

**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:** AO An**Filed to:** Pre-Trial Chamber**Original language:** English**Date of document:** 18 February 2020**CLASSIFICATION****Classification of the document  
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**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**

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**The Co-Prosecutors**  
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**All Civil Party Applicants in Case 004/2**

## INTRODUCTION

1. AO An, through his Co-Lawyers (*'Defence'*), respectfully responds to 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 ('ICP Request for Action')*<sup>1</sup> and submits that the relief requested by the International Co-Prosecutor (*'ICP'*) is not permitted under the legal framework of the Extraordinary Chambers in the Courts of Cambodia (*'ECCC'*). The ICP presents her request as a simple administrative matter. In reality, she is asking the Pre-Trial Chamber (*'PTC'*) to reconsider its decision on the legal effect and procedural consequences of two separate and opposing closing orders.
2. The Defence reiterates its position that Case File 004/2 cannot be forwarded to the Trial Chamber, as the Chamber has not been lawfully seized of the case. In her *Request for Action*, the ICP incorrectly asserts that the 'fundamental and determinative default position', is that the Trial Chamber was 'automatically' seized of the case as of 19 December 2019.<sup>2</sup> In making this assertion, she confuses the PTC's reasons for finding the issuance of two opposing Closing Orders unlawful, with a determination on the legal effect and procedural consequences of that finding. In fact, no supermajority vote was reached on the consequences of the Co-Investigating Judges' (*'CIJs'*) illegal actions – the judges having arrived at opposite conclusions.<sup>3</sup>
3. The ICP also ignores the inescapable fact that the National Co-Investigating Judge (*'NCIJ'*) issued an *Order Dismissing the Case Against AO An ('Dismissal Order')*<sup>4</sup> and that this order was not overturned on appeal by a supermajority vote. On the contrary, the majority of PTC Judges upheld the *Dismissal Order*,<sup>5</sup> and it stands as an enforceable order under IR 77(13)(a). Forwarding the Case File to the Trial Chamber, despite the case having been effectively dismissed, violates the ECCC legal framework. The argument that the *Closing Order (Indictment)*<sup>6</sup> also stands under IR 77(13)(b) does not affect the fact that the *Dismissal Order* terminated Case 004/02 proceedings. A minority of PTC judges cannot

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<sup>1</sup> Case No. 004/2/07-09-2009-ECCC/TC, *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 ('ICP Request for Action')*, **D359/25**, 4 Feb. 2020.

<sup>2</sup> *ICP Request for Action*, para. 23.

<sup>3</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, paras 124, 170-302, 304-329.

<sup>4</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Dismissing the Case Against AO An ('Dismissal Order')*, **D359**, 16 Aug. 2018.

<sup>5</sup> *Considerations on Appeals*, paras 170-302.

<sup>6</sup> Case No. 004/2/07-09-2009-ECCC-OCIJ, *Closing Order (Indictment)*, **D360**, 16 Aug. 2018.

override that decision or unilaterally direct the PTC Greffier to forward the Case File to the Trial Chamber.<sup>7</sup>

4. As held by a majority of the PTC Judges, no rule or legal mechanism exists to resolve the unprecedented legal predicament of having an indictment and dismissal order in the same case and on the same charges, unaffected by appeals. According to the principle of *in dubio pro reo* embodied in Article 38 of the Constitution of the Kingdom of Cambodia ('*Cambodian Constitution*') and Article 14(2) of the International Covenant on Civil and Political Rights ('*ICCPR*'), the resulting doubt must be resolved in AO An's favour.
5. Consequently, the PTC is legally bound to deny the relief requested by the ICP. The Case File cannot be forwarded to the Trial Chamber, which has not been lawfully seized of the case. The Cambodian Constitution dictates that Case 004/02 was effectively terminated as of 19 December 2019.
6. The Defence files this response in English first with the Khmer translation to follow at the earliest opportunity.

#### PROCEDURAL HISTORY

7. On 16 August 2018, the CIJs issued two separate and opposing Closing Orders in Case 004/02.<sup>8</sup>
8. On 17 December 2018, the National Co-Prosecutor ('*NCP*') filed her submissions on appeal against the *Closing Order (Indictment)*.<sup>9</sup> On 20 December 2018, the ICP filed his submissions on appeal against the *Dismissal Order*.<sup>10</sup> Also on 20 December 2018, the Defence filed its submissions on appeal against the *Closing Order (Indictment)*.<sup>11</sup>
9. On 19 December 2019, the PTC issued its *Considerations on Appeals Against Closing Orders* ('*Considerations on Appeals*'). It unanimously held that the issuance of two opposing closing orders was unlawful, and it failed to reach a supermajority on the merits of the parties' submissions on appeal.<sup>12</sup>

<sup>7</sup> *ICP Request for Action*, para. 24.

