

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No:** 004/2/07-09-2009-ECCC/OCIJ

**Party Filing:** AO An

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**REQUEST TO SEAL AND ARCHIVE CASE FILE 004/02**

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## INTRODUCTION

1. AO An, through his Co-Lawyers (*'Defence'*), respectfully requests the Office of the Co-Investigating Judges (*'OCIJ'*) to archive Case File 004/02 pursuant to Rule 69(2)(b) of the Internal Rules (*'IRs'*) of the Extraordinary Chambers in the Courts of Cambodia (*'ECCC'*). The case against AO An was dismissed on 16 August 2018,<sup>1</sup> and the dismissal was not overturned on appeal on 19 December 2019.<sup>2</sup> Pursuant to IR 77(13)(a), the *Order Dismissing the Case Against AO An* (*'Dismissal Order'*) stands, and in light of Article 38 of the Constitution of the Kingdom of Cambodia (*'Cambodian Constitution'*), the case has been terminated. In such circumstances, IR 69(2)(b) requires the OCIJ to seal and archive Case File 004/02.
2. According to information released by the international judges of the Pre-Trial Chamber (*'PTC'*),<sup>3</sup> the PTC has failed to resolve its internal disagreements, and has now reached the limit of its authority to determine the outcome of Case 004/02.<sup>4</sup> The Office of Administration (*'OA'*) has received contradictory judicial instructions, and is unable to take action.<sup>5</sup> The Trial Chamber (*'TC'*), which has not been lawfully seized with the case and has not received access to the case file, is also unable to act.<sup>6</sup> The prevailing ambiguity violates AO An's right to have a final determination on his case, the principle of legal certainty, and continues to impact his well-being. The OCIJ is the only remaining ECCC judicial organ empowered by the IRs to resolve the current impasse. Accordingly, the Defence respectfully requests the OCIJ to seal and archive Case File 004/02 in accordance with IR 69(2)(b) and Article 38 of the Cambodian Constitution.
3. The Defence files this request in English first with the Khmer translation to follow at the earliest opportunity.

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<sup>1</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Dismissing the Case Against AO An* (*'Dismissal Order'*), **D359**, 16 Aug. 2018.

<sup>2</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>3</sup> *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. 1.

<sup>4</sup> *12 March 2020 Memorandum*, paras 27, 33.

<sup>5</sup> *Interoffice Memorandum Dated 31 January 2020 Request for Clarification under Internal Rule 10(2)* (*'31 January 2020 Memorandum'*), sent by Tony Kranh, Acting Director of Administration, and Knut Rosandhaug, Deputy Director of Administration, para. 13, attached as App. 2.

<sup>6</sup> *Email from Greffier of the Trial Chamber to the parties concerning Case 004/02*, (*'Email from TC's Greffier dated 10 Feb. 2020'*), 10 Feb. 2020, attached as App. 3.

### PROCEDURAL HISTORY

4. On 16 August 2018, the Co-Investigating Judges issued two separate and opposing closing orders in Case 004/02.<sup>7</sup>
5. On 17 December 2018, the National Co-Prosecutor ('NCP') filed her submissions on appeal against the *Closing Order (Indictment)*.<sup>8</sup> On 20 December 2018, the ICP filed his submissions on appeal against the *Dismissal Order*.<sup>9</sup> Also on 20 December 2018, the Defence filed its submissions on appeal against the *Closing Order (Indictment)*.<sup>10</sup>
6. 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>11</sup>
7. 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>12</sup>
8. 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>13</sup>
9. On 4 February 2020,<sup>14</sup> the ICP filed 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>15</sup> The Defence filed its response to the *ICP*

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

<sup>8</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>9</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>10</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*, **D360/5/1**, 19 Dec. 2018.

<sup>11</sup> *Considerations on Appeals*, paras 124, 169.

<sup>12</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, attached as App. 4.

<sup>13</sup> *Email from the Greffier of the Trial Chamber to the parties concerning Case 004/02*, 21 Jan. 2020, attached as App. 5.

