

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

FILING DETAILS

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**AO AN'S RULE 80 WITNESS AND EXPERT LIST SUBMISSION WITH
CONFIDENTIAL ANNEX 1 AND HIS RESPONSE TO THE INTERNATIONAL CO-
PROSECUTOR'S RULE 80 WITNESS AND EXPERT LIST SUBMISSION**

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Judge YOU Ottara

The Co-Prosecutors
CHEA Leang
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All Civil Parties in Case 004/2

I. INTRODUCTION

1. AO An, through his Co-Lawyers (*Defence*), respectfully submits his *Rule 80 Witness and Expert List Submission with Confidential Annex 1* (*AO An Witness and Expert List Submission*) and responds to the *International Co-Prosecutor's Rule 80 Witness and Expert List Submission with Confidential Annex A* (*ICP Witness and Expert List Submission*),¹ pursuant to Rule 80(2) of the Internal Rules (*IRs*) at the Extraordinary Chambers in the Courts of Cambodia (*ECCC*).
2. For the avoidance of doubt, the Defence maintains that the *Closing Order (Indictment)* is not final, that the Trial Chamber has not been lawfully seised of Case 004/02, and that the Case File cannot be forwarded to the Chamber. In its *Considerations on Appeals Against the Closing Orders* (*Considerations on Appeals*),² the Pre-Trial Chamber (*PTC*) unanimously declared the issuance of separate and opposing closing orders unlawful,³ but it failed to reach a supermajority on the merits of the Defence and National Co-Prosecutors' (*NCP*) appeals against the *Closing Order (Indictment)* and on the International Co-Prosecutor's (*ICP*) appeal of the *Order Dismissing the Case against AO An* (*Dismissal Order*).⁴ Pursuant to IR 77(13)(a), the Dismissal Order stands, and the case against AO An should be considered lawfully terminated.
3. Nevertheless, mindful of the 15-day deadline set by IR 80(2), and in the absence of guidance from the Trial Chamber (*TC*), the Defence submits *AO An's Witness and Expert List Submission* and responds to the *ICP's Witness and Expert List Submission*. Confidential Annex 1 lists two witnesses and experts that AO An intends to summon in the event of trial. In light of the absence of guidance from the TC, the list of witnesses and experts focuses at this stage on those who could be material to the determination of (personal) jurisdiction. If necessary, AO An reserves the right to supplement witnesses at a later stage of the proceedings.
4. The Defence files this application in English first with the Khmer translation to follow at the earliest opportunity.

¹ Case No. 004/2/07-09-2009-ECCC/TC, *International Co-Prosecutor's Rule 80 Witness and Expert List Submission with Confidential Annex A* (*ICP Witness and Expert List Submission*), 13 Jan. 2020.

² Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *Considerations on Appeals Against Closing Orders* (*Considerations on Appeals*), **D359/24 & D360/33**, 19 Dec. 2019.

³ *Considerations on Appeals*, para. 124.

⁴ *Considerations on Appeals*, para. 169.

II. PROCEDURAL HISTORY

5. On 16 August 2018, the Co-Investigating Judges issued two separate and opposing Closing Orders in Case 004/02.⁵
6. On 17 December 2018, the NCP filed her submissions on appeal against the *Closing Order (Indictment)*.⁶ On 20 December 2018, the ICP filed his submissions on appeal against the *Dismissal Order*.⁷ Also on 20 December 2018, the Defence filed its submissions on appeal against the *Closing Order (Indictment)*.⁸
7. On 19 December 2019, the PTC issued its *Considerations on Appeals*. As noted above, the PTC unanimously held that the issuance of two separate and opposing closing orders was unlawful,⁹ and it failed to reach a supermajority on the merits of the parties' submissions on appeal.¹⁰ Therefore, the *Dismissal Order* stands under IR 77(13)(a).
8. On 30 December 2019, the Defence sent a letter to the TC requesting confirmation that the Chamber has not been lawfully seized of Case 004/02, and in the alternative, seeking time extension and guidance for filing preliminary objections under IR 89.¹¹
9. On 13 January 2020, the ICP filed the *ICP Witness and Expert List Submission*.¹²
10. On 20 January 2020, the Defence filed its *Summary of AO An's Preliminary Objections under IR 89(1)*.¹³
11. On 21 January 2020, the Greffier of the TC sent an email to all parties stating that the PTC had not yet forwarded the Case File to the TC. The Defence notes that the Case File cannot be forwarded because the case should be considered lawfully terminated.

