

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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**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**

Filed by:

Brenda J. HOLLIS
International Co-Prosecutor

Copied to:

CHEA Leang
National Co-Prosecutor

Distributed to:

Pre-Trial Chamber
Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Co-Lawyers for AO An

MOM Luch
Richard ROGERS
Göran SLUITER

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

I. SUBMISSION

1. The International Co-Prosecutor (“ICP”) hereby replies to Ao An’s response¹ to her request that the Pre-Trial Chamber (“PTC” or “Chamber”) take all necessary administrative actions to forward Case File 004/2 to the Trial Chamber (“TC”).² In sum, Ao An incorrectly characterises the ICP Request as a request for reconsideration, fails to understand that Rule 77(13)(b) prevails over Rule 77(13)(a), erroneously argues that a simple majority should prevail rather than the default position that underlies the entire ECCC legal system, misapprehends the *in dubio reo* principle, and misconstrues article 38 of the Cambodian Constitution and the limited grounds for terminating a case at the ECCC.
2. Ao An erroneously characterises the ICP Request as asking the PTC to “reconsider its decision on the legal effect and procedural consequences of opposing closing orders”.³ However, this is not a decision the PTC ever made. In direct contradiction to the very premise of his argument, Ao An correctly states elsewhere⁴ that the Chamber was unable to reach the required supermajority to confirm the impact of its unanimous decision that the *issuance* of two conflicting Closing Orders was illegal.⁵ In fact, the judges separately considered the legality of *each* Closing Order, arriving at differing conclusions of their individual legal status.⁶ The ECCC legal framework dictates the consequences of this situation, and it is these procedures that must be followed.
3. As the PTC did not overturn the Indictment⁷ by supermajority, the TC must be seised under Rules 77(13)(b) and 79(1)⁸ and the case brought to trial, even though the

¹ **D359/26** 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, 18 February 2020 (“Ao An Response”), filed in English first with the Khmer translation to follow. As of the date of this filing, the Khmer translation has not yet been notified.

² **D359/25** 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, 4 February 2020 (“ICP Request”), notified on 10 February 2020.

³ See e.g. **D359/26** Ao An Response, paras 1 (containing the quote), 21 (characterising the PTC’s “decision” as being “on the merits of the appeals and the legal effect of separate and opposing closing orders”).

⁴ **D359/26** Ao An Response, paras 2, 21, 22, 24, 26.

⁵ **D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“PTC Closing Order Considerations”), paras 54, 89, 98, 102, 124, Disposition at EN 01634239 (unanimous).

⁶ **D359/24 & D360/33** PTC Closing Order Considerations, paras 89, 124 (unanimous), paras 170-302 (National Judges’ Opinion), paras 304-329, 681 (International Judges’ Opinion).

⁷ **D360** Closing Order (Indictment), 16 August 2018 (“Indictment”).

⁸ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”). Rule 77(13)(b) establishes that where an appeal against an indictment is not upheld on appeal, the default position is that the TC be seised on the basis of the Closing Order (Indictment). Rule 79(1) provides that the TC shall be seised by an Indictment from the CIJs or the PTC, in conjunction

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Dismissal Order⁹ was also not overturned.¹⁰ This is mandated by Rule 77(13)(b), which is *lex specialis* relating to indictments and therefore prevails over the general terms of Rule 77(13)(a), which relates to orders “other than an indictment”.¹¹ “Dismissal Order” and “Closing Order”, like “Indictment”, are defined terms in the Rules.¹² Had the drafters of the Rules wished to specifically address the effect of the failure of the PTC to overturn a dismissal order, they clearly could have done so but chose not to. In contrast, Rule 77(13)(b) implements the expressed intent of the United Nations (“UN”) and Royal Government of Cambodia (“RGC”) at the time they concluded the ECCC Agreement.¹³ This intent is also evidenced in the ECCC Agreement and ECCC Law, which provide that when the Co-Prosecutors or Co-Investigating Judges (“CIJs”) disagree on progressing a case, the case moves on to the next stage absent a supermajority of the PTC blocking its progress.¹⁴ The ICP Request simply asks the PTC Judges to apply the plain language of the Law and the Rules that bind them by taking the final *administrative* step to forward Case File 004/2 (including the Indictment) to the Trial Chamber.

with Rule 1(2) defining CIJs as acting jointly or individually.

