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

FILING DETAILS

Case No: 004/2/07-09-2009-ECCC-OCIJ/PTC 60 **Party Filing:** International Co-Prosecutor

Filed to: The Pre-Trial Chamber **Original Language:** English

Date of Document: 27 February 2019

CLASSIFICATION

Classification of the document suggested by the filing party: CONFIDENTIAL

Classification by PTC: **សម្ងាត់/Confidential**

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO THE NATIONAL CO-PROSECUTOR'S APPEAL OF THE CASE 004/2 INDICTMENT

Filed by:
Nicholas KOUMJIAN,
International Co-Prosecutor

Distributed to:
CHEA Leang,
National Co-Prosecutor

Distributed to:
Pre-Trial Chamber
Judge PRAK Kimsan
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

All Civil Party Lawyers in Case 004/2

Co-Lawyers for AO An
MOM Luch
Richard ROGERS
Göran SLUITER

I. INTRODUCTION

1. On 16 August 2018, the International Co-Investigating Judge ("ICIJ") issued a closing order ("Indictment") indicting Ao An for genocide, crimes against humanity, and violations of the 1956 Cambodian Penal Code, and committing him for trial.[1] On the same day, the National Co-Investigating Judge ("NCIJ") issued a closing order ("Dismissal Order") dismissing all charges against Ao An on the grounds that he does not fall within the personal jurisdiction of the ECCC.[2] The National Co-Prosecutor ("NCP") appealed the Indictment ("NCP Appeal"), maintaining that the ECCC does not have personal jurisdiction over Ao An because he is not one of those most responsible for crimes committed during the Democratic Kampuchea ("DK") regime.[3] The International Co-Prosecutor ("ICP") now responds.

II. PROCEDURAL HISTORY AND APPLICABLE LAW

2. The ICP incorporates by reference the procedural history set out in Annex I to his appeal of the Dismissal Order.[4]

3. In addition, on 22 January 2019, the Pre-Trial Chamber ("PTC") decided to extend the time and page and limits for the parties' responses to the appeals of both closing orders, instructing them to file their 50-page responses within 30 days of the notification of the translation for the appeal to which they are responding.[5] The English translation of the NCP Appeal was notified on 28 January 2019,[6] making this response due on 27 February 2019.

4. The applicable law is set out in the relevant sections below.

---

1 **D360** Closing Order (Indictment), 16 August 2018 ("Indictment"), EN 01580615-21.
2 **D359** Order Dismissing the Case Against Ao An, 16 August 2018 ("Dismissal Order"), paras 554-555.
3 **D360/8/1** National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/02, 14 December 2018 ("NCP Appeal").
4 **D359/3/1.2** International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Ao An, Annex I: Procedural History, 20 December 2018.
5 **D360/5/3** Decision on Requests for Extension of Time and Page Limits for Responses and Replies Relating to the Appeals Against the Closing Orders in Case 004/2, 22 January 2019.
6 *See* Email from the Case File Officer, 28 January 2019, 11:32 a.m.

III. SUBMISSIONS

5. The International Co-Prosecutor respectfully submits that the NCP Appeal (i) fails to articulate a discernible factual error in the Indictment; (ii) disregards the expressed intent of both the Royal Government of Cambodia ("RGC") and the United Nations ("UN") in concluding the ECCC Agreement; (iii) fails to demonstrate that the RGC has the power to unilaterally restrict personal jurisdiction without formally amending the ECCC Agreement or ECCC Law; and (iv) unpersuasively claims that Cases 001 and 002 constitute sufficient justice for the people of Cambodia.

A. THE NCP APPEAL DOES NOT DEMONSTRATE ANY FACTUAL ERRORS

6. As an Appellant alleging factual errors, the NCP has the burden of demonstrating that no reasonable trier of fact could have made the challenged findings.[7] However, the NCP Appeal does not show that any factual findings in the Indictment are unreasonable; rather, it simply expresses a different view of the facts without directly addressing (or even referring to) any of the ICIJ's factual findings.[8] This approach fails to discharge the NCP's burden on appeal. Accordingly, the factual portions of the NCP Appeal should be dismissed.

7. Additionally, the factual assertions in the NCP Appeal are not supported by the evidence when the Case 004/2 investigation is considered as a whole. The ICP has addressed most of these factual misstatements in his appeal of the NCIJ's Dismissal Order.[9]

---

7 *See, e.g.* Case 002-**D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 113; *Prosecutor v. Haradinaj, et al.*, IT-04-84-A, Judgement, Appeals Chamber, 19 July 2010, para. 12; *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, Appeals Chamber, 17 March 2009, para. 14.

