

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 004/2/07-09-2009-ECCC/TC

Party Filing: International Co-Prosecutor

Filed to: Trial Chamber

Original Language: English

Date of Document: 6 January 2020

CLASSIFICATION

Classification of the document
suggested by the filing party: PUBLIC

Classification by TC:

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

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| ប្រឡង | |
| ORIGINAL DOCUMENT/DOCUMENT ORIGINAL | |
| កាលបរិច្ឆេទ (Date of receipt/Date de reception): | |
| 06 | 01 2020 |
| ពេលវេលា (Time/heure): 15:39 | |
| ឈ្មោះអ្នកទទួលបាន/Case File Officer/L'agent chargé du dossier: SANN RADA | |

INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO AO AN'S REQUEST
REGARDING THE SEISURE OF CASE 004/2

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I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby responds to the letter from Ao An’s Co-Lawyers (“Ao An”) that was emailed to the five Trial Chamber (“TC”) Judges requesting that the TC confirm it was not lawfully seized of Case 004/2 or, alternatively, that the TC provide guidance as to the filing of preliminary objections and grant Ao An adequate time (at least 60 days) to file his preliminary objections (“Ao An’s Request”).¹ As detailed below, Ao An has i) misapprehended the legal basis upon which the TC has been seized, ii) erroneously argued that Ao An’s rights have been violated, and iii) not complied with the Practice Direction for the Filing of Documents before the ECCC (“Practice Direction”).²
2. The ICP therefore requests that the TC: i) deny Ao An’s Request by confirming it is lawfully seized of Case 004/2 on the basis of the Indictment³ directing the case to proceed to trial, ii) grant Ao An’s alternative request for adequate time to prepare his preliminary justiciable objections, and iii) add Ao An’s letter to the Case File and direct Ao An to comply with the Practice Direction for all future requests.

II. PROCEDURAL HISTORY

3. On 19 December 2019, the Pre-Trial Chamber (“PTC”) issued its “Considerations on Appeals Against Closing Orders”, disposing of the appeals against the differing legal conclusions of the two Co-Investigating Judges (“CIJs”) following completion of the investigation into crimes alleged against Ao An.⁴
4. While the PTC unanimously declared that it was illegal for the CIJs to issue two conflicting closing orders,⁵ it did not reach the supermajority required to render a decision on the impact of this error on the legal status of the Closing Order (Indictment).⁶ Three Judges upheld the Dismissal Order and annulled the Indictment,⁷ while the other two Judges voided the

¹ See Email sent to the Trial Chamber Judges from Göran Sluiter on 31 December 2019 at 3:33 p.m. The Co-Prosecutors and other Defence Co-Lawyers were copied, the Civil Parties were not. Attached to the email was a Letter from the Defence Co-Lawyers to the Trial Chamber Judges, 30 December 2019 (“Ao An’s Request”).

² Practice Direction on the Filing of Documents before the ECCC (Rev. 8), amended on 7 March 2012 (“Practice Direction”), ECCC/01/2007/Rev.8.

³ **D360** Closing Order (Indictment), 16 August 2018 (“Indictment”).

⁴ **D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“Pre-Trial Chamber’s Considerations”). The International Co-Investigating Judge indicted Ao An for genocide, crimes against humanity, and violations of the 1956 Penal Code of Cambodia, while the National Co-Investigating Judge dismissed the case against him.

⁵ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, Disposition at EN 01634239.

⁶ See Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”), Rule 77(13).

⁷ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, paras 170-302 (“National Judges’ Opinion”).

Dismissal Order and upheld the Indictment.⁸ The Judges who upheld the Indictment stated that because the Indictment was not reversed by a supermajority, it still stood, and therefore, under Rule 77(13)(b), the TC is seised of the case on the basis of the Indictment.⁹

III. APPLICABLE LAW

5. 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.¹⁰

6. Rule 79(1) provides:

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

7. Rule 1(2) states, in relevant part:

[A] reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually[.]

8. The Practice Direction provides, in relevant part:

Any filing of documents before the ECCC, and any communication from or to the person entitled to file a document, shall be made directly to the greffier of the Office of the Co-Investigating Judges, or the Chamber, as appropriate (hereinafter the ‘relevant greffier’), through the Case File Officer.¹¹

IV. SUBMISSIONS

A. The Trial Chamber is lawfully seised of Case 004/2 on the basis of the Indictment

9. Ao An misapprehends the legal basis upon which the TC has been seised of Case 004/2. He mistakenly focuses on *how many* PTC judges found the mandatory provision in Rule 77(13)(b) to be applicable,¹² whereas the determinative factor is that *no supermajority*

⁸ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, paras 304-694 (“International Judges’ Opinion”), particularly paras 682-684.

