and without legal effect.²⁸ In other words, neither the Indictment or the Dismissal Order was reversed with the required supermajority vote.

26. In order to ensure legal certainty, transparency of proceedings and the interests of justice, the Pre-Trial Chamber unanimously and clearly indicated in the Dispositions that the subsequent proceedings upon the issuance of the Considerations are governed by Internal Rules 77(13) and (14).²⁹

2. The Pre-Trial Chamber Has Discharged Its Duties

27. In accordance with Internal Rule 77(14), a Greffier of the Pre-Trial Chamber immediately submitted a filing and notification instruction form upon the issuance of the Considerations, directing the RAU to file the Considerations as public and to notify the Considerations to the Office of the Co-Investigating Judges and the Parties in Case 004/2.³⁰

²⁵ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33, paras 101-124.

²⁶ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33, paras 124, 170-302, 304-329.

²⁷ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33, paras 282, 294, 302.

²⁸ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33, paras 326, 685.

²⁹ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33, p. 61, VII. Disposition.

³⁰ Filing and Notification Instruction Form submitted by Ms Kristina O'YOUNG, Greffier of the Pre-Trial Chamber, 19 December 2019 (Annex 1).





28. However, the Office of the Co-Investigating Judges has not taken any steps so far. In this regard, the International Judges note the fact that the Office of the Co-Investigating Judges has been without international staff since August 2019.

3. The Pre-Trial Chamber Has Taken Further Steps within Its Powers

29. Pursuant to Internal Rule 21(1), it is the Pre-Trial Chamber's duty 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." Furthermore, the "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties." No rights will be preserved, if the Pre-Trial Chamber does not ensure the possibility for the parties to access to the competent judges, namely the Trial Chamber.

30. The Pre-Trial Chamber performs the same functions within the ECCC legal system as that of a Cambodian Investigation Chamber.³¹ Further, the third paragraph of Article 282 of the Cambodian Code of Criminal Procedure provides that the Investigation Chamber shall end an investigation by a closing order. The provisions of Articles 247 to 250 of the Code, concerning indictments issued by an investigating judge, shall apply to the indictment issued by the Investigation Chamber. Article 250 dictates that when an investigating judge decides to issue an indictment to forward the case for trial, the investigating judge shall send the case immediately to the court president to set the schedule for the trial.

31. Considering the vacuum of the Office of the Co-Investigating Judges, the Pre-Trial Chamber's overall investigative powers, well-functioning of the judicial process as well as the rights of the parties, a Greffier of the Pre-Trial Chamber has taken further steps to prevent the situation of its decision being unimplemented and the case being lost in limbo.

32. On 28 January 2020, a Greffier of the Pre-Trial Chamber, submitted a form instructing the RAU to notify the Trial Chamber of the Pre-Trial Chamber's Considerations in Case 004/2.³²

³¹ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 and D360/33, para. 44.

³² See Notification Instructions for Notification of the Pre-Trial Chamber's Considerations to the Trial Chamber in Case 004/2, 28 January 2020 (Annex 4). However, it does not mean that the Pre-Trial Chamber agrees with the Trial





អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

33. Given the enforceable clauses of the Considerations and the above-mentioned actions that the Chamber has taken, the International Judges declare that the Pre-Trial Chamber has taken every available step and more to effectuate its Considerations.

4. The Current Situation

34. The Pre-Trial Chamber has issued its Considerations in the instant case and took required steps to properly notify it. With respect to the existence of two separate opposing Closing Orders, the Chamber's Considerations, albeit unprecedented, leaves no room for confusion or uncertainty.

35. The International Judges recall that no supermajority vote has been reached to overturn the Indictment and reiterate that, in their view, the Dismissal Order is *ultra vires*, void and without legal effect. Accordingly, only the Indictment, seising the Trial Chamber, stands and the Case File 004/2 shall not be archived.

36. In conclusion, the Pre-Trial Chamber has taken all the required administrative actions to transfer the Indictment and the Case File 004/2 to the Trial Chamber, including submission of the Filing and Notification Instruction Forms on 19 December 2019 and 28 January 2020. Accordingly, it is now up to the Trial Chamber to conduct its judicial review on the Case at hand, which is transferred to it from the Pre-Trial Chamber regardless of any clerical tasks accompanying the transfer.

37. Lastly, the International Judges recall that *via* their 29 January 2020 Memorandum,³³ they have already provided both an authoritative clarification on which instruction regarding the notification of the Considerations is valid and thus should be implemented, and an actionable instruction to transfer the Case File 004/2 to the Trial Chamber. If the Office of Administration were to persist in its inactivity without legal basis, the re-composition of the Office of the Co-Investigating Judges would have to be considered by the relevant stakeholders for the proceedings enshrined in Internal Rule 69(2)(a).

Chamber's interpretation that the Trial Chamber has to be notified of the Considerations by the Pre-Trial Chamber through the CMS in order to be seised of the Indictment and the Case File.

³³ Interoffice Memorandum issued by Judge Kang Jin BAIK, Judge Olivier BEAUVALLET, International Judges of the Pre-Trial Chamber, 29 January 2020 (Annex 6).