8 **D360/8/1** NCP Appeal, paras 68-83.

9 **D359/3/1** International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Ao An (D359), 20 December 2018 ("ICP Dismissal Order Appeal"). For example: (i) the NCP Appeal's contention that starvation and disease were the predominant causes of death during the time that Ao An was in the Central Zone (para. 73) is addressed at paragraphs 83-84 of the ICP Dismissal Order Appeal; (ii) the NCP Appeal's suggestion that the purge of incumbent Central Zone cadres was largely complete prior to the arrival of the Southwest Zone cadres (para. 74) is dealt with in paragraphs 85-86 of the ICP Dismissal Order Appeal; (iii) the NCP Appeal's assertion that Ao An was Sector 41 Secretary for only "about one year" (para. 75) is discussed at paragraphs 73-78 of the ICP Dismissal Order Appeal; and (iv) the NCP Appeal's suggestion that Ao An was subject to unavoidable coercive circumstances that left him with no choice but to commit crimes (para. 83) is addressed at paragraphs 32-41 of the ICP Dismissal Order Appeal.

B. THE RGC AND THE UN BOTH INTENDED THAT "THOSE WHO WERE MOST RESPONSIBLE" BE AN OPEN CATEGORY WHOSE MEMBERSHIP WOULD BE JUDICIALLY DETERMINED

8. The NCP correctly notes that the ECCC's personal jurisdiction was established under the agreement between the RGC and the UN ("ECCC Agreement") and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia ("ECCC Law").[10] Both provide that jurisdiction is limited to senior leaders of Democratic Kampuchea ("DK") and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia.[11] However, the NCP Appeal wrongly asserts that the RGC's "idea for the ECCC Agreement" was that "those who were most responsible" only referred to S-21 Security Centre Chairman Kaing Guek Eav *alias* Duch, and therefore, pursuing a case against Ao An would improperly expand the scope of the Court's personal jurisdiction.[12]

9. Such an interpretation is not supported by the statements of RGC officials at the time of the ECCC Agreement negotiations and passage of the ECCC Law. For example, Prime Minister Hun Sen publicly promised that the RGC would not interfere in any way with the ECCC, including in the determination of how many people should be prosecuted. In March 1999, he told the UN Secretary-General:

> The Royal Government of Cambodia does not have any power to impose anything on the competent tribunal. [...] The issue of whether to try Ta Mok alone or any other Khmer Rouge leaders depends entirely on the competence of the tribunal. The Royal Government of Cambodia will not exert any influence on or interfere, in any form, in the normal proceedings of the judiciary, which will enjoy complete independence from the executive and legislative powers.[13]

---

10 **D360/8/1** NCP Appeal, para. 85; 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 ("ECCC Agreement"); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), ("ECCC Law").

11 ECCC Agreement, art. 1; ECCC Law, art. 1.

12 **D360/8/1** NCP Appeal, paras 91, 96.

13 Letter dated 24 March 1999 from the Prime Minister of Cambodia to the Secretary-General, UN Doc. A/53/875, S/1999/324, 24 March 1999, paras 2-3. *Note* that in para. 4, Hun Sen requested that the letter be circulated as a General Assembly document.

10. One month later, in an April 1999 meeting with U.S. Senator John Kerry, who was involved in the negotiations, Hun Sen affirmed to Senator Kerry that:

> The indictment and prosecution of other Khmer Rouge leaders are the sole competence of the court. The Royal Government is not entitled to give orders to the judicial branch to do this or that.[14]

11. The NCP Appeal correctly states that the issue of the number of those to be brought to trial was "hotly debated during the National Assembly sessions before passing the ECCC Draft Law", but fails to provide details of the discussion about what the RGC meant by "most responsible".[15] The transcript of that October 2004 debate memorialises this discussion, and the ICP submits that the representations made to the National Assembly by Deputy Prime Minister Sok An, who headed negotiations for the RGC, are the best evidence of the intent of the Cambodian government at the time the ECCC Agreement was made. The transcript shows that several government lawmakers asked for clarification as to what the drafters meant by "those most responsible":

> H.E. Ly Thuch: "[O]ur people and civil society want to ask H.E. to make it clear that who are the senior leaders and those most responsible? Do they include also chairmen of units of organization?"[16]