<sup>8</sup> *Closing Order (Indictment)*; *Dismissal Order*.

<sup>9</sup> Case No. 004/2/07-09-2009-ECCC-OCIJ(PTC60), *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.

<sup>10</sup> Case No. 004/2/07-09-2009-ECCC-OCIJ (PTC60), *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against AO An (D359)* ('*ICP Appeal*'), **D359/3/1**, 20 Dec. 2018.

<sup>11</sup> Case No. 004/2/07-09-2009-ECCC-OCIJ (PTC60), *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

<sup>12</sup> *Considerations on Appeals*, paras 124, 169.

10. On 30 December 2019, the Defence sent a letter to the Trial Chamber 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.<sup>13</sup>
11. On 13 January 2020, the ICP filed, in hard copy, to the CMS the *International Co-Prosecutor's Rule 80 Witness and Expert List Submission with Confidential Annex A*.<sup>14</sup>
12. On 20 January 2020, maintaining that the Trial Chamber is not lawfully seized of the case, the Defence filed, in hard copy, to the CMS its *Summary of AO An's Preliminary Objections under IR 89(1)* to preserve AO An's rights.<sup>15</sup>
13. On 21 January 2020, the Greffier of the Trial Chamber sent an email to all parties stating that the PTC had not yet forwarded the Case File to the Trial Chamber.<sup>16</sup>
14. On 28 January 2020, again maintaining that the Trial Chamber is not lawfully seized of the case, the Defence submitted, in hard copy, to the CMS *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* to preserve AO An's rights.<sup>17</sup>
15. On 4 February 2020, the ICP submitted, in hard copy, to the CMS the *ICP Request for Action*. She also filed a *Request that the Trial Chamber Take Action to Obtain Access to the Case 004/02 (AO An) Indictment and Case File*.<sup>18</sup>
16. On 10 February 2020, the Greffier of the Trial Chamber sent a follow-up email to all parties reiterating that the PTC had not yet forwarded the Case File to the Trial Chamber.<sup>19</sup>

## APPLICABLE LAW

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<sup>13</sup> 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.

<sup>14</sup> Case No. 004/2/07-09-2009-ECCC/TC, *International Co-Prosecutor's Rule 80 Witness and Expert List Submission with Confidential Annex A*, 13 Jan. 2020.

<sup>15</sup> Case No. 004/2/07-09-2009-ECCC/TC, *Summary of AO An's Preliminary Objections under IR 89(1)*, 20 Jan. 2020.

<sup>16</sup> Email from the Greffier of the Trial Chamber to the parties concerning Case 004/02, 21 Jan. 2020, attached as App. 1.

<sup>17</sup> Case No. 004/2/07-09-2009-ECCC/TC, *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*, 28 Jan. 2020.

<sup>18</sup> Case No. 004/2/07-09-2009-ECCC/TC, *International Co-Prosecutor's Request that the Trial Chamber Take Action to Obtain Access to the Case 004/02 (AO An) Indictment and Case File*, 4 Feb. 2020.

<sup>19</sup> Email from the Greffier of the Trial Chamber concerning ICP request dated 4 February 2020, 10 Feb. 2020, attached as App. 2.

17. 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 stands.
18. 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 ICCPR.
19. Fair trial rights are enshrined in Article 13 of the 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 (*'UN-RGC Agreement'*), Articles 33 to 35 new of the 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 (*'ECCC Law'*), and IR 21.<sup>20</sup>

#### RESPONSE

20. The relief sought by the ICP is not permitted under the ECCC legal framework and must be denied. Case 004/02 was effectively dismissed as of 19 December 2019, and the Trial Chamber has not been lawfully seized of Case 004/02. The Case File cannot be forwarded to the Trial Chamber without a full reconsideration and a supermajority vote to that effect by the PTC.
21. The ICP presents her request as a 'simple administrative step'.<sup>21</sup> In reality, she is requesting the PTC to reconsider its decision on the merits of the appeals and the legal effect of separate and opposing closing orders.<sup>22</sup> Whilst the PTC unanimously held that the issuance

<sup>20</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 Jun. 2003 (*'UN-RGC Agreement'*), Art. 13; 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'*), Arts 33, 35 new; IR 21.