⁹ **D359/24 & D360/33** International Judges’ Opinion, Disposition at EN 01634444.

¹⁰ Emphasis added.

¹¹ Practice Direction, art. 2.1.

¹² See e.g. Ao An’s Request, p. 2, 1st full para. (“with one closing order dismissing the case against Ao An and benefiting from the support of a majority of judges at this point”), p. 1, para. 3 (“Acting unilaterally, the International PTC Judges are attempting to circumvent ECCC law and their national counterparts to unlawfully continue the proceedings against Ao An.”), p. 2, 2nd full para. (“The minority of PTC Judges cannot simply overlook the disposition of the majority of the PTC Judges, who annulled the *Closing Order Indictment* and

overturned the Indictment on appeal. Contrary to Ao An’s claim that “[t]here is no rule or legal mechanism to resolve this”,¹³ Rule 77(13)(b) *requires* that the TC be seized of the Indictment when the required supermajority is not attained. In short, the Indictment remains “live” and the TC *shall be seized* on the basis of that Indictment. The Judges who upheld the Indictment simply did what they were required to do, which was to implement the mandatory provision of Rule 77(13)(b) because no supermajority had overturned the Indictment.

10. It is important to note that although the PTC Judges disagreed on the disposition of the conflicting 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”,¹⁴ and is “fundamental and determinative.”¹⁵ This default position is clearly enshrined in the ECCC Agreement and ECCC Law.¹⁶ Crucially, they stressed that this fundamental 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.”¹⁷
11. Rule 77(13)(b) is, therefore, fundamental and determinative at this stage of the proceedings in which the PTC’s disposition of the appeals from the Closing Orders failed to achieve a supermajority required to overturn the Indictment. Supreme Court Chamber (“SCC”) jurisprudence supports this outcome, 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.’¹⁸

held that the Court lacks jurisdiction to prosecute Ao An. Sending Ao An’s case for trial despite the majority of judges holding that the Court lacks jurisdiction would be a gross violation of Ao An’s presumption of innocence. This decision cannot be made by two international judges alone.”), p. 2, 1st full para. (“Completely ignoring the fact that the PTC had not reached a supermajority to reverse either the *Closing Order Indictment* or the *Closing Order Dismissal* or to confirm personal jurisdiction, the International PTC Judges unilaterally instructed the PTC Greffier to forward Case File 004/2 to the Trial Chamber, in the belief that they were authorized to do so under Internal Rule 77(13)(b).”).

¹³ Ao An’s Request, p. 2.

¹⁴ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 106.

¹⁵ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 112.

¹⁶ 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), 6(4), 7(4); 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 20 new, 23 new.

¹⁷ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 112.

¹⁸ Case 001-F28 Appeal Judgement, 3 February 2012 (“*Duch AJ*”), para. 65 *citing* ECCC Law, art. 23 new; ECCC Agreement, art. 7(4); Internal Rule 72(4)(d).

12. To be clear, the SCC discussed this scenario in the context of either one or both of the CIJs referring the proposed issuance of a conflicting indictment and dismissal order to the PTC under the disagreement settlement mechanism envisioned by the Rules. However, the SCC's substantive outcome is equally applicable to the current situation in which the PTC did not attain a supermajority on whether either judge erroneously issued his Dismissal Order or Indictment.¹⁹ To find otherwise would do exactly what the PTC Judges unanimously warned against—namely, override or deprive the default position in Rule 77(13)(b) of its fullest weight and effect,²⁰ which would lead to a “manifestly unreasonable legal result”.²¹ Simply put, the position advocated by Ao An would nullify the ECCC's legal framework.
13. Rule 79(1) also mandates that the TC *shall be seised* of an indictment. Ao An's emphasis that the [entire or supermajority] PTC did not seise the TC of the case²² is irrelevant, as Rule 79(1)'s use of the word “or” also allows the seisure to be based on an indictment from the CIJs. When read in conjunction with Rule 1(2), any reference to CIJs in the Internal Rules includes a CIJ acting individually. Thus, the Indictment was not overturned by a supermajority on appeal, remained “live”, and the TC has been properly seised by it.
14. The mandatory provisions of these Rules are further supported by the purpose of the ECCC Agreement and ECCC Law, which is to “[bring] to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”.²³ They are also compatible with the objective of the disagreement settlement mechanism, which is to “prevent a deadlock from derailing the proceedings from moving to trial”.²⁴
15. The TC has a justiciable issue before it: to determine the legal consequence of the failure of a supermajority of the PTC to overturn the Indictment and the applicability of the mandatory provisions of Rules 77(13)(b) and 79(1) in such a situation. Therefore, the ICP respectfully submits that, contrary to Ao An's suggestion, it would not be a proper course of action to “simply refuse to take any action at all”.²⁵ The ICP further respectfully submits that to “refuse to take any action at all” would contravene the Rules, the ECCC's legal framework,²⁶ judicial

¹⁹ *Contra* Ao An's Request, p. 2, 1st full para. (“the PTC International Judges reliance on Internal Rule 77(13)(b) is misplaced, as this rule concerns a situation where there is only one closing order”) (emphasis removed).