> H.E. Keo Remy: "Who are the senior leaders? [...] Will the zone chiefs be prosecuted? Or [is] this law only [being] made to try 4 or 5 leaders. Who else will be prosecuted? It is unfair if we try only 3 or 4 people."[17]

> H.E. Eng Chhay Eang: "I am also not clear about *those most responsible*. For how much will those people have to be responsible? [...] I want the representative of the government to clarify for how much greatest responsibility those people must hold. [...] I would like

---

14 Statement made on 18 April 1999 by the Cabinet of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, UN Doc. A/53/916, 19 April 1999. Additionally, "[u]pon receiving these assurances from Samdech Prime Minister Hun Sen, Senator John Kerrry welcomed the positive position of the Cambodian Prime Minister." *See also* Kyodo News International, *Hun Sen regrets stating number of K. Rouge leaders to be tried*, 7 January 2000 [in an interview with Japanese media: "Cambodian Prime Minister Hun Sen expressed regret Friday at having stated 'four to five' Khmer Rouge leaders will be put on trial [...]. 'I should not comment on or say anything that is within the bounds of the judiciary,' he said. [...] Hun Sen said anyone who specifies the number of leaders to be tried 'is wrong, and that includes U.N. legal experts who mentioned 20 or 30 people.' The prime minister said that by giving an exact number of the Khmer Rouge leaders to be tried, 'We abuse the court of law.'"].

15 **D360/8/1** NCP Appeal, para. 91.

16 **D359/3/1.1.45** Transcript translated by DC-Cam of the First Session of the Third Term of Cambodian National Assembly, 4-5 October 2004 ("National Assembly Transcript"), EN 01598760.

17 **D359/3/1.1.45** National Assembly Transcript, EN 01598761.

> to remind people not to be vague. If we emphasize only on the highest class, we meant Pol Pot, who died already."[18]

12. Sok An responded:

> If we ask the question 'who shall be indicted?,' neither the United Nations nor the Task Force of the Royal Government of Cambodia are able to give a response. Because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: *senior leaders* and *those most responsible*. Considering *senior leaders*, we refer to no more than 10 people, but we don't clearly state that they are the members of the Standing Committee. This is the task of the Co-Prosecutors to decide who are the senior leaders. [...] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That's why we use the term *those most responsible*. <u>There is no specific amount of people in the second group to be indicted</u>.[19]

13. The UN shared the same understanding. Early in the process in 1999, the Group of Experts assigned by the Secretary-General to explore options that would best bring about justice stated:

> [T]he Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. <u>We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation</u>. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30.[20]

14. These recommendations formed the basis for the UN's negotiating position at the time. David Scheffer recalled in an article published in 2011 that UN negotiator Ralph Zacklin

---

18 **D359/3/1.1.45** National Assembly Transcript, EN 01598762.

19 **D359/3/1.1.45** National Assembly Transcript, EN 01598763-64 (emphasis added). For completeness, the page identifying Sok An as the speaker of this quote is annexed to this filing as Authority 20, along with the title page and two pages containing the quote (pp. 1, 29-31). The page identifying Sok An as the speaker of the quote was not included in the **D359/3/1.1.45** transcript excerpt.

20 Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850, S/1999/231, 16 March 1999 ("UN Group of Experts Report"), para. 110 (emphasis added).

visited Phnom Penh in late August 1999 and left with the impression that Cambodian authorities only wanted to prosecute Ta Mok and Duch, but the RGC's position changed as negotiations progressed through the rest of 1999 and 2000.[21] The article details Scheffer's own involvement in the negotiations, particularly relating to the considerations regarding Duch and the "most responsible" category.[22] He wrote: "we were only interested in the surviving senior leaders who demonstrated significant responsibility *as well as other top functionaries, like Duch*, who had such instrumental roles in the atrocities."[23] Clearly, the UN understanding was that the category would not be limited only to Duch.

15. By March 2000, the Cambodian government had proposed the wording "those responsible", which broadened the category beyond what the UN had intended, and UN Secretary-General Kofi Annan and UN Legal Counsel Hans Corell both expressed concern to the RGC that the group was now too large.[24] On 2 January 2001, the Cambodian National Assembly adopted the ECCC Law with the wording "those who were most responsible".[25] Notably, Scheffer recalled:

> [...] having been part of the negotiations for years, I know of no concession by U.N. negotiators to interpret the personal jurisdiction language so as to limit the suspect pool to only five specific individuals.[26]

16. In sum, the ECCC negotiating history shows that the intent of both the RGC and the UN at the time of the ECCC Agreement was that "those who were most responsible" was an open category whose membership would only be determined by the Co-Prosecutors and Judges of the ECCC based on the totality of the evidence and acting independently of any instructions.

