

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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INTERNATIONAL CO-PROSECUTOR'S REQUEST THAT THE TRIAL CHAMBER  
TAKE ACTION TO OBTAIN ACCESS TO THE CASE 004/2 (AO AN)  
INDICTMENT AND CASE FILE

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## I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) respectfully requests the Trial Chamber (“TC”) to request the Pre-Trial Chamber (“PTC”) to take all necessary administrative actions to provide for the immediate transfer of the Indictment<sup>1</sup> (to the extent further action is required for the TC to have access to this public document and should the TC consider such administrative transfer of the public Indictment is required) and remaining Case File in Case 004/2 (“the Case”). Alternatively, if the PTC does not take the necessary administrative steps to cause the Case to be transferred to the TC as soon as possible following the receipt of the TC request, the ICP requests the TC to direct the Office of Administration to provide it with immediate access to the Case. Further, the ICP requests that the TC provide to the Court Management Section (“CMS”) a case number for this Case and reiterates her request that the TC schedule a trial management meeting.<sup>2</sup>
2. The ICP makes this request to effectuate the “fundamental and determinative default position”<sup>3</sup> which the PTC unanimously held “is intrinsic to the ECCC legal framework”,<sup>4</sup> that this case proceed to trial, as set out in the ECCC Agreement,<sup>5</sup> ECCC Law,<sup>6</sup> Internal Rules (“Rules”).<sup>7</sup> The default position that this case proceed 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 prompt corrective action is warranted on the part of the TC to guarantee the expeditious transfer of the Indictment, to the extent this formal step is required, and the remaining 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).

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

<sup>2</sup> See International Co-Prosecutor’s Request for Extension of the Rule 80 Deadline and a Trial Management Meeting, 26 December 2019 (“ICP Request for TMM”).

<sup>3</sup> Case 004/2-**D359/24** & **D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“Considerations”), para. 112.

<sup>4</sup> Case 004/2-**D359/24** & **D360/33** Considerations, para. 106.

<sup>5</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>6</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>7</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).

4. It is respectfully submitted that the continued failure to progress this Case to trial will constructively dismiss the Indictment against Ao An. Such an outcome would 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.

## II. PROCEDURAL HISTORY

5. On 19 December 2019, the PTC notified its public Considerations in this Case.<sup>8</sup> The PTC failed to reach a supermajority decision (the affirmative vote of at least four of the five judges) to attain the required majority to overturn the public Indictment.
6. On 26 December 2019 in accord with Rules 39(4), 77(13)(b), 80(1) and 79, the ICP filed in hard copy a request to the TC for an extension of time to submit her witness and expert list and requesting a trial management meeting.<sup>9</sup> The ICP understands that this filing was provided to the TC Greffier.
7. On 31 December 2019, the ICP received Ao An's Request 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 objections.<sup>10</sup> The ICP filed her response to this Request in hard copy on 6 January 2020.<sup>11</sup> The ICP understands that this filing was provided to the TC Greffier.
8. On 13 January 2020, having received no TC order regarding the requested extension

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<sup>8</sup> See Email from the Case File Officer, 19 December 2019, 4:53 p.m. 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 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, Ao An's Co-Lawyers, the Pre-Trial Chamber Judges, and the Director and Deputy Director of Administration (TC Greffier Email, 21 January 2020, 1:48 p.m.).

<sup>9</sup> See ICP Request for TMM, which was delivered in hard copy to the TC Greffier on 26 December 2019. See also TC Greffier Email, 21 January 2020, 1:48 p.m. acknowledging receipt of the documents sent by the parties to the TC. No Case File document number has been assigned to date to the ICP's Request.

<sup>10</sup> 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. See also TC Greffier Email, 21 January 2020, 1:48 p.m. No Case File document number has been assigned to date to Ao An's Request.

<sup>11</sup> International Co-Prosecutor's Response to Ao An's Request Regarding the Seizure of Case 004/2, 6 January 2020. See also TC Greffier Email, 21 January 2020, 1:48 p.m. acknowledging receipt of the documents sent by the parties to the TC. No Case File document number has been assigned to date to the ICP's Response.

of time to file her list, the ICP submitted her Rule 80(1) Witness and Expert list in hard copy in accord with the date of the requested extension.<sup>12</sup> The ICP understands that this filing was provided to the TC Greffier.

9. On 20 January 2020, the ICP received by email a submission entitled “Summary of Ao An’s Preliminary Objections Under IR 89(1)”.<sup>13</sup>

### III. APPLICABLE LAW

10. 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>14</sup>

11. 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 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>15</sup>

12. 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>16</sup>

13. 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**

<sup>12</sup> International Co-Prosecutor’s Rule 80 Witness and Expert List Submission with Confidential Annex A, 13 January 2020. *See also* TC Greffier Email, 21 January 2020, 1:48 p.m. acknowledging receipt of the documents sent by the parties to the TC. No Case File document number has been assigned to date to the ICP’s Rule 80 List.

