

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

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**INTERNATIONAL CO-PROSECUTOR'S REQUEST FOR EXTENSION
OF THE RULE 80 DEADLINE AND A TRIAL MANAGEMENT MEETING**

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in Case 004/2**

I. INTRODUCTION

1. Pursuant to ECCC Internal Rules 39(4), 77(13)(b), 80(1), and 79,¹ the International Co-Prosecutor (“ICP”) requests that the Trial Chamber (i) extend the 15-day deadline to submit her list of witnesses and experts she intends to summon at trial, and (ii) convene a trial management meeting.

II. PROCEDURAL HISTORY

2. On 19 December 2019, the Pre-Trial Chamber issued its “Considerations on Appeals Against Closing Orders”, disposing of the appeals against the differing legal conclusions of the two Co-Investigating Judges upon the completion of their investigation into crimes alleged against AO An.²
3. The Pre-Trial Chamber unanimously considered that the question of whether the Co-Investigating Judges had the “prerogative” to issue separate closing orders “depends on whether their failure to follow the disagreement settlement procedure [...] has circumvented the practical effect of the default position underlying the whole ECCC legal system”,³ with the “default position” being “that the investigation shall proceed.”⁴ Further, the Pre-Trial Chamber unanimously:

stresse[d] 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.⁵

4. The Pre-Trial Chamber was unable to reach the necessary majority under Rule 77(13) to issue a “decision”. Three judges upheld the Dismissal Order and annulled the

¹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules”).

² **D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“Pre-Trial Chamber’s Considerations”). One Co-Investigating Judge indicted AO An for genocide, crimes against humanity, and violations of the 1956 Cambodian Criminal Code, while the other Co-Investigating Judge dismissed the case against him.

³ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 112.

⁴ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 106, *citing* Case 002-D427/1/30 Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011, para. 274.

⁵ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 112.

Indictment,⁶ whereas the other two judges annulled the Dismissal Order and upheld the Indictment, with some amendments.⁷

5. Pursuant to Rule 77(13)(b), the two Pre-Trial Chamber judges stated:

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 An⁸

6. The two Pre-Trial Chamber judges thereby approved “that AO An be sent for trial as provided in the Closing Order (Indictment), as hereby amended”; and found “that the Trial Chamber be seised on the basis of the Closing Order (Indictment)”.⁹

III. APPLICABLE LAW

7. Internal Rule 1(2) provides that “a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually”.

8. Internal Rule 77(13)(b) provides:

A decision of the [Pre-Trial] 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.

9. Internal Rule 79(1) provides that:

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

10. Internal Rule 79(7) provides that:

⁶ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, paras 170-302 (“National Judges’ Opinion”).

⁷ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, paras 304-633 (“International Judges’ Opinion”).

⁸ **D359/24 & D360/33** International Judges’ Opinion, para. 687.

⁹ **D359/24 & D360/33** International Judges’ Opinion, Disposition.

In order to facilitate the fair and expeditious conduct of the proceedings, the Chamber may confer with the parties or their representatives, as applicable, by holding a trial management meeting. Such meeting shall be held in camera, unless the Trial Chamber decides otherwise. The purpose of this meeting will *inter alia* be to allow exchanges between the parties to facilitate the setting of the date of the initial or of the substantive hearings and to review the status of the case by allowing the Accused to raise issues in relation thereto, including his or her mental and physical condition.

11. Internal Rule 80(1) provides that in preparation of the trial:

The Co-Prosecutors shall submit to the Greffier of the Chamber a list of the witnesses, including a statement of any relationship referred to in Rule 24(2) and experts they intend to summon 15 (fifteen) days from the date the Indictment becomes final. The Greffier shall place the list on the case file and, subject to any protective measures, forward a copy of the list to the parties.

12. Finally, in relation to time limits, Internal Rule 39(4) provides that “the Chambers may, at the request of the concerned party or on their own motion: a) extend any time limits set by them [...]”.

