

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:** 24 February 2020**CLASSIFICATION****Classification of the document suggested by the filing party:**

CONFIDENTIAL

Classification by PTC:

សាធារណៈ/Public

Classification Status:**Review of Interim Classification:****Records Officer Name:****Signature:**

REQUEST FOR CONFIRMATION THAT ALL REQUIRED ADMINISTRATIVE ACTIONS HAVE BEEN TAKEN TO ARCHIVE CASE FILE 004/02

Filed by:Distribution to:**The Co-Lawyers****Pre-Trial Chamber****The Co-Prosecutors**

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All Civil Party Applicants in Case 004/2

INTRODUCTION

1. AO An, through his Co-Lawyers (*'Defence'*), respectfully requests the Pre-Trial Chamber (*'PTC'*) to confirm that all required administrative actions have been taken to archive Case File 004/02. According to Rule 69(2)(b) of the Internal Rules (*'IRs'*) of the Extraordinary Chambers in the Courts of Cambodia (*'ECCC'*), the case file of a dismissed case *'shall be archived'*. The case against AO An was dismissed on 16 August 2018,¹ and the dismissal was not overturned on appeal on 19 December 2019.² IR 69(2)(b) requires the Chamber to seal and archive the case file. 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. Accordingly, the Defence respectfully requests the PTC to confirm that the required administrative actions have been taken to archive Case File 004/02.
2. The Defence files this request in English first with the Khmer translation to follow at the earliest opportunity.

PROCEDURAL HISTORY

3. On 16 August 2018, the Co-Investigating Judges issued two separate and opposing Closing Orders in Case 004/02.³
4. On 17 December 2018, the National Co-Prosecutor (*'NCP'*) filed her submissions on appeal against the *Closing Order (Indictment)*.⁴ On 20 December 2018, the ICP filed his submissions on appeal against the *Order Dismissing the Case Against AO An ('Dismissal Order')*.⁵ Also on 20 December 2018, the Defence filed its submissions on appeal against the *Closing Order (Indictment)*.⁶
5. 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

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

² 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.

³ Case No. 004/2/07-09-2009-ECCC/OCIJ, *Closing Order (Indictment)*, **D360**, 16 Aug. 2018; *Dismissal Order*.

⁴ 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.

⁵ 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.

⁶ 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.

opposing closing orders was unlawful, and it failed to reach a supermajority on the merits of the parties' submissions on appeal.⁷

6. 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 89.⁸
7. 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.⁹
8. On 4 February 2020,¹⁰ 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')*.¹¹ The Defence filed its response to the *ICP Request for Action* on 18 February 2020.¹²
9. 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.¹³

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 (*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.

⁷ *Considerations on Appeals*, paras 124, 169.

⁸ 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. 1

⁹ Email from the Greffier of the Trial Chamber to the parties concerning Case 004/02, 21 Jan. 2020, attached as App. 2.

¹⁰ The document was notified to the Defence on 10 February 2020.

¹¹ 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.

¹² 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.

¹³ Email from the Greffier of the Trial Chamber concerning ICP request dated 4 February 2020, 10 Feb. 2020, attached as App. 3.

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 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.
13. 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 21.¹⁴

REQUEST FOR CONFIRMATION

14. The Defence requests the PTC to confirm that all required administrative actions have been taken to seal and archive Case 004/02 pursuant to IR 69(2)(b).
15. A 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.¹⁵ 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*.
16. Whilst the PTC unanimously held that the issuance of two separate and opposing closing orders was unlawful,¹⁶ it was unable to reach a supermajority on the effect of this

¹⁴ 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.

¹⁵ *Considerations on Appeals*, para. 169.

¹⁶ *Considerations on Appeal*, paras 123-124.

illegality and the procedural consequences for Case 004/02.¹⁷ A majority of PTC judges determined that the constitutional principle of *in dubio pro reo* requires Case 004/02 to be dismissed.¹⁸ A minority of PTC judges disagreed. However, two PTC judges cannot override the majority view or unilaterally direct the PTC Greffier to forward the case to the Trial Chamber.¹⁹

17. 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.²⁰ 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.²¹ 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.
18. 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).
19. 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

¹⁷ *Considerations on Appeal*, paras 124, 170-302, 304-329.

¹⁸ *Considerations on Appeal*, paras 295-302.

¹⁹ *ICP Request for Action*, para. 24.

²⁰ *Considerations on Appeal*, paras 295-302.

²¹ 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. 4; *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. 5 ('[...] 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. 6 ('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.').

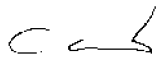
have a final determination on his case, the principle of legal certainty, and continues to impact his well-being.

20. 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'.²² 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.²³
21. 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

22. Accordingly, the Defence respectfully requests the PTC to confirm that the required administrative actions have been taken to archive Case File 004/02.

Respectfully submitted,



MOM Luch



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Co-Lawyers for AO An

Signed 24 February 2020, Phnom Penh, Kingdom of Cambodia

²² *Marini v. Albania*, ECtHR, *Judgement*, App. no. 3738/02, 7 Jul. 2008, para. 120, attached as App. 7.

²³ *Marini*, paras 122-123.