

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No:** 004/2/07-09-2009-ECCC/OCIJ

**Party Filing:** AO An

**Filed to:** The Co-Investigating Judges

**Original language:** English

**Date of document:** 26 May 2020



**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:**

CONFIDENTIAL

**Classification by OCIJ:**

សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

---

**REPLY TO INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO AO AN'S  
REQUEST TO SEAL AND ARCHIVE CASE FILE 004/02**

---

Filed by:

Distribution to:

**The Co-Lawyers**  
MOM Luch  
Richard ROGERS  
Göran SLUITER

**The Co-Investigating Judges**  
Judge YOU Bunleng  
Judge Michael BOHLANDER

**The Co-Prosecutors**  
CHEA Leang  
Brenda HOLLIS

**All Civil Party Applicants in Case 004/2**

1. AO An, through his Co-Lawyers (*'Defence'*), respectfully submits this reply to the *International Co-Prosecutor's Response to AO An's Request to Seal and Archive Case File 004/02 ('Response')*.<sup>1</sup>
2. The International Co-Prosecutor (*'ICP'*) claims that AO An's *Request to Seal and Archive Case File 004/02 ('Request')*<sup>2</sup> is premature because her appeal<sup>3</sup> against the 'Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An' (*'3 April Statement'*)<sup>4</sup> is pending before the Supreme Court Chamber (*'SCC'*).<sup>5</sup> This argument is incorrect and misleading. The Defence filed its *Request* on 17 March 2020, seven weeks before the ICP filed her *Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2 ('Immediate Appeal')*. Whilst, for reasons beyond the Defence's control, the *Request* was only electronically notified on 4 May 2020, a courtesy copy was provided to the Office of the Co-Investigating Judges (*'OCIJ'*) and the parties (including the ICP), on 20 March 2020.<sup>6</sup> Thus, the ICP was well aware that the *Request* was pending before the OCIJ when she filed her *Immediate Appeal*.<sup>7</sup>
3. The *Request* was filed to the OCIJ because Internal Rule (*'IR'*) 69(2) provides that it is for the OCIJ to seal the Case File on completion of pre-trial proceedings, and – as in the case in hand – to archive the dismissed case. The International Judges of the Pre-Trial Chamber (*'PTC'*) confirmed as much, when they stated that 'a Greffier of the [PTC] 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 [OCIJ] and Parties in Case 004/2'.<sup>8</sup> The Trial Chamber implicitly confirmed this position by stating that it had no access to the Case File and no legal

<sup>1</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ, *International Co-Prosecutor's Response to Request to Seal and Archive Case File 004/02 ('Response')*, **D363/1**, 14 May 2020.

<sup>2</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ, *Request to Seal and Archive Case File 004/02 ('Request')*, **D363**, 17 Mar. 2020.

<sup>3</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ, *International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, **E004/2/1**, 4 May 2020.

<sup>4</sup> Trial Chamber, 'Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An', available at <https://cecc.gov.kh/cn/articles/statement-judges-trial-chamber-cccc-regarding-case-0042-involving-ao>.

<sup>5</sup> *Response*, para. 10.

<sup>6</sup> Email correspondence on behalf of Co-Lawyers re AO An's courtesy copy of his Request to Seal and Archive Case File 004/02, 20 Mar. 2020, attached as App. 1.

<sup>7</sup> Email correspondence from the ICP re courtesy copy of her Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/02, 4 May 2020, attached as App. 2.

<sup>8</sup> International PTC Judges, *Interoffice Memorandum Dated 12 March 2020 Regarding the Transfer of Case File 004/2*, **D359/36 & D360/45**, para. 8.

004/2/07-09-2009-ECCC/OCIJ

powers to obtain that access.<sup>9</sup> Thus, the Trial Chamber was never seized with Case 004/02, since the OCIJ had not yet completed the procedure mandated by IR 69(2). Consequently, it was the ICP's *Immediate Appeal* that was premature, as she is attempting to appeal a 'decision' that has not yet (and could not have yet) been made.

4. Furthermore, as explained in AO An's *Letter Regarding His Response to ICP's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2*, dated 14 May 2020, the ICP's appeal is inadmissible and fails on the merits.<sup>10</sup>
5. Finally, in the *Response*, the ICP again incorrectly asserts that 'only a supermajority overturning the Indictment can prevent this case from moving forward to trial', and she misunderstands the principle of *in dubio pro reo*.<sup>11</sup> She continues to deny the existence of the *Order Dismissing the Case Against AO An* ('*Dismissal Order*')<sup>12</sup> and the opinion of the National PTC Judges in the *Considerations on Appeals Against Closing Orders* ('*Considerations on Appeals*').<sup>13</sup>
6. As previously argued by the Defence and incorporated herein,<sup>14</sup> AO An's case was effectively terminated upon the issuance of the *Considerations on Appeals*,<sup>15</sup> which did not overturn the *Dismissal Order*.<sup>16</sup> This dismissal stands pursuant to IR 77(13)(a) and in light of Article 38 of the Constitution of the Kingdom of Cambodia. Even if the *Closing Order (Indictment)* also stands under IR 77(13)(b), it does not affect the validity of the *Dismissal Order*. The 3 April Statement by the Trial Chamber supports the Defence's position, confirming that AO An's case was completed almost six months ago.

<sup>9</sup> Email correspondence from the Greffier of the Trial Chamber to the parties concerning Case 004/02, **D359/36.2 & D360/45.2**, 21 Jan. 2020; Email correspondence from the Greffier of the Trial Chamber concerning Case 004/02, **D359/36.8 & D360/45.8**, 10 Feb. 2020.

<sup>10</sup> The ICP's appeal is not admissible under IR 104(4)(a) or the SCC's inherent jurisdiction. With respect to the merits, the Trial Chamber did not err in law or abuse its discretion. *Letter Regarding AO An's Response to International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2* ('*Letter Response*'), 14 May 2020, attached as App. 3.

<sup>11</sup> *Response*, paras 11-12.

<sup>12</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Dismissing the Case Against AO An* ('*Dismissal Order*'), **D359**, 16 Aug. 2018.

<sup>13</sup> 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.

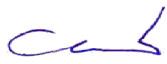
<sup>14</sup> *Letter Response; Request*; Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *Reply to International Co-Prosecutor's Response to AO An's Request for confirmation that all required Administrative Actions have been taken to Archive Case File 004/02*, **D359/31 & D360/40**, 17 Mar. 2020; Case No. 004/2/07-09-2009-ECCC/OCIJ (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*, **D359/26 & D360/35**, 18 Feb. 2020; 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*', 30 Dec. 2019, attached as App. 4.

<sup>15</sup> *Considerations on Appeals*.

<sup>16</sup> *Dismissal Order*.

7. Therefore, the only remaining step in Case 004/02 is the sealing and archiving of the Case File. Accordingly, the Defence respectfully requests that the Co-Investigating Judges reject the arguments in the *Response*, and pursuant to Internal Rule 69(2)(b), seal and archive the Case File in an expeditious manner.
8. This reply is filed in English first with the Khmer translation to be filed at the earliest opportunity.


Respectfully submitted,



MOM Luch



Richard ROGERS



Göran SLUITER

**Co-Lawyers for AO An**

Signed 26 May 2020, Phnom Penh, Kingdom of Cambodia