IV. SUBMISSIONS

13. As the Pre-Trial Chamber was unable to achieve a supermajority in its disposition of the appeals against the Closing Order indicting AO An, the “default position” mandates that the case go to trial based on Rule 77(13)(b). The definition of Co-Investigating Judges in Rule 1(2) as including “both acting together and each acting individually”, and Rule 79(1) also support this action. In sum, an indictment issued by a Co-Investigating Judge which is not overturned by supermajority on appeal “shall” seise the Trial Chamber, as is the situation here.
14. Given the lack of a supermajority, the Trial Chamber is now seised of this case based on Rule 77(13)(b), with the case file to now be transferred to the Chamber. The case file being transferred to the Trial Chamber is a consequence of the Chamber being seised pursuant to this Rule; it is not the transfer of the case file which seises the Chamber.
15. Although the judges of the Pre-Trial Chamber disagreed on the disposition of the individual Closing Orders, they unanimously agreed on the principle that, in the absence

of a supermajority decision, the default position that the “investigation shall proceed” is “intrinsic to the ECCC legal framework”,¹⁰ and is “fundamental and determinative.”¹¹

16. Rule 77(13)(b) represents the fundamental and determinative nature of the default position at the stage of the proceedings where the Pre-Trial Chamber’s disposition of appeals from Closing Orders fails to achieve the required majority to overturn an indictment. Supreme Court Chamber (“SCC”) jurisprudence supports this, holding that:

If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed.’¹²

17. Although the SCC used the phrase “the investigation shall proceed” because it was quoting directly from the ECCC Law, the only reasonable interpretation of this statement is that the Indictment would proceed to trial—there is no other sense in which anything could “proceed” at the stage that the SCC is discussing, i. e., the issuance of conflicting indictment and dismissal orders.
18. The Pre-Trial Chamber’s Considerations was notified on 19 December 2019. Pursuant to Rule 77(13)(b), the Pre-Trial Chamber Greffier was instructed to forward the (amended) Indictment, the “Considerations”, and the Case 004/2 Case File to the Trial Chamber for trial. That triggers Rule 80(1), which requires the ICP to submit her list of witnesses and experts to the Trial Chamber Greffier within 15 days from the date the Indictment becomes final. As there is no appeal from the Pre-Trial Chamber’s disposition of the appeals against the Closing Orders, the ICP considers 19 December 2019 to be the date that the (amended) Indictment became final. Thus, her list of witnesses and experts must be submitted by 3 January 2020.

¹⁰ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 106.

¹¹ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 112.

¹² Case 001-F28 Appeal Judgement, 3 February 2012, para. 65 *citing* ECCC Law, art. 23^{new}; ECCC Agreement, art. 7(4); Internal Rule 72(4)(d). Whilst this finding arises out of a discussion of the scenario where one or both of the CIJs has referred the question of a conflicting indictment and dismissal order to the Pre-Trial Chamber under Internal Rule 72, the substantive outcome is equally applicable to the current situation where the Pre-Trial Chamber was unable to attain a supermajority on whether either judge erred in issuing his Dismissal Order or Indictment.

19. Pursuant to Rule 39(4), the ICP requests an extension of ten (10) days, until 13 January 2020, to submit the list of witnesses and experts required by Rule 80(1). This requested extension is necessitated by the ICP's current work load, which involves responding to YIM Tith's two appeals relating to the Closing Orders in Case 004 as well as preparing to respond to KHIEU Samphan's 1800+ ground appeal due in February 2020 in Case 002/02. In addition, two senior attorney positions remain open after those staff members left in November (including one who had been assigned to Case 004/2), and several staff attorneys are currently on long-planned holiday leave. The ICP therefore requests ten (10) additional days to submit the list of witnesses and experts so that she may conduct a meaningful review and selection from the more than 470 witnesses named in the ICP's Final Submission.
20. Pursuant to Rule 79(7), the ICP also requests the Trial Chamber to schedule a trial management meeting to facilitate the fair and expeditious conduct of the proceedings, including the setting of the date of the initial or substantive hearings and reviewing the status of the case.

V. RELIEF REQUESTED

21. For all of the foregoing reasons, the International Co-Prosecutor respectfully requests that the Trial Chamber extend the 15-day deadline under Rule 80(1) to 13 January 2020 and convene a trial management meeting.

Respectfully submitted,

Date	Name	Place	Signature
26 December 2019	Brenda J. HOLLIS, International Co-Prosecutor	Phnom Penh	