²⁰ See para. 10, *supra*.

²¹ **D359/24 & D360/33** Pre-Trial Chamber's Considerations, para. 112.

²² Ao An's Request, p. 2, 1st full para. (“It must also be mentioned that Internal Rule 79(1) refers to the Trial Chamber being seized by the PTC. Again, the PTC has *not* seized the Trial Chamber of the case.”) (emphasis in the original).

²³ ECCC Agreement, art. 1 (emphasis added), ECCC Law, art. 1 (emphasis added).

²⁴ See **D359/24 & D360/33** International Judges' Opinion, para. 323 and the citations therein.

²⁵ Ao An's Request, p. 2, 2nd full para. (“the Trial Chamber could also simply refuse to take any action at all. This, paradoxically, could also consist of ignoring the present letter”).

²⁶ As discussed in para. 14, *supra*.

ethics principles,²⁷ the interests of justice, and jeopardise the Court’s legacy of transparent proceedings.

B. Ao An’s rights have not been violated

16. Ao An conflates the failure to reach a supermajority with the presumption of innocence and the principles of *in dubio pro reo* and legal certainty,²⁸ wrongly asserting that the case against him must be dismissed pursuant to those principles. The PTC unanimously held that Ao An’s “mischaracterisation of the supermajority voting rule of the Chamber as ‘presumption-of-innocence-defying’ misapplies the principle and misunderstands the ECCC legal framework”.²⁹ Ao An is not being sent to trial by two PTC judges, as he suggests.³⁰ Ao An is being sent to trial based on the legally valid Indictment that was not overturned by supermajority on appeal, as expressly provided for in the Rules.
17. To be clear, the presumption of innocence ensures that before criminal sanctions can be imposed, the prosecution must prove the accused’s guilt beyond a reasonable doubt *at trial*.³¹ All suspects, charged persons, and accused persons, including Ao An, enjoy the presumption of innocence *unless and until* they are convicted by a supermajority of TC judges. The PTC unanimously and correctly found that Ao An’s presumption of innocence has been “sufficiently safeguarded”, emphasising that “the instant proceedings are in the pre-trial stage, which does not involve any determination of guilt or innocence”.³²
18. Similarly, the *in dubio pro reo* principle is a corollary of the presumption of innocence and is one aspect of the requirement that guilt must be found at trial beyond a reasonable doubt,³³

²⁷ See e.g. Code of Judicial Ethics, adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008 and amended on 5 September 2008, art. 5; Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, The Law Association for Asia and the Pacific, 28 August 1997, art. 3 (“Independence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over *all issues of a justiciable nature*.”) (emphasis added); Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principles 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”), 6 (“The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”).

²⁸ Ao An’s Request, p. 2.

²⁹ **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 163.

³⁰ Ao An’s Request, p. 2.

³¹ Internal Rule 21(1)(d); Case 001-**F28** Duch AJ, para. 33; ECCC Law, art. 35 new; *The Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-A, Judgement (Reasons), Appeals Chamber, 1 June 2001, para. 107.

³² **D359/24 & D360/33** Pre-Trial Chamber’s Considerations, para. 163.

³³ Case 002-**E50/3/1/4** Decision on Immediate Appeal by Khieu Samphan on Application for Release, SCC, 6 June 2011 (“Khieu Samphan SCC Release Decision”), para. 31; *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgement, Appeals Chamber, 27 September 2007, para. 21 (“The Appeals Chamber is satisfied that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden on proof beyond a

not by the probability standard applicable at the investigative stage of the proceedings. Its primary function is to address questions of fact and triggers the default finding when factual doubts are not removed by the evidence adduced at trial.³⁴ Put another way, it is mainly a principle that relates to factual proof and not legal interpretation. Even in the rare event that it applies to questions of law as a principle pertaining to the presumption of innocence, *in dubio pro reo* deals primarily with doubt regarding substantive criminal law, or determining an accused's guilt.³⁵ The question at issue *here* is not whether Ao An is innocent or guilty of the indicted crimes, but whether he will be tried for them. *In dubio pro reo* therefore does not apply.

