

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: Deadlock Continues in Ao An Case

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Ten-Year Deadlock Continues in Ao An Case

A complex 266 page, December 19, 2019 ruling by the judges of the Pre-Trial Chamber of the ECCC failed to resolve the question of whether Case 004/02, with charges of genocide and crimes against humanity against Ao An, will proceed to trial. The court failed to reach a binding decision on the core issue, which required a supermajority vote of 4 of 5 judges.¹ The Cambodian judges insist that the case be dismissed, and the international judges maintain that the case be transferred immediately for trial on the charges in the indictment. It remains unclear if or how the case will proceed. This absurd result follows a ten-year pattern of standoff between Cambodian and international judges about whether to pursue charges against Ao An and two additional accused: Meas Muth and Yim Tith.

Background

In November 2008, the ECCC's international prosecutor, Robert Petit, formally notified the court that he and his Cambodian counterpart, Chea Leang, disagreed about whether it was appropriate to submit two cases against five suspects (Cases 003 and 004) to the court's co-investigating judges for formal investigation of charges of crimes against humanity and genocide. Ao An, a regional deputy commander of the Khmer Rouge, was one of these suspects. The court's complicated structure includes a dispute resolution mechanism and a special Pre-Trial Chamber designed to resolve such disagreements, and avoid standoffs between either the two co-prosecutors or the two co-investigating judges about whether to proceed with an investigation.

The Agreement between the United Nations and the Government of Cambodia that established the ECCC² stipulates that the court can only prosecute "senior leaders and those most responsible" for Khmer Rouge crimes. In 2008, the international prosecutor believed that there were ample facts to find that Ao An and the other Case 003 and 004 accused qualified a "persons most responsible" for crimes under the jurisdiction of the ECCC. This position has been affirmed with respect to Ao An, as well as two additional accused in the cases, by the international co-prosecutor and the international judges of the Pre-Trial Chamber.

¹ Considerations on Appeals Against Closing Orders, 19 December 2019 at www.eccc.gov.kh/en/document/court/considerations-appeals-against-closing-orders. ("Considerations" of Pre-Trial Chamber). ("Ruling")

² 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 (Agreement), June 6, 2003, at www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecutio.

In contrast, the Cambodian prosecutor argued that Ao An, and the other Case 003 and 004 accused, did not meet the required threshold of “persons most responsible” that would allow the ECCC to have jurisdiction. Her position is that the only accused that qualify for prosecution by the ECCC are those tried by the court in its first two cases (Cases 001 - Duch; and 002 - Nuon Chea, now deceased, and Khieu Samphan). Versions of this argument have been repeated in lockstep by the Cambodian co-prosecutor, co-investigating judge and Cambodian judges of the Pre-Trial Chamber from 2008 up to the Pre-Trial Chamber decision issued on December 19, 2019.

This standoff reached a new height of legal absurdity when the two co-investigating judges issued separate and contradictory closing orders following the completion of a nine-year period of judicial investigation. Under the court’s rules, a “closing order” must be issued at the conclusion of the judicial investigation: the rules provide that it shall be *either* an indictment sending the case for trial or an order dismissing the case.³ Instead of a single closing order, the Cambodian judge issued a dismissal order and the international judge issued an indictment for genocide and crimes against humanity.

The Agreement establishing the court does not anticipate the unorthodox decision to issue contradictory closing orders. However, it was designed to avoid deadlock and ensure that cases could not be dismissed prior to reaching the Trial Chamber based on the decisions of Cambodian officials alone. This structure was developed to meet a concern of the United Nations when negotiating the Agreement. It worried that the government of Cambodia would attempt to interfere with the independence of the prosecutors and judges when determining who qualified as senior leaders or persons most responsible for crimes within the jurisdiction of the court.⁴

The 003 and 004 series of cases have been divisive since the day the international co-prosecutor announced his decision to pursue them. The government of Cambodia has been vocal that it does not wish the cases to proceed and the Cambodian officials on the court have taken every decision available to them to deliver that result. The court’s unique structure, however, has been effective in preventing cases from being dismissed over international officials’ objections, and has allowed the international co-investigating judge to complete a judicial investigation and to issue indictments against three of

³ ECCC Internal Rules (Rev.9), Rule 67, at www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf. (Internal Rules.)

