

**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:** 17 March 2020**CLASSIFICATION****Classification of the document suggested by the filing party:**

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**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**

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

## INTRODUCTION

1. AO An, through his Co-Lawyers (*'Defence'*), respectfully submits this reply to the *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 ('Response')*.<sup>1</sup> Regardless of the recent divergent statements by the National and International Judges of the Pre-Trial Chamber (*'PTC'*) in their respective memoranda that may render this reply moot,<sup>2</sup> AO An submits his arguments to ensure that the Case File is accurate and includes all relevant materials and to further highlight the erroneous position put forward by the International Co-Prosecutor (*'ICP'*), as well as the International PTC Judges.
2. In the *Response*, the ICP again incorrectly asserts that the 'default position' is that AO An's case must proceed to trial.<sup>3</sup> She continues to deny the very existence of the *Order Dismissing the Case Against AO An ('Dismissal Order')*,<sup>4</sup> the joint disposition of the PTC Judges in the *Considerations on Appeals Against Closing Orders ('Joint Disposition'* and *'Considerations on Appeals'*, respectively),<sup>5</sup> and the opinion of the National PTC Judges, which together effectively terminated the case almost three months ago.<sup>6</sup>
3. Without basis, the ICP, as well as the International PTC Judges, maintain that the International PTC Judges' opinion and the *Closing Order (Indictment)*<sup>7</sup> carry more weight than the Joint Disposition, the National PTC Judges' opinion, and the *Dismissal Order*.<sup>8</sup> In

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<sup>1</sup> Case No. 004/2/07-09-2009-ECCC (PTC60), *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 ('Response')*, **D359/30 & D360/39**, 5 Mar. 2020.

<sup>2</sup> *Memorandum Dated 16 March 2020 Regarding Re-Confirmation of the Decision on Case File 004/2 ('16 March 2020 Memorandum')*, sent by the President of the PTC to the parties, pp. 1-2, attached as App. 1; *Interoffice Memorandum Dated 12 March 2020 Regarding the Transfer of Case File 004/2 ('12 March 2020 Memorandum')*, sent by the International PTC Judges to the parties, p. 1, attached as App. 2.

<sup>3</sup> *Response*, para. 13.

<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> 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>6</sup> Pursuant to IR 77(13)(a), the National PTC Judges upheld that *Dismissal Order* and ordered the National PTC Greffier to inform the Case Management Section (*'CMS'*) that Case004/02 is finished and the Case File should be archived. *Email Correspondence between PTC and CMS*, 28 Jan. 2020, attached as App. 3.

<sup>7</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ, *Closing Order (Indictment)*, **D360**, 16 Aug. 2018.

<sup>8</sup> *Response*, para. 12 (Ignoring the existence of the *Dismissal Order*, not overturned on appeal, the ICP states that 'only a supermajority overturning the Indictment would have prevented this case from moving forward to trial' [emphasis added].); Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *International Co-Prosecutor's Reply to AO An's Response to the ICP's Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber ('ICP Reply Regarding Forwarding Case File')*, **D359/28 & D360/37**, 3 Mar. 2020, para. 3 ('As the PTC did not overturn the Indictment by supermajority, the TC must be seized under

doing so, they toss aside the *Dismissal Order*, the Joint Disposition, and the National PTC Judges' actions, disregard the Court's hybrid nature in which national and international judges enjoy equal status, and jeopardise the Court's entire legacy.

4. The Defence requests the PTC to reject the arguments in the *Response* and confirm that all required administrative actions have been taken to archive Case File 004/02, pursuant to IR 69(2)(b).
5. The Defence files this reply in English first with the Khmer translation to follow at the earliest opportunity.

### PROCEDURAL HISTORY

6. On 24 February 2020, the Defence filed its *Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02* ('Request').<sup>9</sup>
7. On 12 March 2020, the ICP filed the *Response*.
8. On 12 March 2020, the International PTC Judges sent the *Interoffice Memorandum Dated 12 March 2020 Regarding the Transfer of Case File 004/2* ('12 March 2020 Memorandum') to all parties and copied the Office of Administration, the Trial Chamber Greffier, and the National PTC Judges.<sup>10</sup> In this memorandum, they disclosed additional facts concerning the current impasse in the case and again explained why they believe the Case File must be transferred to the Trial Chamber.<sup>11</sup> While the Defence appreciates the International PTC Judges clarifications, the memorandum has no legal force. Neither the Office of the Administration nor the Trial Chamber are obligated to act. *Acting on the views of the minority of PTC Judges and without a judicial decision would amount to a serious violation of obligations.*
9. On 16 March 2020, the President of the PTC sent the *Memorandum Dated 16 March 2020 Regarding Re-Confirmation of the Decision on Case File 004/2* ('16 March 2020

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Rules 77(13)(b) and 79(1) and the case brought to trial, *even though the Dismissal Order was also not overturned* [emphasis added].); *Interoffice Memorandum Regarding Notification of the Pre-Trial Chamber's Considerations in Case 004/2 D29 January 2020*, p. 6, sent by the International PTC Judges to the Office of Administration and the CMS, attached as App. 4 ('Irrespective of the legal force of the Dismissal Order in the case at hand, since the Indictment has not been reversed by a supermajority vote, the Indictment stands'; and 'Irrespective of any instructions [the President's instructions] (now apparently void) not to notify the Trial Chamber and to archive the Case 004/2, the Trial Chamber is seised [...] pursuant to Internal Rule 77(13)(b)' [emphasis added].).

