

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: Competing Orders in Ao An Investigation

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In a long-awaited development, on August 16, 2018 the two Co-Investigating Judges issued Closing Orders in Case 004/02, relating to charges against 85-year-old Ao An. The case has been under investigation since September 2009. The Judges issued two contradictory orders—with the Cambodian Co-Investigating Judge You Bunleng seeking to dismiss the charges and International Judge Michael Bohlander seeking to send an indictment to the Trial Chamber on charges of genocide and crimes against humanity.

Under the ECCC rules, the Co-Investigating judges issue a closing order at the conclusion of a judicial investigation, and this contains either an indictment to be presented to the Trial Chamber for a public trial or a dismissal of charges. They may dismiss charges because evidence is insufficient, or because they find that the court lacks jurisdiction. The court's internal rules do not expressly address how the court is to deal with opposing closing orders, and it is now uncertain how or whether the case against Ao An will proceed.

To support their competing decisions, the each judge's closing orders include detailed factual analysis of Ao An's relationship to Khmer Rouge crimes. Regardless of how the quandary of competing closing orders is resolved, the publication of extensive factual analysis of the investigation against Ao An is of significant value—to Cambodians today, researchers and historians, and future generations. Years of great effort, stories of numerous victims and witnesses, review of thousands of documents, and in-depth legal analysis would have been lost and wasted if the case had disappeared prior to the issuance of detailed public closing orders. Given Ao An's role as a Khmer Rouge official operating at a level of leadership below that of the most senior central command, the closing orders provide important insight into the contribution of mid-level actors in Khmer Rouge atrocities.



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224 West 57th Street,
New York, New York, 10019
P. +1 212-548-0600
opensocietyfoundations.org

International Co-Investigating Judge's Closing Order is Indicts Ao An on Charges of Genocide and Crimes against Humanity

In a 415-page factually detailed ruling, the International Co-Investigating Judge issued an indictment against Ao An. In late 1976 or early 1977, Pol Pot and Tal Mok sent An to the Central Zone of Democratic Kampuchea, where he held positions as Deputy Secretary of the Central Zone, Member of the Central Zone Committee, and Secretary of Sector 41 of the Central Zone. The summary of the indictment alleges that:

During this time, Ao An, together with Central Zone Secretary Ke Pauk and other cadres of the Communist Party of Kampuchea (CPK), carried out a joint criminal enterprise (JCE) with the common purpose of implementing four Khmer Rouge policies in the Central Zone:

- (a) The establishment and operation of cooperatives and worksites;
- (b) The re-education of 'bad elements' and killing of 'enemies' both inside and outside the CPK ranks;
- (c) The targeting of specific groups, including Central Zone CPK 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), people from the East Zone, the Cham, and their families; and
- (d) The regulation of marriage through, inter alia, the forced marriage of the inhabitants of the Central Zone.

Further, the International Judge states that Ao An implemented these policies by committing 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; all of these crimes are punishable under the ECCC Law and the Penal Code of Cambodia. He concludes 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 Ao An's position in the regime hierarchy and the gravity of his crimes:

[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'. Ao An should thus stand trial for these grave crimes."¹

¹ See Press Release announcing the issuance two separate closing orders in Case 004/02 by the Co-Investigating Judges, and containing a summary of each closing order at www.eccc.gov.kh/sites/default/files/media/ECCC%20PRESS%20RELEASE%20OCIJ%20004-2%20ENG.pdf. The full closing order of the Cambodian Co-Investigating Judges was filed in Khmer and has not yet been translated into English (available at <https://eccc.gov.kh/en/node/40433>). The full closing order of the International Co-Investigating Judge, consisting of an Indictment, is available in English only and is at <https://eccc.gov.kh/en/document/court/closing-order-indictment>.

Cambodian Co-Investigating Judge's Closing Order Dismisses Charges on Grounds Ao An is not a "Person Most Responsible"

The Cambodian Co-Investigating Judge's closing order, while also lengthy and apparently detailed, is only available in Khmer. However, a summary provided by the Judge in English specifies his reasons for concluding that the charges against Ao An should be dismissed.

The summary notes that the ECCC is a court of limited jurisdiction and its founding law confers authority on the court to prosecute only "senior leaders and persons most responsible" for crimes committed during the Khmer Rouge Regime. The judge finds that Ao An was neither a senior leader nor a person most responsible, and therefore not subject to prosecution by the ECCC. The summary gives two bases for dismissing the charges. First, it states that Ao An's participation in criminal actions of the Khmer Rouge was "not direct and enough to confirm that Ao An is most responsible person falling within the personal jurisdiction." The judge asserts there is no evidence that Ao An had any plan, or initiated or instigated activities of the Khmer Rouge beyond what was normal of other sector secretaries. This conclusion is inconsistent with the International Co-Investigating Judges detailing of evidence of Ao An's exercise of authority.