⁴ Histories of the negotiations of the Agreement support the finding that concern on the part of the UN that the Cambodian Government would seek to interfere with judicial and prosecutorial decision, including who was indicted, in violation of international standards was the key motivation for the complex disagreement procedures and the establishment of an additional judicial chamber, the Pre-Trial Chamber, in the structure of the ECCC. See J. Ciorciari & A. Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, University of Michigan Press, 2014, pages 43-44, and Chapter 6, pages 167-201; and D. Scheffer, *Negotiating History and Analysis of ECCC Law*, Cambodia Tribunal Monitor, at www.cambodiatribunal.org/wp-content/uploads/2013/08/history_history-analysis-scheffer_english.pdf.

the accused. Simultaneous with the indictments, however, the Cambodian co-investigating judge issued orders dismissing each accused after finding them not subject to the court's jurisdiction.

This deadlock situation set the stage for claims by Ao An that he is being subject to unlawful, unfair court orders in violation of his fair trial rights, and for separate cross appeals by the co-prosecutors. The Pre-Trial Chamber judges issued, in a unanimous portion of the ruling, a scathing rebuke of the co-investigating judges for issuing competing orders instead of following established disagreement procedures designed to avoid such a result. Unfortunately, the chamber judges failed to reach a single opinion on the core merits of the case: whether Ao An was properly found to be "a person most responsible" and subject to the court's jurisdiction. Thus, the appeal intended to resolve the deadlock between the investigating judges has resulted in a deadlock among the Pre-Trial Chamber judges.

Claims against Ao An

Ao An was a Khmer Rouge deputy secretary of Democratic Kampuchea's Central Zone and secretary of that zone's Sector 41. In issuing his indictment at the conclusion of the investigation, the international co-investigating judge found that Ao An held positions of substantial responsibility that enabled him to make a significant contribution to grave crimes committed in these areas. He is alleged to have had authority over a string of security centers and work and execution sites where he and his subordinates exercised power over life and death. In exercising his authority, Ao An is alleged to have targeted specific groups, including Central Zone cadres, former officials of the Khmer Republic, '17 April people' (a term broadly denoting urban elites and educated persons – from the date when Phnom Penh fell to the Khmer Rouge), and the Cham and their families. The judge found Ao An exercised his authority so as to commit genocide against the Cham population and crimes against humanity including acts of torture, murder, enslavement, persecution, forced marriage and rape in the context of forced marriage.

The international judge concluded that Ao An is subject to the ECCC's personal jurisdiction as one of the persons "most responsible" for crimes committed during the Khmer Rouge period, based on his position in the regime hierarchy and the gravity of his crimes. He emphasized that "[Ao An] held an elevated position in the DK (Democratic Kampuchea) hierarchy which he used to destroy the Cham and kill at least tens of thousands of people in the Central Zone, and to cause severe harm and suffering to countless more, creating a nightmarish environment which one witness described as 'hell in the human world.'⁵

⁵ See ECCC Press Release, Co-Investigating Judges Issue Two Separate Closing Orders in Case Against Ao An Case No 004/2/07-09-2009-ECCC/OCIJ, 16 August 2018, at www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-ao-case-no-004207.

In contrast, the Cambodian co-investigating judge, who did not actively participate in the investigation, held that Ao An did not exercise sufficient authority to qualify as a “person most responsible” for Khmer Rouge crimes. He thus concluded that it was appropriate to dismiss the case against Ao An. This position mirrors that of the government of Cambodia, which has issued many statements demanding that the 003 and 004 cases be dismissed.