⁵ Case No. 004/2/07-09-2009-ECCC-OCIJ, *ICIJ Closing Order (Indictment)*, **D360**, 16 Aug. 2018; Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Dismissing the Case Against AO An ('Dismissal Order')*, **D359**, 16 Aug. 2018.

⁶ Case No. 004/2/07-09-2009-ECCC-OCIJ, *National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/2*, **D360/8/1**, 14 Dec. 2018.

⁷ Case No. 004/2/07-09-2009-ECCC-OCIJ, *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against AO An (D359) ('ICP Appeal')*, **D359/3/1**, 20 Dec. 2018.

⁸ Case No. 004/2/07-09-2009-ECCC-OCIJ, *AO An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/2 ('AO An's Appeal Against the Indictment')*, **D360/5/1**, 19 Dec. 2018

⁹ *Considerations on Appeals*, para. 124.

¹⁰ *Considerations on Appeals*, para. 169.

¹¹ AO An Defence Team, 'Request for confirmation that the Trial Chamber has not been lawfully seized of Case 004/02; in the alternative, request for time extension and guidance for filing preliminary objections under Internal Rule 89' ('Request for Confirmation'), 30 Dec. 2019.

¹² *ICP Witness and Expert List Submission*.

¹³ Case No. 004/2/07-09-2009-ECCC/TC, *Summary of AO An's Preliminary Objections under IR 89(1)*, 20 Jan. 2020.

III. APPLICABLE LAW

12. IR 80(2) states that within 15 days from notification of the *ICP Witness and Expert List Submission*, the accused may submit a list of additional witnesses and experts that are not on the ICP's list and that it would like to summon.
13. IR 77(13)(a) provides that if the required majority is not attained on an appeal against an order other than an indictment, the default decision of the Chamber shall be that such order shall stand. Article 38 of the Constitution of the Kingdom of Cambodia provides that any cases of doubt shall be resolved in favour of the defendants. The same principle is universally accepted as being enshrined into Article 14(2) of the International Covenant on Civil and Political Rights ('*ICCPR*').
14. IR 29(3) provides that after having consulted with the Victims Support Section or the Witnesses/Experts Support Unit, the TC may issue protective measures for victims and witnesses whose appearance before the TC could seriously endanger their lives or health, or that of their family members or close relatives. Furthermore, Article 7.1 of the Practice Direction relating to the Classification and Management of Case-Related Information provides that for protection, witnesses should be referred to by number, initial, pseudonym or other means deemed appropriate in public hearings and filings.

IV. SUBMISSIONS

A. AO An's Witness and Expert List

15. In the event that the TC is considered lawfully seised of the case and the trial proceeds, the Defence first requests the TC for permission and additional time and resources to conduct investigations, prior to submitting its witness and expert list. AO An was unlawfully prevented from conducting investigations during the investigative phase of the proceedings, and the International Co-Investigating Judge did not equally investigate inculpatory and exculpatory evidence.¹⁴ Thus, additional investigations are required at this stage. Upon further direction from the TC, the Defence is prepared to provide additional written submissions regarding this request.
16. Alternatively, to comply with 15-day deadline in IR 80(2), the Defence submits the attached Annex 1. In this annex, the Defence lists in alphabetical order the witnesses and experts that were not included in the *ICP Witness and Expert List Submission* and that at this time,

¹⁴ See *AO An's Appeal Against the Indictment*, para. 225.

the Defence intends to summon if a trial were to take place. These individuals offer exculpatory evidence that relates closely to the material already in the Case File, and in the interests of justice, must be evaluated together to avoid a miscarriage of justice.¹⁵ In addition, these witnesses will assist the TC in determining that AO An does not fall within the ECCC's (personal) jurisdiction.