<sup>14</sup> The document was notified to the Defence on 10 February 2020.

<sup>15</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 & D360/34**, 4 Feb. 2020.

*Request for Action* on 18 February 2020.<sup>16</sup> The ICP replied to the Defence's response on 3 March 2020.<sup>17</sup>

10. 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>18</sup>
11. On 24 February 2020, the Defence filed a *Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02*.<sup>19</sup> The ICP filed a response to the Defence's request on 5 March 2020.<sup>20</sup> The Defence filed a reply on 17 March 2020.<sup>21</sup>
12. On 12 March 2020, the international judges of the PTC issued an *Interoffice Memorandum on the Transfer of Case File 004/02*, with eight accompanying Annexes.<sup>22</sup>

#### APPLICABLE LAW

13. 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 (*i.e.* either by decision of the PTC or as a result of the Chamber's failure to attain a supermajority). As such, IR 69(2)(b) must apply *mutatis mutandis* to the present situation.
14. 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.

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<sup>16</sup> Case No. 004/2/07-09-2009-ECCC/TC, *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*, **D359/26 & D360/35**, 18 Feb. 2020.

<sup>17</sup> Case No. 004/2/07-09-2009-ECCC/TC, *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*, **D359/28 & D360/37**, 3 Mar. 2020.

<sup>18</sup> *Email from TC's Greffier dated 10 Feb. 2020*.

<sup>19</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*, **D359/27 & D360/36**, 24 Feb. 2020.

<sup>20</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*, **D359/30 & D360/39**, 5 Mar. 2020.

<sup>21</sup> Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *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*, 17 Mar. 2020.

<sup>22</sup> *12 March 2020 Memorandum*.

15. 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.
16. 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>23</sup>

### REQUEST TO SEAL AND ARCHIVE

17. The Defence requests the OCIJ to seal and archive Case 004/02 pursuant to IR 69(2)(b).
18. The *Dismissal Order* pursuant to IR 67(2) was issued in Case 004/02 on 16 August 2018. The ICP lodged an appeal against the *Dismissal Order*, however the PTC failed to reach a supermajority on the merits of that appeal.<sup>24</sup> Pursuant to IR 77(13)(a), 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 shall stand. As such, the *Dismissal Order* continues to stand unaffected by the appeal. The fact that the *Closing Order (Indictment)* may also stand, pursuant to IR 77(13)(b), has no bearing on the continuing enforceability of the *Dismissal Order* (particularly in light of the constitutional principle of *in dubio pro reo*, and the support of a majority of PTC judges for dismissing the case).
19. Whilst the PTC unanimously held that the issuance of two separate and opposing closing orders was unlawful,<sup>25</sup> it was unable to reach a supermajority on the effect of this illegality and the procedural consequences for Case 004/02.<sup>26</sup> A majority of PTC judges determined that the constitutional principle of *in dubio pro reo* requires Case 004/02 to be dismissed.<sup>27</sup> A minority of PTC judges disagreed. However, two PTC judges cannot

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<sup>23</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>24</sup> *Considerations on Appeals*, para. 169.

<sup>25</sup> *Considerations on Appeals*, paras 123-124.

<sup>26</sup> *Considerations on Appeals*, paras 124, 170-302, 304-329.

<sup>27</sup> *Considerations on Appeals*, paras 295-302.

override the majority view or unilaterally direct the PTC Greffier to forward the case to the Trial Chamber.<sup>28</sup>