Views of the Pre-trial Chamber: Another stand-off

The simultaneous issuance of an indictment and a dismissal order by the co-investigating judges set up a direct conflict likely unprecedented in an atrocity tribunal anywhere, and one not anticipated or provided for in the ECCC’s rules. It resulted in a complex set of appeals to the Pre-Trial Chamber. The accused challenged the legality of being the subject of both an indictment and a dismissal order, and also appealed the substantive finding of the international judge that he was a “person most responsible” and should be committed for trial on charges of genocide and crimes against humanity. The Cambodian co-prosecutor likewise argued that the indictment against Ao An was invalid, insisting that no persons other than the accused in Case 001 and Case 002 were appropriate candidates for prosecution by the ECCC. The international prosecutor appealed the dismissal order, arguing that the indictment issued by the international investigating judge must be affirmed along with the order to send the charges against Ao An to the Trial Chamber.

The rules of the court mandate that any decision of the Pre-Trial Chamber requires the agreement of four of the five judges: a supermajority. When the chamber is unable to reach a supermajority on all issues it files a ruling that details any issues the judges do agree on and appends the separate opinions of the judges on the issues for which there is no supermajority vote. The Pre-Trial Chamber’s December 19, 2019 ruling details the procedural history of the case and includes the agreed positions of the judges on several issues that do not resolve the ultimate questions on appeal. The judges were unable to reach a supermajority consensus on the dispositive issue of whether the accused was a “person most responsible” and should be committed for trial per the indictment, or rather, was not subject to the jurisdiction of the court and should benefit from the dismissal of all charges. The Cambodian judges explain their opinion that the case should be dismissed, and the international judges published their opinion that the indictment should stand.

Joint Portion of the Ruling

The Pre-Trial Chamber judges agreed that the investigating judges committed a serious and blatant violation of the Agreement establishing the court by issuing separate and contradictory closing orders rather than following the disagreement procedure that was specifically designed to prevent such an untenable situation. The chamber was unsparing in its criticism, finding:

[B]y issuing split Closing Orders, the Co-Investigating Judges violated the ECCC legal framework, derogated from their highest duties and created an unprecedented legal predicament undermining the very foundations of their judicial office. (Citations omitted.)⁶

The judges jointly conclude their criticism as follows:

[T]he Pre-Trial Chamber stresses that the errors committed by the Co-Investigating Judges in this case undermine the very foundations of the hybrid system and proper functioning of the ECCC. Despite the crucial and sensitive nature of the matter at stake, the Co-Investigating Judges have allowed themselves to issue the split Closing Orders with remarkably minimal reasons to justify their actions, recalling simply one of their prior decisions. The Chamber finds it especially disturbing that the split Closing Orders were issued on the same day, in one language only, with an explicit declaration by the two Judges that they agreed on the unlawful issuance of separate and conflicting Closing Orders. The Chamber considers that the Co-Investigating Judges' malpractice has in this case jeopardized the whole legal system upheld by the Royal Government of Cambodia and the United Nations. It is astonishing to observe that the Judges were fully "aware of the problem" that the issuance of split Closing Orders would cause, notably on appeal. Yet, they nonetheless decided to shield their disagreements from the most effective dispute settlement mechanism available under the ECCC legal framework to ensure a way out of procedural stalemates. More than a blatant legal error, violating the most fundamental principles of the ECCC legal system, the Pre-Trial Chamber considers that the Co-Investigating Judges' unlawful actions may well amount to a denial of justice, especially since this Chamber is unable to exclude that the Co-Investigating Judges may have willfully intended to defeat the purpose of the default position in this case and deliberately sought to frustrate the authority of the Pre-Trial Chamber. (Citations omitted.)⁷

Despite this remarkable joint holding, the Cambodian and international judges on the chamber split on the impact of the co-investigating judges' actions and were unable to resolve the standoff created by the issuance of both an indictment and a dismissal order. However unfortunate, this result was predictable. From the first time the Pre-Trial Chamber addressed any of the 003 and 004 Cases in 2009, it has split. The Cambodian judges have voted that the cases should be dismissed and the international judges have found ample legal and factual bases for the cases to proceed.

