

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

**FILING DETAILS**

**Case No:** 004/2/07-09-2009-ECCC/OCIJ (PTC60) **Party Filing:** International Co-Prosecutor

**Filed to:** Pre-Trial Chamber

**Original Language:** English

**Date of Document:** 4 February 2020

**CLASSIFICATION**

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



**Classification by PTC:**

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

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**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**

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## I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) respectfully requests that the Pre-Trial Chamber (“PTC”) take all necessary administrative actions to direct the Court Management Section (“CMS”) to transfer (allow electronic access) the Indictment,<sup>1</sup> to the extent further administrative action is required regarding this public document, and the remaining Case File in Case 004/2 to the Trial Chamber (“TC”), which would include filing the appropriate administrative forms, if required.
2. The ICP makes this request to effectuate the “fundamental and determinative default position”<sup>2</sup> which the PTC unanimously held “is intrinsic to the ECCC legal framework”,<sup>3</sup> that this case proceed to trial, as set out in the ECCC Agreement,<sup>4</sup> Law,<sup>5</sup> and Internal Rules (“Rules”).<sup>6</sup> The default position that this case go to trial must be implemented as the PTC failed to attain the affirmative vote of at least four of the five judges to overturn the Indictment. The request is also made to ensure that Ao An is tried expeditiously as required by Article 33 new of the ECCC Law.
3. The ICP submits that the PTC is required to take all necessary administrative actions to guarantee the expeditious transfer of the Indictment and Case File to the TC in order to uphold the legal certainty and transparency provided by the default position and required by Rule 21(1).
4. It is respectfully submitted that the impact of a continued failure to provide the TC access to the Case File will be to contradict the requirements of the default decision, deny the victims’ and Civil Parties’ right to justice, undermine the integrity of the ECCC process, and impede the orderly administration of justice in this case.

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<sup>1</sup> **D360** Closing Order (Indictment), 16 August 2018 (“Indictment”).

<sup>2</sup> **D359/24** & **D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“Considerations”), para. 112.

<sup>3</sup> **D359/24** & **D360/33** Considerations, para. 106.

<sup>4</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 June 2003 (“ECCC Agreement”), arts 5(4), 7(4).

<sup>5</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended 27 October 2004 (NS/RKM/1004/2006) (“ECCC Law”), art. 23 new.

<sup>6</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”), Rules 77(13)(b), 79(1).

## II. PROCEDURAL HISTORY

5. On 19 December 2019, the PTC notified its Considerations in this Case.<sup>7</sup> The PTC failed to reach a supermajority decision (the affirmative vote of at least four of the five judges) required to overturn either the Dismissal Order<sup>8</sup> or the Indictment.
6. As a consequence, paragraph 687 of these Considerations directed, in relevant part, that the “Greffier of the Pre-Trial Chamber will forward the present Considerations, the International Co-Investigating Judge’s Closing Order (Indictment) and the remaining Case File onward to the Trial Chamber.”
7. The distribution list of those notified of the Considerations included the TC Greffier and two TC judges.<sup>9</sup> However, the TC has informed the PTC judges, the Office of Administration, Ao An, and the Co-Prosecutors that, as of 21 January 2020, the Indictment and Case File have not yet been transferred to the TC.<sup>10</sup>
8. To date, the Indictment and Case File have still not been transferred to the TC.

## III. APPLICABLE LAW

9. Article 5(4) of the ECCC Agreement states:
 

The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, **the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled** in accordance with Article 7.<sup>11</sup>
10. Article 7(4) of the ECCC Agreement states:
 

**A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges.** The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. **They**

<sup>7</sup> Email from the Case File Officer, 19 December 2019 (“PTC Notification Email”), 4:53 p.m.

<sup>8</sup> **D359** Order Dismissing the Case Against Ao An, 16 August 2018.

<sup>9</sup> See PTC Notification Email. The distribution list included two TC judges, Judge Claudia Fenz and Judge Martin Karopkin, as well as the TC Greffier and Legal Officer Suy-Hong Lim, *contra* Email entitled “Information” sent by Suy-Hong Lim on behalf of the TC on 21 January 2020 at 1:48 p.m. stating that the “Considerations have so far not been notified to the Trial Chamber”.