17. The Defence has not contacted these individuals to determine if they have a relationship as described in IR 24(2), and additional enquiries will need to be made.
18. Because these individuals have not been contacted, the Defence cannot determine at this time if protective measures are required, and it reserves its right to request protective measures, if necessary, at a later date. Therefore, it requests that the individuals listed in Annex 1 be referred to with the assigned pseudonyms and that these pseudonyms be used throughout the proceedings until the TC determines whether protective measures are necessary.
19. Moreover, the Defence reserves its right to provide written submissions concerning the order in which all witnesses, experts, and civil parties should be called and the length of time required for examining them.
20. Finally, the Defence reserves its right to add, remove, or amend the names of the individuals listed in Annex 1, depending on the evidence presented by parties at trial so that it may adequately protect AO An's fair trial rights and enable him to present an effective defence. This may include the addition of witnesses and experts whose testimony may be used to impeach witnesses or experts or challenge the authenticity of documents that other parties seek to admit into evidence.

B. Response to the ICP's Witness and Expert List Submission

21. In her submission and confidential annex, the ICP lists 126 witnesses, experts, and civil parties that she intends to summon at trial.¹⁶
22. In connection with this list, the ICP notes the following: (a) she has omitted some witnesses, experts, and civil parties from the list because she intends to introduce into evidence their

¹⁵ Case No. 002/19-09-2007-ECCC/TC, *Decision on NUON Chea Rule 87(4) Request for Admission of Material in relation to the Late King Father Norodom Sihanouk*, 21 Sep. 2016, para. 6, attached as App. 1 ('[...] in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criterion, including in instances where evidence relates closely to the material already before the Chamber and where the interests of justice require the sources to be evaluated together, and where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice (E276/2, para. 2 referring to E190 and E172/24/5/1; E260, para. 5.').

¹⁶ *ICP Witness and Expert List Submission*, Confidential Annex.

prior statements and related documents pursuant to IR 87;¹⁷ (b) she intends to summon alternative witnesses, experts, and civil parties if those identified in her list cannot appear at trial, or if they appear at trial and are unable to establish the facts contained in their prior statements;¹⁸ and (c) she requests permission to add new witnesses, experts, and civil parties as the preparation phase and the trial progress.¹⁹

23. In response to the above matters, the Defence respectfully reserves the right to object to the testimony of any of the witness, expert, or civil parties in the ICP's confidential annex; challenge the admissibility of any prior statements or related documents of witnesses, experts, or civil parties that the ICP seeks to admit into evidence without hearing the relevant testimony; and challenge any requests by the ICP to summon alternative or additional witness, experts, and civil parties.
24. At this stage, the Defence already voices its objection against the admission of any incriminating witness statement without the Defence having been allowed to effectively examine the witness, a right protected in Article 14 (3)(e) of the ICCPR.
25. In order to ensure protection of this aforementioned right, and if and when the case would proceed to trial, all witnesses should be called (a) who have provided incriminating evidence which has been added to the Case File, (b) on the statements of which the TC could rely for a finding of guilt, and (c) whom the Defence has not been able to previously cross examine.
26. Finally, at this time, the Defence does not object to the ICP's request regarding potential protective measures, including keeping the names of the individuals in her annex confidential and using the assigned pseudonyms.

V. RELIEF REQUESTED

27. The Defence respectfully requests that the TC:
 - (1) Bring Case 004/02 to a definitive conclusion by confirming that it has not been lawfully seized, or that there is no personal jurisdiction over AO An;
 - (2) Failing that, admit the witness and expert list in Annex 1;
 - (3) Assign the pseudonyms as attributed to the witnesses and experts in Annex 1 and instruct the parties to use these pseudonyms until further determinations

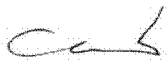
¹⁷ ICP Witness and Expert List Submission, para. 13.

¹⁸ ICP Witness and Expert List Submission, para. 14.

¹⁹ ICP Witness and Expert List Submission, para. 15.

- are made; and
- (4) Admit all witnesses (a) who have provided incriminating evidence which has been added to the Case File, (b) on the statements of which the Trial Chamber could rely for a finding of guilt, and (c) whom the Defence has not been able to cross examine.

Respectfully submitted,



MOM Luch



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Co-Lawyers for AO An

Signed 28 January 2019, Phnom Penh, Kingdom of Cambodia