<sup>21</sup> *ICP Request for Action*, paras 23-24.

<sup>22</sup> The party requesting reconsideration must satisfy a high standard, which the ICP has not done in her *Request for Action*. Reconsideration is a discretionary measure that applies only in exceptional cases where a change of circumstances occurred, resulting in the previous decision being erroneous or causing injustice. Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), *Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person*, **C22/I/68**, 28 Aug. 2008, paras 25-28, attached as App. 3 (The PTC described the standard for reconsideration as follows: 'a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice."'') (quoting *Prosecutor v. Milutinovic et al.*, IT-05-87-T, *Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial-Related Protective Measure for Witness K56*, 9 Nov. 2006, para. 2); *Prosecutor v. Mucic et al.*, *Judgment on Sentence Appeal*, IT-96-21-A bis,

of two separate and opposing closing orders was unlawful,<sup>23</sup> it was unable to reach a supermajority on the effect of this illegality and the procedural consequences for Case 004/02. A majority of PTC judges has decided that the constitutional principle of *in dubio pro reo* requires Case 004/02 to be dismissed.<sup>24</sup> A minority of PTC judges cannot override that decision or unilaterally direct the PTC Greffier to forward the case to the Trial Chamber.<sup>25</sup>

22. The ICP erroneously argues that the Trial Chamber is automatically seised of Case 004/02 on the basis of the ‘default position’ – *i.e.* that in the event of an unresolved disagreement between CIJs, the investigation proceeds.<sup>26</sup> This is incorrect because: (a) The CIJs opted out of all available mechanisms to resolve their disagreement – including the ‘default position’ – by issuing separate and opposing closing orders;<sup>27</sup> (b) the PTC failed to reach a supermajority decision on the legal effect of the unlawful issuance of two closing orders and its procedural consequences;<sup>28</sup> and (c) according to IR 73(13)(a), the *Dismissal Order* stands, unaffected by the appeals.
23. The PTC unanimously held that the issuance of two closing orders was unlawful.<sup>29</sup> Central to its reasoning was the notion that a closing order must bring the investigation to a definitive conclusion, and that all disagreements over this matter must be resolved through the disagreement procedure under IR 72, or by reverting to the ‘default position’.<sup>30</sup> According to the PTC, by failing to rely on the legal framework, the CIJs frustrated the ‘default position’,<sup>31</sup> opting instead to unlawfully issue two separate and opposing closing orders.
24. Crucially, the PTC failed to reach a supermajority decision on the impact of this illegality or on its procedural consequences.<sup>32</sup> Only a minority of judges found that the case should

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8 Apr. 2003, para. 49, attached as App. 4; *Prosecutor v. Bagosora et al., Decision on Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of “Lack of Jurisdiction”*, ICTR-98-41-A, 2 May 2002, para. 10, attached as App. 5.

<sup>23</sup> *Considerations on Appeal*, paras 123-124.

<sup>24</sup> *Considerations on Appeal*, paras 295-302.

<sup>25</sup> *ICP Request for Action*, para. 24.

<sup>26</sup> *ICP Request for Action*, paras 23, 25-26.

<sup>27</sup> *Considerations on Appeal*, para. 121.

<sup>28</sup> *Considerations on Appeal*, paras 124, 170-302, 304-329.

<sup>29</sup> *Considerations on Appeal*, paras 123-124.

<sup>30</sup> The ‘default position’ is defined as: if ‘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 [...] that the difference shall be settled’. *Considerations on Appeal*, para. 111.

<sup>31</sup> *Considerations on Appeal*, para. 121.