<sup>9</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02* ('Request'), **D359/27 & D360/36**, 24 Feb. 2020.

<sup>10</sup> *12 March 2020 Memorandum*, paras 1-4, header.

<sup>11</sup> *12 March 2020 Memorandum*, paras 9-13, attachments 1-8.

*Memorandum*') in which he re-confirmed that only the Joint Disposition has legal effect, that *the judges' individual opinions attached to the Joint Disposition do not have legal effect*, and that Case 004/02 has been effectively terminated on 19 December 2019.<sup>12</sup>

#### APPLICABLE LAW

10. IR 69(2)(b) provides that 'Where no appeal is filed against a Closing Order, the Co-Investigating Judges shall seal the case file, and [...] If a Dismissal Order is issued, the case file shall be archived after the expiry of the time limit for appeal'. There is no equivalent provision for the situation where a Dismissal Order is confirmed or not overturned on appeal. As such, IR 69(2)(b) applies *mutatis mutandis* to AO An's case.
11. 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.
12. Article 38 of the Constitution of the Kingdom of Cambodia provides that '[a]ny case of doubt, it shall be resolved in favour of the accused'. The same principle is universally accepted as being enshrined into Article 14(2) of the ICCPR.

#### REPLY

13. AO An's *Request* neither ignores the ECCC legal framework nor is premature.<sup>13</sup> The ICP again misrepresents the so-called default position of the ECCC, misunderstands the principle of *in dubio pro reo*, and disregards the fact that the case was effectively terminated as of 19 December 2019, and thus, must be archived.<sup>14</sup>

#### A. The ICP Again Misrepresents the So-Called Default Position of the ECCC

14. In the *Response*, the ICP again misrepresents the so-called default position of the ECCC and denies the *Dismissal Order's* existence.<sup>15</sup> This so-called default position applies to the ECCC's disagreement mechanism, as explained by the portions of negotiation history cited by the ICP in the *Response*.<sup>16</sup> It does not apply to the present situation, where there are two separate, opposing closing orders, neither of which were overturned on appeal.<sup>17</sup>

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<sup>12</sup> 16 March 2020 Memorandum.

<sup>13</sup> *Response*, paras 12, 17.

<sup>14</sup> *Response*, paras 12, 16, 17.

<sup>15</sup> *Response*, para. 13.

<sup>16</sup> *Response*, para. 3, fn 13.

<sup>17</sup> *Request*, para. 17.

15. In maintaining that this default position applies, the ICP is claiming that the International PTC Judges' opinion in the *Considerations on Appeals* has more legal effect than the Joint Disposition and the National PTC Judges' opinion.<sup>18</sup> As noted in the *Request*, the PTC unanimously decided that the issuance of two separate and opposing closing orders was unlawful, but it was unable to reach a supermajority on the effect of this illegality and the procedural consequences for Case 004/02.<sup>19</sup> The President of the PTC in the *16 March 2020 Memorandum* and the *Internal Memorandum Dated 29 January 2020* emphasised that only the Joint Disposition decided and signed by all five judges has 'applicable effect' and that 'notification to any person or chamber who is not a party of this case [violates] the unanimous decision of the PTC.'<sup>20</sup> Neither the ICP nor the International PTC Judges have identified any valid basis in the ECCC law to conclude that the minority opinion of the International PTC Judges prevails over the Joint Disposition and the majority opinion of the National PTC Judges.
16. Finally, while the Defence recognises that the PTC Judges' majority-minority split is not a decisive factor in AO An's case, it is also not 'irrelevant', as asserted by the ICP.<sup>21</sup> Rather, this split is notable in the present situation where the ECCC legal framework is incapable of resolving the current impasse and where the ICP and International PTC Judges continue to ignore the existence and enforceability of the *Dismissal Order*.

**B. The Principle of *In Dubio Pro Reo* Applies to the Present Impasse in AO An's Case**

17. The principle of *in dubio pro reo* is applicable to the impasse concerning IR 77(13) in the current pre-trial proceedings against AO An. Contrary to the ICP's assertions, the principle of *in dubio pro reo* does not apply solely to factual doubts at the trial stage concerning AO An's alleged guilt, and its application in AO An's case does not amount to 'an automatic default finding' or violate the civil parties' rights.<sup>22</sup>

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<sup>18</sup> *Response*, paras 12, 14.

