

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

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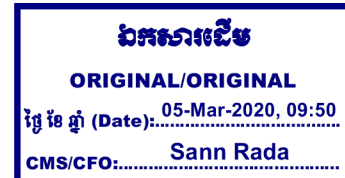
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**INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO AO AN'S REQUEST FOR
CONFIRMATION THAT ALL REQUIRED ADMINISTRATIVE ACTIONS
HAVE BEEN TAKEN TO ARCHIVE CASE FILE 004/2**

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I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby responds to Ao An’s request asking the Pre-Trial Chamber (“PTC”) to confirm that all required administrative actions have been taken to archive Case File 004/2 (“Ao An’s Request”).¹ While Ao An is correct that all required administrative actions need to be taken,² he misstates the action required, that is, the PTC is mandated under the ECCC Agreement, ECCC Law, Internal Rules, and jurisprudence to forward the Case File (including the Indictment) to the Trial Chamber (“TC”).
2. That mandate is clear, and it ensures a proper hearing at which Ao An’s fair trial rights will be protected and the voices of the victims, alive and dead, will be heard. As Holocaust survivor and Nobel laureate Elie Wiesel, stated: “To forget the victims is to kill them a second time. [We] couldn’t prevent the first death. [We] surely must be capable of saving them from a second death.”³ The dead cannot speak from the grave. Evidence adduced at trial is their voice. Independent judges⁴ of an independent judicial institution must not deny them that voice.
3. As discussed below, Ao An’s Request should be dismissed as it improperly attempts to circumvent the ECCC legal framework that dictates the consequences of the situation at hand, or in the alternative, if, *arguendo*, the PTC determines that the Case File should be archived, Ao An’s Request is premature.

¹ **D359/27** Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/02, 24 February 2020 (“Ao An’s Request”).

² Although these administrative actions need to be taken by the PTC in order for the Trial Chamber to have immediate access to the Case File, the TC is now seised of the case by virtue of the PTC’s Considerations Rule 77(13)(b), and Rule 79(1). Consequently, the TC has the duty to hear the case, regardless of whether the Case File is immediately forwarded to the TC by the PTC. *See* 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).

³ NPR, *Elie Wiesel, Holocaust Survivor and Nobel Laureate, Dies at 87*, 2 July 2016, p. 2.

⁴ 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. 3(3); 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. 10 new.

II. PROCEDURAL HISTORY

4. On 19 December 2019, the PTC issued its Considerations on the appeals of the conflicting Closing Orders in Case 004/2, failing to reach a supermajority decision⁵ required to overturn either the Dismissal Order⁶ or the Indictment.⁷
5. On 4 February 2020, the ICP filed a request to the PTC for it to take all administrative actions necessary to forward the Case File to the Trial Chamber.⁸ As of the date of this Response, the PTC has not decided the issue, nor has the Case File been forwarded.

III. APPLICABLE LAW

6. Article 7(4) of the ECCC Agreement states, in relevant part:

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. [...] **If there is no majority, as required for a decision, the investigation or prosecution shall proceed.**⁹

7. Article 23 new of the ECCC Law states, in relevant part:

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. [...] **If there is no majority as required for a decision, the investigation shall proceed.**¹⁰

8. Rule 2 states, in relevant part:

Where [...] a question arises which is not addressed by these IRs, the [...] Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles [...] 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedure laws.

9. 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. In this

⁵ **D359/24 & D360/33** Considerations on Appeals Against Closing Orders, 19 December 2019 (“PTC Closing Order Considerations”), para. 169, Disposition at EN 01634239.

⁶ **D359** Order Dismissing the Case Against Ao An, 16 August 2018 (“Dismissal Order”).

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

⁸ **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 Forwarding Request”).

⁹ Emphasis added.

¹⁰ Emphasis added.

respect: a) ECCC proceedings shall be fair and adversarial and **preserve a balance between the rights of the parties** [...].¹¹

10. 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:

(a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.

(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.¹²

11. Rule 79(1) states:

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

IV. SUBMISSION

Ao An's Request must be denied, as it attempts to circumvent the ECCC legal framework which mandates that his case must proceed to trial

12. Ao An's Request ignores the ECCC legal framework to which he himself refers in paragraph 17—specifically, the legal effect of the failure of a supermajority of the PTC to overturn the Indictment issued in this case—and focuses on the irrelevant split between three and two of the PTC judges.¹³ “Irrelevant” is used advisedly, as only a supermajority overturning the Indictment would have prevented this case from moving forward to trial.¹⁴ Despite Ao An's repeated assertions, a simple majority carries no weight in the ECCC framework.

¹¹ Emphasis added.

¹² Emphasis added.

¹³ **D359/27** Ao An's Request, paras 16, 17.

¹⁴ ECCC Agreement, art. 7(4); ECCC Law, art. 23 new; Rule 77(13)(b); Rule 79(1). *See also* **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; **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.