We cannot fairly evaluate the competing claims until the Cambodian Judge's full order is available in English.

Second, the judge concludes that Ao An's participation in atrocity crimes committed by the Khmer Rouge was under orders from the senior leadership and that others who opposed such orders were killed. The Judge concludes that in the context of the Khmer Rouge structural hierarchy, "no one even senior leader dares to oppose the collective policies of the party. Those opposing were regarded as enemies subjecting [them] to re-education or arrest and killing."

Again, it is perhaps unfair to criticize this conclusion given that we are unable to review the entire order in English. On its face, however, it seems to ignore the principle of international criminal law holding that following orders, even if failure to do so results in threats of violence or death, is not a defense to atrocity crimes such as those committed by the Khmer Rouge.² Under the disclosed reasoning of the Cambodian Judge, no person beyond the Khmer Rouge's top leadership could be subject to the ECCC's jurisdiction. This would render meaningless the concept of prosecuting "persons most responsible" in addition to "senior leaders" as clearly contemplated in the ECCC Law.

² See Principle IV, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950 at http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf. ("The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.") Likewise, duress is not a full defense to international crimes; see *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

What Happens to charges Against Ao An with Competing and Contradictory Closing Orders?

Following the issuance of inconsistent closing orders, the question of which one prevails goes to the Pre-Trial Chamber. It can do so either on an appeal filed by Ao An, or as part of a process provided in the court's rules for resolving disagreements between the two Co-Investigating Judges. The Pre-Trial Chamber, consisting of three Cambodian judges and two International judges, is deadlocked unless it can obtain a supermajority vote--the agreement of at least four judges--for a decision. The history of appeals in this and other cases currently under investigation by the Co-Investigating Judges indicates such an agreement is unlikely. There is a nearly unbroken pattern of non-decisions (failure to achieve a supermajority vote on relevant issues) by the Pre-Trial Chamber when asked to address questions related to whether cases should move forward. The judges have invariably split along Cambodian/International lines thus preventing the supermajority necessary to reach a binding decision.

The International Co-Investigating Judge addressed this conundrum when considering whether to order Ao An be held in custody pending any trial:

Given that, on the one hand, there are, for the first time, opposing closing orders and that it is therefore unclear under (the Court's Internal Rules Regarding what happens when the Pre Trial Chamber cannot reach a supermajority decision on a question before it) whether the indictment will stand, should there be no super-majority upon appeal in the Pre-Trial Chamber, and, on the other hand, that Ao An has known for years that he is under investigation but made no attempts to evade, or tamper with, the ECCC's jurisdiction, it was not appropriate to consider ordering his detention pending trial.

The appeals process through the Pre-Trial Chamber is likely to take up to a year. If a deadlock appears at that point, the question about how to proceed could play out in a number of ways. Judges of the Pre-Trial or the Trial Chamber might interpret the court's rules as requiring them to respect the dismissal order rather than the indictment. Or they might decide the opposite and rule that the court rules and founding documents favor an indictment going forward in the face of the conflicting closing orders. The court's rules do not expressly resolve the dilemma. However, the rules and founding documents favor moving forward with investigating and prosecuting cases on the merits in the face of a disagreement between Cambodian and International officials. This could mean that there is a strong logical argument

that the International Co-Investigating Judge's indictment should advance the case to trial absent a binding supermajority vote of the Pre-Trial chamber or the Trial Chamber to the contrary.³

There is a significant possibility that the Co-Investigating Judges will also issue competing closing orders at the conclusion of the investigations in Case 003, with charges against Meas Muth, and Case 004, with charges against Yim Tith. There have been indications that the current government of Cambodia has politically interfered in the court's proceedings to ensure that none of these three cases go to trial.⁴ It is thus critical to the integrity and reputation of the court that resolution of the dilemma of competing Closing Orders be resolved with total transparency and scrupulous respect for the ECCC's governing legal principles. Anything short of this would only reinforce concerns that politics, not the law, are driving this court's outcomes.

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³ See ECCC Internal Rules, Rules 13(5), 14(7), 71(c), 72(d), 77(13), and (new) Articles 20 and 23 of ECCC Law. ("If there is no majority as required for a decision, the prosecution [or investigation] shall proceed."), and David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia," 2008, http://www.cambodiatribunal.org/assets/pdf/court-filings/Cambodia_Scheffer_Abridged_Chapter_July_2007.pdf, p. 14: "The only way the prosecution or investigation is halted is if the Pre-Trial Chamber decides by supermajority vote that it should end. The rationale behind this procedure is that it prevents one co-investigating judge 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."

⁴ See Justice Initiative Report, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update," <https://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20110614.pdf>, and Justice Initiative Report, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015," <https://www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf>.