⁹ **D359** Order Dismissing the Case Against Ao An, 16 August 2018 (“Dismissal Order”).

¹⁰ *Contra* **D359/26** Ao An Response, paras 3, 25, the ICP does not ignore the fact that the Dismissal Order was not overturned on appeal. She did not mention it in her Request because Rule 77(13)(b) prevails.

¹¹ The Latin expression “*lex specialis*” refers to a doctrine relating to the interpretation of laws according to which a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).

¹² See Internal Rules, pp. 83-84.

¹³ **D324.30** Letter from UN Secretary General to Prime Minister H.E. Hun Sen, 19 April 2000, Annexed Note from Hans Corell to Secretary General, Subject: Urgent call from Cambodia – Options to settle differences between investigating judges/prosecutors, 19 April 2000, EN 01326090 (On the same day that the UN first provided the article 7(4) wording to the RGC, Hans Corell, the Under Secretary General for Legal Affairs and Legal Counsel of the UN, recorded a conversation with Deputy Prime Minister Sok An, the RGC’s chief negotiator, rejecting his call to have a supermajority requirement to *approve* the continuation of an investigation or prosecution. Hans Corell explained that the disagreement mechanism as drafted meant “you would need a supermajority to stop the investigation or prosecution”); **D324.36** Statement by Under Secretary General Hans Corell Upon Leaving Phnom Penh on 17 March 2003, 17 March 2003, EN 01326112. See also **D359/3/1.1.43** David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246 (EN 01598756) (David Scheffer, the U.S. Ambassador at Large for War Crimes Issues and heavily involved in the ECCC negotiations, expressed the same view: “The only way the prosecution or investigation is *halted* is if the [PTC] decides by supermajority vote that it should end. The rationale behind this procedure is that it prevents one [CIJ] or one Co-Prosecutor from blocking an investigation or prosecution, respectively, by failing to reach agreement with his or her counterpart or simply derailing an investigation or prosecution due to political or other kinds of influence.” (emphasis added)).

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, 6 June 2003 (“ECCC Agreement”), art. 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 on 27 October 2004 (“ECCC Law”), art. 23 new.

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4. By contrast, Ao An erroneously creates a new “default position” not foreseen by the ECCC legal framework, stating that in the absence of a supermajority, the simple majority view upholding the Dismissal Order prevails, and arguing that continuing the proceedings would violate “basic due process norms” and be “anathema to a competent tribunal established by law”.¹⁵ Ao An’s reliance on a majority view is misplaced due to the hybrid nature and unique structure of the ECCC. A simple majority view has never carried the decisive weight at the ECCC that it does at other courts. Rather, the founders of this Court implemented the supermajority rule to protect the proceedings against outside influence or interference and created the default position so that a case could not be derailed if a supermajority could not be reached.¹⁶ This supermajority rule and default position were agreed by both the UN and the RGC and passed into law.¹⁷ Contrary to Ao An’s argument, adhering to these lawful principles in no way renders this Court an incompetent tribunal.
5. Ao An incorrectly asserts that because the CIJs failed to submit their disagreement to the PTC using the Rule 72 disagreement settlement procedure, the CIJs in effect “opted out” of the default position, making it inapplicable to the case at hand.¹⁸ While this Chamber *did* find that the CIJs failed to properly refer their disagreement to the PTC,¹⁹ it also examined whether that failure circumvented the practical effect of the default position underlying the entire ECCC legal system.²⁰ All five PTC Judges stressed 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”.²¹ Following this reasoning, although the PTC ultimately found that the CIJs’ issuance of two conflicting closing orders was unlawful, the default position is so “fundamental and determinative” a principle, it cannot be overridden by the CIJs’ illegal actions.

¹⁵ **D359/26** Ao An Response, para. 27. *See also* paras 3, 24, 25.

¹⁶ *See e.g.* **D359/3/1.1.43** David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246 (EN 01598756).