13. Contrary to Ao An's unfounded argument and as set out in other ICP submissions,¹⁵ that framework resolves any impasse that remains after the PTC has ruled on the parties' appeals. Rule 77(13)(b), which implements the intent and relevant provisions of the ECCC Agreement and ECCC Law,¹⁶ operates as *lex specialis*, thus prevailing over the general terms of Rule 77(13)(a). Rule 77(13)(b) reflects the clear intent of the Agreement and Law whereby it dictates that, where the Indictment has not been overturned by a supermajority, the **default position shall be** that the TC be seised of the Indictment. This Rule and corresponding Rule 79(1) thus resolve any impasse.
14. Moreover, the instant case does not involve "two judges [overriding] the majority view or unilaterally [directing] the PTC Greffier to forward the case to the Trial Chamber" as Ao An asserts.¹⁷ Rather, the legal framework of the ECCC renders irrelevant a 3/2 split between the judges, and requires that the Case File, including the Indictment, be forwarded to the TC, which was seised of the case as of 19 December 2019.¹⁸
15. Ao An's unfounded contention that the winner of the race to file the Closing Orders prevails is equally irrelevant; he points to nothing in the ECCC Agreement, ECCC Law, Internal Rules or jurisprudence which would substantiate this spurious argument.¹⁹ In any event, the ICP notes that the timestamps on the Closing Orders indicate that the Dismissal Order was not filed first: the Co-Investigating Judges filed the two Closing Orders together at 8:10 a.m. on 16 August 2018.²⁰
16. Ao An's argument regarding *in dubio pro reo* is equally unfounded.²¹ The principle is inapplicable to questions of procedure such as this, as fully set out in the ICP's recent Reply before this Chamber relating to forwarding the Case File to the TC.²²

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).

¹⁵ See e.g. **D359/25** ICP Forwarding Request, para. 2; **D359/28** 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, 3 March 2020 ("ICP Forwarding Reply"), paras 3, 5, 8.

¹⁶ See fn. 14, *supra*.

¹⁷ **D359/27** Ao An's Request, para. 16.

¹⁸ See also **D359/25** ICP Forwarding Request, paras 2, 23, 25; **D359/28** ICP Forwarding Reply, para. 4.

¹⁹ **D359/27** Ao An's Request, para. 17.

²⁰ **D359** Dismissal Order (Khmer version), cover sheet; **D360** Indictment (English version), cover sheet.

²¹ **D359/27** Ao An's Request, paras 16-17.

²² **D359/28** ICP Forwarding Reply, paras 6-10.

Ao An's Request must be denied because it is premature

17. In the event that, *arguendo*, the PTC determines it will archive and seal the case, Ao An's Request must nonetheless be rejected as premature. It disregards what "lies at the heart of a judge's highest responsibility and function",²³ which is the "judicial duty to pronounce"²⁴ on issues before the PTC that still require resolution. Notably, the PTC has yet to pronounce on the Civil Parties' appeal regarding admissibility, the ICP's request regarding review of the French transcripts from the appeal hearings in June 2019, and the ICP's request that all administrative actions be taken to forward the Case File to the Trial Chamber.²⁵
18. Ao An's Request must also be rejected as premature because it ignores that ECCC proceedings must preserve a balance between the rights of the parties, including Civil Parties.²⁶ This balance requires that, before the Chamber takes such action, the parties, including the ICP and Civil Parties, be given the opportunity to request that specified filings such as appellate submissions relating to the Closing Orders, be re-classified from confidential to public. Such opportunity is required to ensure transparency of ECCC proceedings.²⁷
19. The ICP notes with concern that there are currently no Lead Co-Lawyers for the Civil Parties recognised in Case 004/2, and due to non-functioning email addresses of some of the individual Civil Party lawyers, it is unclear if the Civil Parties have even been informed about the developments and current status of Case 004/2. To archive and seal the Case File without giving the Civil Parties an opportunity to respond would violate the interests of justice and the fundamental principle entrusted to Judges and Chambers of the ECCC to "assure a meaningful participation for the victims of the crimes committed" in keeping with the Court's pursuit of national reconciliation.²⁸

²³ **D359/24 & D360/33** PTC Closing Order Considerations, para. 122.

²⁴ **D359/24 & D360/33** PTC Closing Order Considerations, para. 122.

²⁵ **D362/5** Appeal Against Order on the Admissibility of Civil Party Applicants, 29 November 2018; **D359/18** International Co-Prosecutor's Request for a Full Review of the French Transcripts of the Appeal Hearings Held Before the Pre-Trial Chamber, 11 October 2019; **D359/25** ICP Forwarding Request.

²⁶ Rules 21(1)(a), 21(1)(c).



²⁷ Rule 21(1). *See also* ECCC Agreement, art. 12(2).

²⁸ 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.

V. CONCLUSION

20. Ao An correctly asserts that there must be a final determination on this matter, but entirely misapprehends what that final determination must be. Given the PTC's failure to attain a supermajority overturning the Indictment, the "fundamental and determinative" default position²⁹ enshrined in the ECCC's legal framework dictates that the PTC immediately forward the Case File (including the Indictment) to the Trial Chamber. In addition, archiving this case without a trial will effectively bury the hope of, and right to justice for the victims of these egregious crimes, and the Cambodian people, past and present.
21. For all the foregoing reasons, Ao An's Request must be dismissed.
22. To avoid further delay and ensure an expeditious trial as mandated by Article 33 new of the ECCC Law, the ICP renews her request that the PTC act in accordance with the ECCC Agreement, ECCC Law, Internal Rules and jurisprudence of this Court by immediately taking all necessary administrative actions to transfer the Case File (including the Indictment) to the Trial Chamber.

Respectfully submitted,

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

²⁹ **D359/24 & D360/33** PTC Closing Order Considerations, paras 106-107, 111-112, 116-117 (unanimous). *See also* Case 002-**D427** Closing Order, 15 September 2010, paras 1574, 1576 (wherein the two CIJs disagreed as to the disposition of the case, but to avoid a procedural stalemate together indicted the charged persons **sending the case to trial**); Case 002-**D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 274 (wherein the PTC held this approach was coherent with the default position that the "investigation shall proceed"); **D359/24 & D360/33** PTC Closing Order Considerations, paras 106 (wherein the PTC unanimously confirmed this holding), 114-115.