---

21 Scheffer, D.J., "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 22 May 2011 ("Scheffer article"), p. 3.
22 Scheffer article, particularly pp. 3-5.
23 Scheffer article, p. 5 (emphasis removed and added).
24 Scheffer article, pp. 5-8.
25 Scheffer article, p. 8.
26 Scheffer article, p. 10.

C. NEITHER PARTY TO THE ECCC AGREEMENT CAN NOW UNILATERALLY CHANGE THE SCOPE OF PERSONAL JURISDICTION

17. The NCP Appeal argues that "founders of international tribunals may have an influence on the scope of the personal jurisidiction and judicial affairs without prejudice to impartiality and independence of tribunals" and that "[f]or the restriction of the ECCC personal jurisdiction, the RGC is playing a role as the UN Security Council did with the ICTY, ICTR and SCSL."[27] Based on this, the NCP Appeal "urges the ICIJ and the Chamber to act in line with the RGC determination and the spirit of the ECCC Law"[28] on personal jurisdiction.

18. The NCP Appeal bases this argument on Security Council Resolutions 1503 and 1534, which were adopted approximately 10 years after the founding of the ICTY and ICTR and related to the completion plans of the two tribunals. These resolutions directed the ICTY and ICTR to focus their efforts on "the most senior leaders suspected of being most responsible for crimes" and refer other cases to national jurisdictions in order to achieve the goals in the tribunals' completion plans.[29] From this, the NCP Appeal concludes that "[t]he RGC, a founder of the ECCC Agreement, may have an influence on the functioning of the ECCC and the termination of its mandate" and that "[a] method acceptable for terminating the ECCC mandate is a restriction on the scope of personal jurisdiction."[30]

19. This is an inapt analogy. The ICTY and ICTR were originally established by Security Council resolutions,[31] and in adopting Resolutions 1503 and 1534 relating to the completion plans, the Security Council went through precisely the same process, with all of the same procedural safeguards, as it had when it initially set up the *ad hoc* tribunals. All of the members of the Security Council had the right to participate in the debate on Resolutions 1503 and 1534 and to be heard on the merits of changing the tribunals' case selection strategy. Every member of the Security Council then had the right to vote on

---

27 **D360/8/1** NCP Appeal, para. 90.
28 **D360/8/1** NCP Appeal, para. 90.
29 **D360/8/1** NCP Appeal, para. 87; Security Council Resolution 1503, 28 August 2003 ("Resolution 1503"), S/RES/1503 (2003), pp. 1-2; Security Council Resolution 1534, 26 March 2004 ("Resolution 1534"), S/RES/1534 (2004), paras 4-5.
30 **D360/8/1** NCP Appeal, para. 86.
31 Security Council Resolution 827, 25 May 1993, S/RES/827 (1993) [establishing the ICTY]; Security Council Resolution 955, 8 November 1994, S/RES/955 (1994) [establishing the ICTR].

the proposed resolutions before they were adopted. Clearly, if a single member of the Security Council had expressed a view that the *ad hoc* tribunals should change their case selection strategy, to have any effect, it would have had to first go through the process of debate and a vote to adopt a formal resolution.

20. In the case of the ECCC, the proper analogy to the Security Council resolutions establishing the *ad hoc* tribunals is the ECCC Agreement, which was approved by both the UN and the RGC following negotiations in which the parties were equal participants. The ECCC Agreement provides that "[i]n case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties."[32] This provision makes it clear that any change in policy regarding matters addressed by the ECCC Agreement (which includes personal jurisdiction) must be approved by *both* parties following a discussion in which *both* parties participate. To date, neither the RGC nor the UN have sought to amend the provision regarding the personal jurisdiction of the ECCC.

21. Recognising the UN's right to participate in changes to the policy on personal jurisdiction in no way diminishes Cambodia's sovereignty: all states have the power to voluntarily enter into binding agreements, and, having done so, every state from the largest to the smallest is obligated to follow such agreements unless and until they are amended or the state formally withdraws. Having ratified the ECCC Agreement, both sides are bound by its terms, and neither side can modify the meaning of those terms by unilateral policy declarations made after its adoption.[33] If the RGC no longer wishes to entrust the ECCC with the responsibility of bringing to trial those most responsible for crimes committed during the DK regime, the Government could seek to withdraw from the Agreement[34] or amend the ECCC Law with the consent of the UN. No effort has been made to do either. Accordingly, the scope of personal jurisdiction set out in the ECCC Agreement and ECCC Law are the only sources of law that the PTC may consider.