<sup>13</sup> *See* Email sent to the Trial Chamber Judges from Kristin Rosella on 20 January 2020 at 5:09 p.m. The Trial Chamber, Co-Prosecutors and Civil Party Lawyers were copied. *See also* TC Greffier Email, 21 January 2020, 1:48 p.m. acknowledging receipt of the documents sent by the parties to the TC. No Case File document number has been assigned to date to Ao An’s Preliminary Objections.

<sup>14</sup> Emphasis added.

<sup>15</sup> Emphasis added.

<sup>16</sup> Emphasis added.

**law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.**<sup>17</sup>

14. 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>18</sup>

15. 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>19</sup>

16. 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>20</sup>

17. Rule 79(1) states:

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

18. Rule 80(1) states:

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.<sup>21</sup>

19. 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>22</sup>

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<sup>17</sup> Emphasis added.

<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.

20. 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.

21. 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>23</sup>

22. 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>24</sup>

23. 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.

#### IV. SUBMISSIONS

24. The PTC's failure to reach the required majority to overturn the Indictment in this case triggered the "fundamental and determinative default position" established by the ECCC Agreement, ECCC Law and Rules 77(13)(b) and 79(1). This default position seises the TC of this Case as of 19 December 2019. The transfer of the Indictment and Case File is an administrative consequence of the TC being seised of the Case. However, over six weeks have passed since the Considerations were issued and neither the PTC nor the Office of Administration has effected the transfer. As the TC is now seised of this Case, prompt corrective action by the TC is necessary to ensure there is

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<sup>23</sup> Emphasis added.

<sup>24</sup> Emphasis added.

- no further delay in progressing this Case to trial.
25. The ICP understands that CMS is waiting for the PTC to take further administrative action to transfer the Indictment and remaining Case File to this Chamber. It is believed this administrative action may require the submission of a form to CMS simply reiterating the directive in paragraph 687 of the Considerations. The ICP also understands that, despite their unambiguous wording, the instructions contained in paragraph 687 of the 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 considered sufficient authorisation for CMS to take this action.
  26. The ICP suggests that immediate TC action to obtain the Indictment and remaining Case File is warranted for numerous reasons. First, to ensure that the Court does not risk prioritising form over substance or technicality over core principles. As the PTC unanimously 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. Concluding otherwise would lead to a manifestly unreasonable legal result violating both Cambodian law and international law.”<sup>25</sup>
  27. Second, immediate action is required to prevent further delay, or continued inaction, from undermining legal certainty and transparency afforded by the default position and required by Rule 21(1). The existing delays create uncertainty and a lack of transparency as to the progress of the Case. It is at present unclear to the Accused, the Parties, the Cambodian population, and the international community whether this Accused will stand trial or whether the serious charges at issue will be left forever in legal limbo. Such uncertainty contrasts with putting into effect the default position which serves to avoid the current legal impasse.
  28. Third, action now is required to ensure that the trial proceeds expeditiously in accordance with Article 33 new of the ECCC Law. Most significantly, the ICP submits that prompt action by the TC is required to resolve this current stalemate, as failure to progress this Case to trial constitutes a constructive dismissal of the Case.<sup>26</sup> In addition,

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<sup>25</sup> Case 004/2-**D359/24** & **D360/33** Considerations, para. 112.

<sup>26</sup> Case 004/2-**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

this failure to gain access to the Indictment and remaining Case File 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 being disputed by Ao An is the TC’s jurisdiction over the Indictment.

## V. CONCLUSION

29. The ICP respectfully submits that the current administrative stalemate warrants prompt action by the TC to guarantee the expeditious transfer of the Indictment, if such formal transfer is required, and the remaining Case File to it in order to uphold the legal certainty and transparency provided by the default position and required by Rule 21(1). It is respectfully submitted that the impact of the ongoing lack of access of the TC to the Indictment and remaining Case File violates the mandated default decision, denies the Accused’s right to an expeditious trial, denies the victims’ and Civil Parties’ right to justice, undermines the integrity of the ECCC process, and impedes the orderly administration of justice in this case.

## VI. RELIEF REQUESTED

30. For all the reasons set forth above, the International Co-Prosecutor respectfully requests the Trial Chamber to:
- a) request the PTC to take all necessary administrative actions to immediately transfer the remaining Case File 004/2 and the Indictment, to the extent such formal transfer of this public Indictment is required, to the TC, or alternatively;
  - b) in the event that the PTC does not take all necessary administrative steps to give the TC access to the remaining Case File and the Indictment as soon as possible following the receipt of the TC request, direct the Office of Administration to provide it with immediate access to the remaining Case File and the Indictment;

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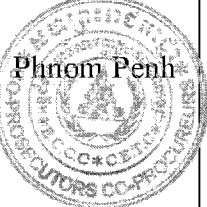
been applied by the Pre-Trial Chamber to cover exceptional situations where the inaction of the Office of the Co-Investigating Judges or the delay in acting may cause prejudice”).

<sup>27</sup> Case 004/2-D359/24 & D360/33 Considerations, para. 122.



- c) provide to CMS a case number for this Case; and
- d) schedule a trial management meeting.

Respectfully submitted,

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