<sup>10</sup> Email entitled “Information” sent by Suy-Hong Lim sent on behalf of the TC on 21 January 2020 at 1:48 p.m., stating that “The Chamber has asked me to inform you of the following: It is aware of the publicly available Considerations on Appeal against Closing Orders issued by the Pre-Trial Chamber on December 19, 2019 and documents you sent to the Trial Chamber. However, these Considerations have so far not been notified to the Trial Chamber and neither the Indictment nor the Casefile have been forwarded yet.” This email was sent to the Co-Prosecutors, the Ao An Defence Team, the Pre-Trial Chamber Judges, and the Director and Deputy Director of Administration (TC Greffier Email, 21 January 2020).

<sup>11</sup> Emphasis added.

**shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.**<sup>12</sup>

11. Article 23 new of the ECCC Law states:

**A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges.** The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. **They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.**<sup>13</sup>

12. Article 33 new of the ECCC Law states:

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international **standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.**<sup>14</sup>

13. Rule 21(1) states:

The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to **ensure legal certainty and transparency of proceedings**, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement [...].<sup>15</sup>

14. Rule 69(3) states:

The filing of an appeal against a Closing Order **does not prevent access by the Trial Chamber and Civil Party Lead Co-Lawyers to the case file for the purposes of advance preparation for trial.**<sup>16</sup>

15. Rule 77(13) states:

A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the **default decision** of the Chamber **shall be** as follows: [...]

(b) As regards appeals against indictments issued by the Co-Investigating Judges, **that the Trial Chamber be seised on the basis of the Closing Order** of the Co-Investigating Judges.<sup>17</sup>

16. Rule 79(1) states:

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

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<sup>12</sup> Emphasis added.

<sup>13</sup> Emphasis added.

<sup>14</sup> Emphasis added.

<sup>15</sup> Emphasis added.

<sup>16</sup> Emphasis added.

<sup>17</sup> Emphasis added.

17. Paragraph 41 of the Considerations states:

Regardless of its designation – the second-instance Investigation Chamber, Accusation Chamber, or Pre-Trial Chamber – **the present Chamber forms a final jurisdiction over the pre-trial stage at the ECCC [...].**<sup>18</sup>

18. Paragraph 68 of the Considerations states:

At this stage, the Pre-Trial Chamber recalls its commitment to **legal certainty and transparency** of proceedings [...].<sup>19</sup>

19. Paragraph 109 of the Considerations recognises the overriding principle that:

ECCC proceedings must comply with the legality, fairness and effectiveness requirements under the ECCC legal framework. In this case, the requirement of effective criminal justice is worthy of particular attention by this Chamber.

20. Paragraph 112 of the Considerations stresses that:

[A] **principle as fundamental and determinative as the default position cannot** be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions, taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless. Concluding otherwise would lead to a manifestly unreasonable legal result, violating both Cambodian law and international law.<sup>20</sup>

21. Paragraph 122 of the Considerations states:

The **judicial duty to pronounce, based on the law, a decision on a matter in dispute (*jurisdictio*) lies at the heart of a judge's highest responsibility and function.** As such, pronouncements adjudicating and settling matters in dispute enjoy a legal obligatory nature and effect (*imperium*) unlike the submissions made by parties. However, the judge cannot refrain from adjudicating the matter before him or her and from arriving at a conclusion that effectively decides this matter.<sup>21</sup>

22. Paragraph 687 of the Considerations states:

In light of the clear terms of Internal Rule 77(13)(b), **the inability of the Pre-Trial Chamber to reach a decision by a majority of at least four judges does not prevent the Indictment, along with the supporting Case File, from being transmitted to the Trial Chamber so that it may commence trial proceedings against Ao An.** Consistent with this provision, the Greffier of the Pre-Trial Chamber will forward the present Considerations, the International Co-Investigating Judge's Closing Order (Indictment) and the remaining Case File onward to the Trial Chamber.<sup>22</sup>

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<sup>18</sup> Emphasis added.

<sup>19</sup> Emphasis added.

<sup>20</sup> Emphasis added.

<sup>21</sup> Emphasis added.

<sup>22</sup> Emphasis added.