19. Finally, there is no *legal lacunae* or uncertainty here, despite Ao An's arguments.³⁶ As discussed in Section IV.A, *supra*, Rules 77(13)(b), 79(1) and 1(2) mandate that where no supermajority overturns the Indictment, the default position shall be that the TC is seised on the basis of the Indictment of the CIJs acting jointly or individually. As argued above, this

reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged. [...] the principle is essentially just one aspect of the requirement that guilt must be found beyond a reasonable doubt.”); *Renzaho v. The Prosecutor*, ICTR-97-31-A, Judgement, Appeals Chamber, 1 April 2011, para. 474 (“The Appeals Chamber recalls that, as a corollary of the presumption of innocence and the burden of proof beyond reasonable doubt, the principle of *in dubio pro reo* applies to findings required for conviction, such as those which make up the elements of the crime charged.”). *See also Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para. 601 (“the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.”).

³⁴ Case 002-**E50/3/1/4** Khieu Samphan SCC Release Decision, para. 31; Case 003-**D87/2/1.7/1/1/7** Decision on [Redacted] Appeal Against the International Co-Investigating Judge's Decision on [Redacted] Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, PTC, 10 April 2017, para. 65 (“the Pre-Trial Chamber considers that there is no need to examine further the Appellant's arguments relating to the principle of *in dubio pro reo* which, as underlined by the International Co-Prosecutor and the Supreme Court Chamber, is primarily a rule of proof and not of legal interpretation”); *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber, 31 July 2003, para. 416 (The *in dubio pro reo* principle “is applicable to findings of fact and not of law”).

³⁵ *See e.g. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-744, Judgment on the Appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016, entitled ‘Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’, Appeals Chamber, 1 November 2016, para. 83 (“The Appeals Chamber notes that the principle *in dubio pro reo* is encapsulated in article 22 (2) of the Statute as a general principle of criminal law to be employed, where ambiguity arises, in the interpretation of the definition of a crime.”).

³⁶ While the PTC judges unanimously found that “by issuing split Closing Orders, the Co-Investigating Judges violated the ECCC legal framework, derogated from their highest duties and created an unprecedented legal predicament”, the PTC exercised its review powers to restore legality and remedy the CIJs' actions (*see D359/24 & D360/33* Pre-Trial Chamber's Considerations, para. 89). *Contra* Ao An's Request, p. 2 (“There is no rule or legal mechanism to resolve this unprecedented legal predicament”). As for “uncertainty”, *see D359/14.1.1* Email from Mr. Göran Sluiter to the Chief of DSS, 25 June 2019, EN 01623714 (in which the Defence anticipated a trial and requested adequate funding to prepare for it: “the case of AA is very different. With 2 conflicting closing orders, he is being sent to trial on the basis of 1 CO already. Knowing previous positions of the PTC in our case, there is a considerable chance that no supermajority will be reached on either CO-appeal. As a result, both CO's will stand. During last week's hearing the ICP has made it very clear, that he will take AA's case to trial on the basis of the Indictment CO. This means we are in a position that we will need to prepare for trial.”).

reflects the clear intent of the ECCC Agreement and ECCC Law that when there is no supermajority in the PTC, the investigation *shall* continue.³⁷

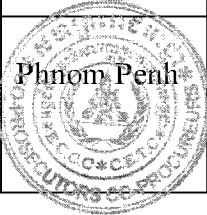

C. Ao An's Request does not comply with the Practice Direction

20. Ao An's decision to send his Request via email rather than formally submit it through the Court Management Section does not comply with the Practice Direction.³⁸ As a result, the Case File is no longer transparent or complete, and the Civil Parties, who are an official party to Case 004/2, have thus far been excluded from knowing the content of the Request and therefore denied an opportunity to respond to it. The ICP therefore requests that the TC i) rectify this issue by adding Ao An's letter to the Case File, notifying all parties including the Civil Parties of its addition, and ii) direct Ao An to file all future requests in compliance with the Practice Direction.

V. CONCLUSION

21. As the PTC failed to achieve a supermajority to overturn the Indictment against Ao An, the Trial Chamber is seized of that Indictment based on Rules 77(13)(b) and 79(1), read in conjunction with Rule 1(2).
22. Therefore, for all the foregoing reasons, the ICP respectfully requests that the Trial Chamber:
- i) deny Ao An's Request by confirming it is lawfully seized of Case 004/2 on the basis of the Indictment directing the case to proceed to trial;
 - ii) grant Ao An's alternative request for adequate time to prepare its preliminary justiciable objections; and
 - iii) add Ao An's letter to the Case File and direct Ao An to comply with the Practice Direction for all future requests.

Respectfully submitted,

| Date | Name | Place | Signature |
|----------------|--|--|---|
| 6 January 2020 | Brenda J. HOLLIS, International Co-Prosecutor | Phnom Penh  |  |

³⁷ As discussed in para. 10, *supra*.

³⁸ Practice Direction, art. 2.1.