⁶ Considerations of Pre-Trial Chamber, Paragraph 89.

⁷ Considerations of Pre-Trial Chamber, Paragraph 123.

Cambodian Judges' Separate Opinion: Uphold Dismissal Order and Reject Indictment

The Cambodian judges of the chamber wrote separately to express their view that the dismissal order of the Cambodian co-investigating judge must stand and the indictment be rejected. Their expressed reasoning includes the belief that the Agreement contemplates only the prosecution of senior leaders (which they define as the named members of the Khmer Rouge Standing Committee) and Duch (Case 001). They reject the argument that the co-prosecutors or the co-investigating judges hold discretion to evaluate the jurisdictional parameters of “senior leaders and those most responsible” to include other persons.

In addition, they find dismissal appropriate because:

Ao An’s participation in the commission of crimes was non-autonomous, inactive, non-creative, and indirect, and is far different from Duch’s active, direct and creative participation. Moreover, Ao An did not participate in making CPK policies.⁸

The Cambodian judges implicitly acknowledge the influence of political instruction in their position by stating in the first paragraph of their separate opinion that:

The Agreement, the ECCC Law, the Internal Rules and, *in particular, the various Press Releases*, provide irrefutable evidence that the Co-Prosecutors and the Co-Investigating Judges should have accepted: and they have the discretion to consider and to issue decisions reflecting reality. With the omission of this evidence, issuing a decision deviates from reality, which disables the ECCC to conclude the Cases in compliance with judicial proceedings. (Emphasis added)⁹

No citations or further description of the “Press Releases” is provided, but it is reasonable to assume that the judges refer to government press releases criticizing the pursuit of Cases 003 and 004 with charges against Ao An and others.

The Cambodian judges do not explain their conclusion that the dismissal order stands in spite of the chamber’s failure to achieve a supermajority decision.

⁸ Pre-Trial Chamber Considerations, Paragraph 280.

⁹ Pre-Trial Chamber Considerations, Paragraph 170.

International Judges' Separate Opinion: Uphold Indictment and Send to Trial Chamber

In the complicated set of appeals, the chamber's international judges reviewed a variety of intertwined claims. Their conclusions center on two main issues: First, what is the impact of the failure of the co-Investigating judges to follow the disagreement procedures on the validity of either the indictment or the dismissal order? Second, after finding that the indictment was validly issued from a procedural standpoint, was the international co-investigating judge's substantive conclusion that Ao An was a "person most responsible" for Khmer Rouge crimes an appropriate exercise of his discretion?

Impact of the Co-Investigating Judges' Failure to Follow Disagreement Procedures

The international judges analyze the impact of the co-investigating judges' decision to disregard the disagreement procedures, and the resulting anomaly of producing both an indictment and a dismissal order. They conclude that the dismissal order is *ultra vires* and void, but that the indictment is valid and must be proceed to the Trial Chamber.

The international judges detail the structure of the Agreement and internal rules with respect to resolving disagreements about whether a case should proceed. They describe a framework with clear default provisions mandating that an investigation proceed in the event of a disagreement between the co-investigating judges or the Pre-Trial Chamber judges. This "principle of continuation" applies to a disagreement about whether to issue an indictment:

In this specific situation where one of the Co-investigating Judges proposes to issue an indictment and the other Co-Investigating Judge disagrees, "the investigation shall proceed" means that the indictment be issued as proposed.¹⁰

The judges note that the disagreement settlement mechanism's goal is to prevent a deadlock derailing cases from moving to trial. The history of the negotiations between the UN and the Government of Cambodia reveal that the essential purpose of establishing the Pre-Trial Chamber was to ensure this result. The international judges characterize the co-investigating judges' refusal to use the procedure as an attempt to deliberately defeat an element of the ECCC Agreement designed as a critical protection of basic fair trial standards and judicial independence.