¹⁷ ECCC Agreement, art. 7(4); ECCC Law, art. 23 new.

¹⁸ **D359/26** Ao An Response, paras 22 and 23 *citing* **D359/24 & D360/33** PTC Closing Order Considerations, para. 121.

¹⁹ *See e.g.* **D359/24 & D360/33** PTC Closing Order Considerations, para. 120.

²⁰ **D359/24 & D360/33** PTC Closing Order Considerations, para. 112.

²¹ **D359/24 & D360/33** PTC Closing Order Considerations, para. 112, *emphasis added*.

6. Ao An also misapprehends the *in dubio pro reo* principle.²² The very existence of the default position contradicts Ao An’s assertion that “all impasses and uncertainties must be resolved in [his] favour”.²³ Moreover, *in dubio pro reo* is a corollary of the presumption of innocence and is one aspect of the requirement that guilt must be found beyond a reasonable doubt *at trial*.²⁴ The principle is applied when factual doubts are not removed by the evidence presented at trial, or in very rare instances of doubt in the *substantive* law.²⁵ In other words, *in dubio pro reo* deals with doubt about the accused’s ultimate guilt, not with procedural impasses in the pre-trial phase that do not involve any determination of guilt or innocence.²⁶
7. The *in dubio pro reo* principle has occasionally been applied in dilemmas of law, but its applicability is limited to doubts that remain after using civil law rules of interpretation.²⁷ Every legal text is subject to interpretation and the fact that a particular scenario might not be expressly covered by it does not raise “doubt” from which a defendant will always profit. As the Supreme Court Chamber (“SCC”) has held, “*in dubio pro reo* will therefore be unnecessary when addressing legal *lacunae*”.²⁸
8. While the ICP’s position is that no legal *lacunae* are present in this case because the default position is clearly applicable, when a procedural question is not addressed by

²² **D359/26** Ao An Response, paras 4, 26.

²³ **D359/26** Ao An Response, para. 26.

²⁴ Case 002-E50/3/1/4 Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011 (“Khieu Samphan Release Decision”), para. 31; *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgement, Appeals Chamber, 27 September 2007, para. 21; *Renzaho v. The Prosecutor*, ICTR-97-31-A, Judgement, Appeals Chamber, 1 April 2011, para. 474 (noting that the principle applies to findings required for conviction); *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998 (“*Čelebići TJ*”), para. 601 (“At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.”).

²⁵ See e.g. Rome Statute of the International Criminal Court, 17 July 1998, art. 22(2). See further *The Prosecutor v. Gbagbo and 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.

²⁶ See e.g. **D359/24 & D360/33** PTC Closing Order Considerations, paras 85 (“although it is necessary at the pre-trial stage to have more than mere indicia or suspicion to send a person to trial, the evidence gathered does not yet need to assert guilt with certainty”), 163 (unanimous); Case 002-D427 Closing Order, 15 September 2010, para. 1323.

²⁷ Case 002-E50/3/1/4 Khieu Samphan Release Decision, para. 31 (explaining that civil law rules of interpretation of the law take into account “the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective”); *Čelebići TJ*, para. 413 (“The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning *which the canons of construction fail to solve*, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*.” (emphasis added)).

²⁸ Case 002-E50/3/1/4 Khieu Samphan Release Decision, para. 31.

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the Rules, Rule 2 directs the Chamber to decide the question in keeping with Cambodian law and relevant procedural rules. These relevant rules include article 23 new of the ECCC Law, which mandates that the “investigation shall proceed”.²⁹ Notably, Rule 2 does not provide for an automatic default finding in favour of the accused. Instead, it instructs the Chamber to have particular attention to the fundamental principles set out in Rule 21, which safeguards the rights not only of the accused but also of the victims, and mandates fair proceedings that preserve a balance between the rights of *all* parties. To “resolve all impasses and uncertainties” in Ao An’s favour, as he argues is required,³⁰ would contravene this balance, particularly the meaningful participation of victims of the crimes pursuant to the ECCC’s pursuit for national reconciliation.³¹