<sup>32</sup> *Considerations on Appeal*, paras 124, 170-302, 304-329.

be forwarded to the Trial Chamber.<sup>33</sup> The majority upheld the NCIJ's dismissal of the case.<sup>34</sup>

25. Furthermore, the ICP also ignores the inescapable fact that the NCIJ issued a *Dismissal Order* (prior to the *Closing Order (Indictment)*),<sup>35</sup> and it was not overturned on appeal by a supermajority vote. In fact, this *Dismissal Order* benefits from a clear majority of the judges and support from the NCP. Pursuant to IR 77(13)(a), if the required majority is not attained on an appeal against an order other than an indictment, the order stands. Accordingly, the NCIJ's *Dismissal Order* is unaffected by the ICP's appeal. The 'default position' – which exists to regulate disagreements between CIJs prior to issuing decisions – cannot be relied on to undo or ignore an enforceable *Dismissal Order*.
26. Finally, the argument that the *Closing Order (Indictment)* may also stand under IR 77(13)(b), does not affect the fact that the *Dismissal Order* terminated proceedings in Case 004/02. As confirmed by a majority of PTC judges, the ECCC legal framework is incapable of resolving the impasse created by the issuance of two separate and opposing closing orders, neither of which have been overturned on appeal by a supermajority vote.<sup>36</sup> Pursuant to the principle of *in dubio pro reo* enshrined in Article 38 of the Cambodian Constitution and Article 14(2) of the ICCPR, all impasses and uncertainties must be resolved in AO An's favour. The *Dismissal Order*, benefitting from the support of a majority of judges and the NCP, must take precedence over the *Closing Order (Indictment)*.
27. This outcome is inescapable also in light of AO An's right under Article 14 of the ICCPR to a 'competent, independent and impartial tribunal *established by law*'. According to international jurisprudence, a tribunal 'established by law' is not a mere formality issue,<sup>37</sup> but rather, the relevant law must comply with a certain qualitative threshold, including respect for basic due process norms.<sup>38</sup> A legal system that ignores the majority of the

<sup>33</sup> *Considerations on Appeal*, para. 694.

<sup>34</sup> *Considerations on Appeal*, para. 302.

<sup>35</sup> The *Dismissal Order* was placed on the Case File and given the document number, D359. This placement occurred prior to the issuance of the *Closing Order (Indictment)*, which was given the document number D360. Although this fact may seem trivial, it exacerbates the ICP's complete disregard for the existence of the *Dismissal Order*.

<sup>36</sup> *Considerations on Appeal*, paras 295-302.

<sup>37</sup> Human Rights Committee ('HRC'), General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 18, attached as App. 6.

<sup>38</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, *Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal*, 7 Dec. 2009, para. 13, attached as App. 7 ('[...] an international criminal court is "established by law" when it is "rooted in the rule of law and offer[s] all guarantees embodied in the relevant international instruments"') (quoting *Prosecutor v. Tadić*, IT-94-1-AR72, *Decision on the Defence Motion for*

judges' position, especially when there is no clear legal framework as to what should happen next, would not meet that threshold.<sup>39</sup> There can be no doubt that the present situation – where the ICP intends to ignore a *Dismissal Order*, supported by a majority of judges, and continue with the proceedings – does not respect basic due process and is anathema to a competent tribunal established by law.

28. For the above-stated reasons, Case File 004/02 cannot be forwarded to the Trial Chamber as it has been effectively dismissed as of 19 December 2019, and the Trial Chamber has not been legally seised of the case. The ICP is attempting to portray the present situation as an 'administrative' issue, whilst it is one of legality.

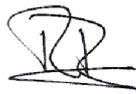
### CONCLUSION AND REQUEST

29. The Defence respectfully requests the PTC to deny the relief requested by the ICP. Case 004/02 was effectively terminated on 19 December 2019, and the Trial Chamber has not been lawfully seised of the case. For all of the above-stated reasons, forwarding the Case File to the Trial Chamber would violate the ECCC legal framework, the principle of *in dubio pro reo*, and AO An's right to be tried by a competent tribunal established by law.

Respectfully submitted,



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Signed 18 February 2020, Phnom Penh, Kingdom of Cambodia

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*Interlocutory Appeal on Jurisdiction*, 2 Oct. 1995, paras 10-12); *Richert v. Poland*, ECtHR, App. no. 54809/07, *Judgment*, 25 Jan. 2012, para. 43, attached as App. 8 ('A tribunal established by law must satisfy a series of conditions such as the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards.').

<sup>39</sup> The Defence acknowledges that the present situation is unprecedented and has not been the subject of any litigation at an international human rights mechanism. The international human rights jurisprudence to a large degree has focused on the unlawfulness of special military tribunals or commissions established with a view to essentially facilitate convictions. See HRC, General Comment No. 32, para. 22.