The international judges conclude that the Cambodian co-investigating judge's dismissal order is void because it violates the principle that disagreements

¹⁰ Pre-Trial Chamber Considerations, Paragraph 322.

about whether to issue an indictment or a dismissal must be resolved in favor of an indictment. There was clearly a disagreement between the investigating judges, and in spite of the fact that they declined to follow the appropriate procedure, the principle of continuation applies and defeats the dismissal order. In contrast, the indictment was issued consistent with the principle that the case proceeds to the Trial Chamber in the event of a disagreement. It is, therefore, valid even though the proper disagreement procedure was not followed.

The judges consider but reject Ao An's arguments that the existence of contradictory closing orders renders the case unlawful as a violation not only of the framework of the court, but of his fair trial rights. He claims it is an affront to the principle of legal certainty and the presumption of innocence, and that it is a mockery of justice. He argues that for the indictment to go ahead after completely inconsistent findings by the judges on the Pre-Trial Chamber would perpetuate the violation of basic rights begun by the co-investigating judges.

The international judges reason that, given what we know of the views of the co-investigating and Pre-Trial Chamber judges on the substantive issue of Ao An's case continuing, if the co-investigating judges had followed the correct disagreement procedure, this could only have resulted in issuance of an indictment for transfer to the Trial Chamber. Thus they conclude that the error of the co-investigating judges should not be a basis for defeating this result.

International judges uphold finding that Ao An is a "person most responsible" and subject to the jurisdiction of the ECCC

Finding that the indictment prevails procedurally, the international judges consider the challenge of Ao An and of the national co-prosecutor, who argue that Ao An is not a "person most responsible" for Khmer Rouge crimes and therefore not subject to the court's jurisdiction. The judges apply an abuse of discretion standard, noting that those "most responsible" is an open category whose membership is to be decided by the co-prosecutors and co-investigating judges based on the evidence, independent of any instructions.

The international judges provide a lengthy analysis of the international co-investigating judge's finding that Ao An is a "person most responsible" and evaluate in detail claims by Ao An that the finding is legally and factually flawed, so as to constitute an abuse of discretion. They conclude that, in issuing the indictment, the co-investigating judge did not commit fundamental errors or abuses in the exercise of his discretion.

The international judges also found that the international co-investigating judge erred in failing to properly consider the issuance of an arrest warrant for Ao An to accompany the indictment.

Where do we go from here?

The appeals to the Pre-Trial Chamber in this case started with the contradiction of an indictment and a dismissal order on the same charges. Because the chamber was unable to reach a consensus of four out of five votes to resolve the challenge, the lengthy appeal process ends with the same contradiction: the three Cambodian judges hold that the dismissal order prevails, and the two international judges hold that the indictment prevails.

At this point the co-investigating judges' failure to proceed through the disagreement mechanism directly (and perhaps, according to the Pre-Trial Chamber, intentionally) produces legal uncertainty, confusion, and greater unfairness to the accused. Had the disagreement procedures been followed, the Pre-Trial Chamber likely would have been considering *only* the indictment's validity. The prospect of a dismissal order would have been quashed by the "continuation principle" when the dispute over competing orders was initially evaluated. Thus, only the indictment would have been issued, and when the Pre-Trial Chamber was unable to reach a supermajority decision about its validity on appeal, the unambiguous rule that the case proceed to the Trial Chamber under those circumstances would prevail.

The international judges have a strong argument that given the chamber's inability to reach a supermajority decision on the indictment, the internal rules require that the default decision be that the Trial Chamber is seized of the case because that is what would likely have occurred had the disagreement procedure been followed.¹¹ However, it is clear that the Cambodian judges on the chamber do not concede this point.