9. Finally, Ao An misconstrues article 38 of the Cambodian Constitution, wrongly asserting that it dictates that Case 004/2 was effectively terminated as of 19 December 2019.³² In Khmer, article 38 states: “*Reasonable doubt* shall be in favour of the accused”,³³ not, as Ao An maintains, *any* doubt.³⁴ The Constitution’s usage of the “reasonable doubt” language reinforces the ICP’s position that *in dubio pro reo* is primarily applicable when doubt remains after assessing the guilt of the accused *at trial*, as the trial phase is the only phase when the burden of proof is beyond a “reasonable doubt”. The Cambodian Code of Criminal Procedure further reinforces this position, as “reasonable doubt” and “benefit of the doubt” are used only in the context of the guilt of a convicted person.³⁵
10. Ao An’s termination argument³⁶ also violates Cambodian (and French) procedural law. Cambodian procedure states that criminal action may only be extinguished upon the death of the accused, the expiration of the statute of limitations, the grant of an amnesty, the abrogation of the law, or *res judicata*.³⁷ Jurisprudence at the international

²⁹ Internal Rule 2.

³⁰ **D359/26** Ao An Response, para. 26.

³¹ Case 002-**D411/3/6** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, paras 64-65; ECCC Agreement, preamble.

³² **D359/26** Ao An Response, paras 4, 5, 18.

³³ The Constitution of the Kingdom of Cambodia, adopted 21 September 1993, art. 38 (emphasis added).

³⁴ *Contra* **D359/26** Ao An Response, para. 18.

³⁵ Code of Criminal Procedure of the Kingdom of Cambodia, 7 June 2007 (“CCCP”), arts 350-351 (relating to declaration of guilt, noting that the “accused always has the benefit of the doubt”), 445 (“A motion for review may be filed: [...] 4. Where new facts, documents, or other new evidence lead to a reasonable doubt as to the guilt of a convicted person.”).

³⁶ **D359/26** Ao An Response, paras 3-5.

³⁷ CCCP, art. 7. *See also* French Code of Criminal Procedure, 10 February 2020, art. 6 (“L’action publique


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level³⁸ also establishes an extremely high threshold for the termination or stay of proceedings.³⁹ The SCC and TC have both held that it follows that the ECCC has no authority to order termination for other reasons.⁴⁰ Indeed, under Rule 67(3), there is no provision to dismiss a case at the closing order stage because of a procedural impasse.

II. RELIEF REQUESTED

11. For the foregoing reasons, the International Co-Prosecutor respectfully requests the Pre-Trial Chamber to take all necessary administrative actions to ensure that the Case 004/2 (Ao An) Indictment and remaining Case File are immediately transferred to the Trial Chamber.

Respectfully submitted,

Date	Name	Place	Signature
3 March 2020	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh	

pour l'application de la peine s'éteint par la mort du prévenu, la prescription, l'amnistie, l'abrogation de la loi pénale et la chose jugée." Unofficial translation: "Criminal proceedings are extinguished by the death of the defendant, expiry of the statute of limitations, amnesty, repeal of the criminal law and res judicata.").

³⁸ ECCC Law, art. 33 new instructs that guidance may be sought in procedural rules established at the international level when existing procedures do not deal with a particular matter, there is uncertainty regarding their interpretation or application, or there is a question regarding their consistency with international standards.

³⁹ Terminations or stays of proceedings have occasionally been granted by other international tribunals, but examples are few and reflect situations in which discontinuance is considered to be the *only* remedy capable of ensuring the fairness of proceedings or otherwise imperative in the interests of justice. See e.g. *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion for Stay of Proceedings, Trial Chamber, 8 April 2010, para. 4 (acknowledging that the extreme remedy of a stay of proceedings may be granted where serious violations of the accused's human rights render a fair trial impossible); *The Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, para. 30.

⁴⁰ Case 002-E138/1/10/1/5/7 Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, SCC, 14 December 2012, para. 38; Case 002-E116 Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), TC, 9 September 2011, paras 16-17 (finding that ECCC proceedings may only be terminated under Internal Rule 89(1)(b) on one of the limited grounds set out in art. 7 of the CCCP).