#### IV. SUBMISSIONS

23. Pursuant to Rules 77(13)(b) and 79(1), the TC automatically became seised of this Case on 19 December 2019 as a result of the PTC's failure to attain the required supermajority to overturn the Indictment. Consequently, by failing to attain this supermajority decision, the "fundamental and determinative default position" obliges the PTC to take immediate administrative action to transfer the Indictment and Case File to the TC so that Ao An can be tried expeditiously in accordance with Article 33 new of the ECCC Law. The *administrative* consequence of the TC being seised of the case is that the Indictment and remaining Case File must be transferred to the TC. Over six weeks have passed since the Considerations were issued and the TC has still not been provided access to the Indictment or the Case File.
24. To avoid further administrative delays, the ICP respectfully submits that all necessary administrative steps must be taken to ensure the effective transfer of the Indictment and Case File to the TC as soon as possible. The ICP understands that, despite the instruction's unambiguous wording, CMS is waiting for the PTC to take an administrative action in order for the transfer to be effectuated. It is believed this administrative action merely requires an administrative form to be provided to CMS reiterating the directive set forth in Paragraph 687 of the Considerations for the PTC Greffier to effect this transfer. The ICP also understands that, despite the unambiguous language, the instructions contained in paragraph 687 of the PTC Considerations that "the Greffier of the Pre-Trial Chamber will forward the present Considerations, the [Indictment] and the remaining Case File onward to the Trial Chamber" are not sufficient authorisation for the PTC (national or international) Greffier and/or CMS to take the necessary actions.
25. The ICP respectfully submits that from the moment this Chamber issued its Considerations, the only remaining action for the PTC to take to enable the TC to progress Case 004/2 is an administrative one. Such action is necessary to put into effect the transfer to the TC of the remaining Case File and Indictment, to the extent that additional administrative action is required. The ICP respectfully submits that such action must be carried out immediately to give effect to the "fundamental and determinative default position" as mandated in the ECCC Agreement, ECCC Law and Internal Rules.

26. The ICP further submits that it is important that no further delay, impediment or obstruction postpones the progress of this case before the TC. Otherwise, the Court risks prioritising form over substance or technicality over core principles. As this Chamber has stressed in its Considerations, the “principle as fundamental and determinative as the default position cannot be overridden or deprived of its fullest weight” by “convoluted interpretative constructions” to “render this core principle of the ECCC Agreement meaningless.”<sup>23</sup> This Chamber then concluded by holding that doing so would “lead to a manifestly unreasonable legal result violating both Cambodian law and international law.”<sup>24</sup>
27. Further delays in providing the TC access undermine the legal certainty and transparency afforded by the default position and required by Rule 21(1). The delays experienced herein make it unclear to the Accused, Parties, the Cambodian population and international community whether this Accused will stand trial or whether the serious charges at issue will be forever in legal limbo. Such uncertainty contrasts with the recognised “overriding principle that ECCC proceedings must comply with the legality, fairness and effectiveness requirements under the ECCC legal framework” to achieve “effective criminal justice”.<sup>25</sup>
28. In the end, however, the ultimate effect of the TC not having access to the Indictment and Case File means this case is constructively dismissed.<sup>26</sup> This failure to provide access will prevent the TC from carrying out its “judicial duty to pronounce, based on the law, a decision on a matter in dispute, [...] [a duty which] lies at the heart of a judge’s highest responsibility and function.”<sup>27</sup> In this case, the matter in dispute is the TC’s jurisdiction over the Indictment. In substance, the ongoing failure to provide the TC with access to the Indictment and Case File will deny the Accused’s right to be tried expeditiously, the victims’ and Civil Parties’ right to justice, undermine the integrity of the ECCC process, and impede the orderly administration of justice in this case.

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<sup>23</sup> **D359/24 & D360/33** Considerations, para. 112.

<sup>24</sup> **D359/24 & D360/33** Considerations, para. 112.

<sup>25</sup> **D359/24 & D360/33** Considerations, para. 109.

<sup>26</sup> **A117/2/2** Decision on Appeal Against Constructive Dismissal of Ta An’s Fourth Request for Investigative Action, PTC, 22 October 2014, para. 11 (“[t]he constructive refusal doctrine [...] has been applied by the Pre-Trial Chamber to cover exceptional situations where the inaction of the Office of the Co-Investigating Judges or the delay in acting may cause prejudice”).

<sup>27</sup> **D359/24 & D360/33** Considerations, para. 122.

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**V. RELIEF REQUESTED**

29. For the foregoing reasons, the International Co-Prosecutor respectfully requests the Pre-Trial Chamber to take all necessary administrative actions to ensure that the Case 004/2 (Ao An) Indictment and remaining Case File are immediately transferred to the Trial Chamber.

Respectfully submitted,

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