<sup>19</sup> *Request*, para. 16.

<sup>20</sup> *16 March 2020 Memorandum*, p. 2; *Internal Memorandum Dated 29 January 2020 Regarding Clarification in the Decision in Case 004/2*, sent by the President of the PTC to the CMS, p. 2, attached as App. 5.

<sup>21</sup> *Response*, paras 12, 14.

<sup>22</sup> *Response*, para. 16 (incorporating arguments from *ICP Reply Regarding Forwarding Case File*, paras 6-7).

18. It is well established at the ECCC that the fundamental principles safeguarded in IR 21 and Article 38 of the Cambodian Constitution, including the presumption of innocence and the principle of *in dubio pro reo*, apply at both the pre-trial and trial stages of proceedings.<sup>23</sup>
19. Furthermore, the fundamental principles of substantive criminal law, such as *in dubio pro reo* and the prohibition of the retroactive application of the law, can also be extended to procedural law. The ECCC and other international criminal tribunals have applied the principle of *in dubio pro reo* to dilemmas of fact and substantive law, as well as procedural law.<sup>24</sup> This application is consistent with the application of the principle of *in dubio pro reo* in Article 22 of the Rome Statute, which reflects an accepted international standard.<sup>25</sup>
20. Finally, while the Defence maintains that under IR 77(13)(b) the *Dismissal Order* stands and the case was terminated on 19 December 2019, in the event that the *Closing Order (Indictment)* also stands under IR 77(13)(a), the principle of *in dubio pro reo* must apply, and the present impasse must be resolved in AO An's favour. The application of *in dubio pro reo* is further strengthened by AO An's right to be tried by a competent tribunal established law, which requires the proceedings to be based on the rule of law. It is thus not only relevant that no supermajority was reached to overturn the *Closing Order (Indictment)* or the *Dismissal Order*, but it is also relevant that the *Dismissal Order* was upheld by the majority of the PTC Judges votes.

<sup>23</sup> Case No. 002/19-09-2007-ECCC/OCIJ (PTC42), *Decision on IENG Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, D264/2/6*, 10 Aug. 2010, para. 13, attached as App. 6; *Vera Fernández-Huidobro v. Spain*, ECtHR, no. 74181/01, 6 Apr. 2010, paras 108-114, attached as App. 7.

<sup>24</sup> **Substantive Law:** Case 002/19-09-2007-ECCC-TC/SC(04), *Decision on Immediate Appeal by Khieu Samphan on Application for Immediate Release*, E50/3/1/4, 6 Jun. 2011, para. 31 (holding '[i]n so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it must be limited to doubts that remain after interpretation' [internal citations omitted]), attached as App. 8; Case 002/19-09-2007 ECCC/OCIJ (PTC 145 & 146), *Decision on Appeal by Nuon Chea and Ieng Thirith Against the Closing Order*, D427/2/15, 15 Feb. 2011, para. 144, attached as App. 9 (holding whether armed conflict nexus requirement was part of definition of crimes against humanity was not sufficiently clear to charge accused). **Procedural Law:** *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11 OA 10, 12 Feb. 2016, paras 94-98, attached as App. 10 (prohibiting the retroactive application of procedural rules regarding the admission of evidence, which was to the detriment of the accused); *Prosecutor v. Tadić*, IT-94-1-A, *Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence*, 15 Oct. 1998, para. 73, attached as App. 11 (stating in a case of doubt concerning the application of the criteria for admitting evidence, the principle of *in dubio pro reo* applies); *Prosecutor v. Akayesu*, ICTR-96-4-T, *Trial Judgement*, 2 Sep. 1998, para. 319, attached as App. 12 (applying *in dubio pro reo* broadly to ambiguous translation of indictment and stating 'the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected').

<sup>25</sup> Rome Statute of the International Criminal Court (last amended 2010), 17 Jul. 1998, ISBN No. 92-9227-227-6, Art. 22(2) ('The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.').

**C. The Request is Not Premature**

21. The Defence has not prematurely filed the *Request*. Case 004/02 was effectively dismissed almost three months ago when the PTC Judges issued the *Considerations on Appeals*. Following that effective dismissal, the Case File should have been archived pursuant to IR 69(2)(b). In accordance with this rule, the President of the PTC and the National PTC Judges (making up the majority) have instructed the National PTC Greffier to inform the Case Management Section that Case 004/02 had been terminated and that the Case File should be archived.<sup>26</sup> However, to date, this action has not occurred.

**CONCLUSION AND REQUEST**

22. For the above reasons, the Defence respectfully requests the PTC to reject the ICP's arguments in the *Response* and confirm that the required administrative actions have been taken to archive Case File 004/02.

Respectfully submitted,



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Signed 17 March 2020, Phnom Penh, Kingdom of Cambodia

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<sup>26</sup> *Email Correspondence between PTC and CMS, 28 Jan. 2020.*