20. 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>29</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. In addition, AO An's right to be tried by a competent tribunal established by law prescribes that the view of a majority of judges cannot be ignored.<sup>30</sup> It should, finally, be noted that the *Dismissal Order* has been registered on the case file prior to the *Closing Order (Indictment)*. Therefore, the *Dismissal Order*, benefitting from the support of a majority of judges and the NCP, must take precedence over the *Closing Order (Indictment)*. Consequently, the case against AO An has been effectively dismissed.
21. According to IR 69(2)(b), 'if a Dismissal Order is issued, the case file shall be archived'. Whilst IR 69(2)(b) explicitly applies to the situation where no appeal has been lodged against a dismissal order, there is no equivalent provision for the situation where a dismissal order is confirmed or not overturned on appeal (*i.e.* either by a supermajority of the PTC or as a result of the PTC having failed to attain one). Logic, dictates that in such circumstances the case file must be sealed and archived in accordance with IR 69(2)(b).
22. According to IR 69(2)(b), it falls to the OCIJ to seal and archive the case file. The international judges of the PTC have confirmed that, '*a Greffier of the Pre-Trial Chamber immediately submitted a filing and notification instruction form upon the issuance of the Considerations, directing the RAU to file the Considerations as public and to notify the Considerations to the Office of the Co-Investigating Judges and Parties in Case 004/2*'.<sup>31</sup>

<sup>28</sup> *ICP Request for Action*, para. 24; see also *Email Correspondence between PTC and CMS* ('*Email Correspondence between PTC and CMS*'), 28 Jan. 2020, attached as App.6.

<sup>29</sup> *Considerations on Appeals*, paras 295-302.

<sup>30</sup> This right is not a mere formality, and requires compliance with basic due process norms: Human Rights Committee, 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. 7; *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. 8 ('[...] 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 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. 9 ('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>31</sup> *12 March 2020 Memorandum*, para. 27.

On 28 January 2020, a PTC Greffier – acting pursuant to instructions from a majority of judges – confirmed that *‘this 004/2 case is finished’*.<sup>32</sup> However, the PTC – paralysed by internal disagreements – has reached the limit of its authority to determine the outcome of Case 004/02,<sup>33</sup> the OA is unable to act on contradictory judicial instructions,<sup>34</sup> and the TC has not been lawfully seised with the case and has not received access to the Case File.<sup>35</sup> As such, the OCIJ is the only remaining ECCC judicial organ empowered by the IRs to resolve the current impasse.

23. To date, AO An has not received any confirmation that Case File 004/02 has been sealed and archived as required under the IRs. The resulting ambiguity violates AO An’s right to have a final determination on his case, the principle of legal certainty, and continues to impact his well-being.
24. According to persuasive case law of the European Court of Human Rights (*‘ECtHR’*), fundamental fair trial guarantees (enshrined in Article 13 of the UN-RGC Agreement and Articles 33 to 35 ECCC Law) *‘include the right to have a final determination on a matter submitted to a court’*.<sup>36</sup> The ECtHR further found that *‘tied vote arrangements [...] do not serve the interests of legal certainty and are capable of depriving [a defendant] of an effective right to have his [case] finally determined [leading to a restriction on] the essence of his right of access to a court’*, and therefore, a breach of his fair trial rights.<sup>37</sup>
25. Moreover, the lack of certainty as to the final outcome of Case 004/02 is an anathema to AO An’s right to have his case heard by a competent tribunal established by law. Inevitably, the resulting uncertainty – whether or not he still faces charges involving mass crimes, including genocide – continues to impact AO An’s well-being. A defendant should not be held hostage to a tribunal’s dysfunction, irrespective of where the responsibility for that dysfunction lies.

### CONCLUSION AND REQUEST

26. Accordingly, the Defence respectfully requests the OCIJ to seal and archive Case File 004/02.

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<sup>32</sup> *Email Correspondence between PTC and CMS.*

<sup>33</sup> *12 March 2020 Memorandum*, paras 27, 33.

<sup>34</sup> *31 January 2020 Memorandum*, para. 13.

<sup>35</sup> *Email from PTC’s Greffier dated 10 Feb. 2020.*

<sup>36</sup> *Marini v. Albania*, ECtHR, *Judgement*, App. no. 3738/02, 7 Jul. 2008, para. 120, attached as App.10.

<sup>37</sup> *Marini*, paras 122-123.

Respectfully submitted,



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Signed 17 March 2020, Phnom Penh, Kingdom of Cambodia