It is not certain the Trial Chamber will even convene to consider the case. It may not consider that it is seized of the case in light of the Pre-Trial Chamber's contradictory views. Will the Cambodian judges consider the dismissal order definitive and refuse to even engage with the case? If the Trial Chamber does convene to consider the case, it is not clear what issues it will consider open: Does it evaluate, yet again, if the indictment or the dismissal order prevails? Can it reevaluate the claims of the accused that he is facing an increasingly unfair situation? If the Trial Chamber accepts that the international Pre-Trial judges are correct and that it is seized of the indictment only, will the first issue it has to consider be Ao An's renewed motion to dismiss on the ground that he is not a "person most responsible"? Will the Trial Chamber's Cambodian Judges follow the pattern of their colleagues on the Pre-Trial Chamber and vote to dismiss the case? At some point does the ECCC Supreme Court Chamber get involved?

The "principle of continuation" mandating that a case move forward in the event of the failure of the judges on the Pre-Trial Chamber to reach a

¹¹See Internal Rule 77 913) (b).

supermajority decision does not apply to the Trial Chamber. If the Trial Chamber can agree, with four out of five votes, to either move forward with a trial or dismiss the case, then the current standoff will end. But if no supermajority decision is reached the case is at yet another standoff. Dismissal is a likely result. The Agreement provides that in the event of the failure of a supermajority vote of 4 out of 5 Trial Chamber judges to *convict* an accused at trial, an acquittal is entered.¹² It is not clear if this provision would control what happens following a stand-off on a motion to dismiss for lack of jurisdiction before trial. It would seem useless and unfair, however, to proceed to trial if it is clear that at least two of the judges would vote to acquit based on lack of jurisdiction following a trial.

If the international judges on the Trial Chamber rule consistent with the international judges of the Pre-Trial Chamber to move forward with a trial, the future of the case will be in the hands of the Cambodian judges of the Trial Chamber. Will they follow their Cambodian colleagues at the prosecution, investigating judge and pre-trial level, who have uniformly held that the cases should be dismissed, or could they break ranks?

Strangely, the ruling makes no mention of civil parties' appeals to a variety of rulings by the international co-investigating judge on the admissibility of civil party claims.

Observations

After ten years of contentious wrangling about the course of the remaining 003 and 004 Cases, and amid credible claims of political interference to scuttle the cases, deadlock between international and Cambodian judges continues to be the characteristic trait. Beginning with the co-prosecutors, moving through the co-investigating judges and to the Pre-Trial Chamber, the pattern has been unbroken. The international players have attempted to move the cases forward substantively, finding that the accused qualify for prosecution as "persons most responsible," and their Cambodian counterparts insist the accused do not meet the criteria. This pattern supports a conclusion that the Cambodian officials are following the express or implied instructions of a government with complete control over its judiciary.

It is clear from the Pre-Trial Chamber ruling that the co-investigating judges' refusal to follow the disagreement mechanism designed specifically to lend certainty to proceedings in the face of dispute about whether to issue and indictment is largely responsible for the state of uncertainty that currently exists in this case. The same can be said for the cases against Meas Muth and Yim Tith, which are in similar procedural positions. Whatever strategic reason they had for creating this state of confusion, and the obvious fair trial issues it creates, is not disclosed in their public decisions.

¹² Internal Rules, Rule 98.

In the end, however, it is not clear whether the co-investigating judges' procedural failures will change the case's outcome. Even if the dismissal order had not been issued and the indictment alone transferred to the Trial Chamber following the disagreement process, it would remain up to the Trial Chamber judges to determine whether to validate jurisdiction over the accused and proceed to trial. If the Cambodian judges on the Trial chamber determine to dismiss the case, there may be no more presumptions or default rules to prevent that result.

The recent Pre-Trial Chamber decision ends another long and expensive step that follows the same pattern that has existed in the case since it was initiated. It fails to provide any legal certainty and highlights the inadequacy of the court's design to resolve key issues. Despite some fascinating discussion about the intricacies of the ECCC design, the decision may amount to a futile effort to provide a real sense that justice is being done at the ECCC.