---

32 ECCC Agreement, art. 2(3).

33 It is presumably obvious that if a UN official were to state that the term "most responsible" included, for example, any Khmer Rouge cadre of any level who had killed more than 25 people, this would not be a persuasive basis for arguing that that was the proper definition of the term.

34 Vienna Convention on the Law of Treaties, 23 May 1969, arts 54, 56.

22. Unlike the RGC's "influence on the functioning of the ECCC",[35] Resolutions 1503 and 1534 did not purport to have any effect on whether a given case was prosecuted; rather, they affected only the court in which a particular case was tried. Resolution 1503 instructed the *ad hoc* tribunals to focus on cases against "the most senior leaders suspected of being most responsible", but other cases were not dismissed—rather, they were to be "transferr[ed] […] to competent national jurisdictions."[36] Indeed, the Security Council emphasised that the adoption of Resolution 1503 was not intended to reduce the number of people to be investigated and tried for mass atrocity crimes: the Resolution explicitly stated that the tribunals' completion plans "in no way alter the obligation of Rwanda and the countries of the former Yugoslavia to investigate those accused whose cases would not be tried by the ICTR or ICTY and take appropriate action with respect to indictment and prosecution".[37] Resolutions 1503 and 1534 did not promote impunity for crimes within the jurisdiction of the *ad hoc* tribunals; rather, they simply divided the task of investigation and prosecution between the *ad hoc* tribunals and national courts.

23. In addition, the Security Council respected judicial independence by never expressing any views on the appropriate disposition of any particular case at the ICTY or ICTR. While the Council *did* set out the criterion of "the most senior leaders suspected of being most responsible for crimes" as the test for which cases should be retained, it never expressed any view as to whether any particular case met that test. The application of the test was appropriately left to the independent discretion of the ICTY's and ICTR's judges.

24. The ECCC Agreement and ECCC Law both require that ECCC judges be free to undertake the same exercise of independent discretion. Article 10 *new* of the ECCC Law provides, in part, that "Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source." The prohibition on judges accepting instructions from governments or any outside source also appears in Article 3(3) of the ECCC Agreement.

---

35 **D360/8/1** NCP Appeal, para. 86.
36 Resolution 1503, pp. 1-2.
37 Resolution 1503, p. 2.

25. The requirement for an independent judiciary is also reflected in multiple human rights instruments and statements of best practices and minimum standards, including the Beijing Statement of Principles of the Independence of the Judiciary promulgated by the Law Association for Asia and the Pacific,[38] the New Delhi Code of Minimum Standards of Judicial Independence adopted by the International Bar Association,[39] and the Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly.[40] These principles require that "The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole."[41]

26. A fundamental principle of the Rule of Law is that while the legislature or executive is responsible for *making the law* through legislation, executive acts, and treaties, it is solely the judiciary that decides *how to apply the law* to individual cases. In a system governed by the Rule of Law, judicial independence is respected. Judges must make their rulings based on the law, the evidence, and their own judgement and conscience without taking instructions from governments or any outside sources.

D. AN INDEPENDENT JUDICIAL RESOLUTION OF CASES 003, 004 AND 004/2 WILL PROMOTE BOTH JUSTICE AND RECONCILIATION

27. The NCP Appeal asserts that the Preamble of the ECCC Agreement requires "striking a balance between 'justice' and 'national reconciliation'", avers that Cases 001 and 002 have already brought justice to the victims, and implies that the continuation of proceedings against Ao An would undermine national reconciliation.[42] However, the NCP Appeal does not provide any evidence that bringing Ao An to account for the very serious crimes with which he is charged would in any way hinder national reconciliation. On the contrary, it is clear that making Ao An answer at trial to the compelling evidence of his role in genocide and crimes that affected tens of thousands of Cambodians would

38 Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, The Law Association for Asia and the Pacific, 28 August 1997, arts 3(a), 4-5.
39 New Delhi Code of Minimum Standards of Judicial Independence, International Bar Association, 22 October 1982 ("New Delhi Code"), art. 16.
40 Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras 1-2, 4.
41 New Delhi Code, art. 16.
42 **D360/8/1** NCP Appeal, paras 94-96.

help achieve some measure of justice for additional victims, thus addressing the Preamble's concerns.

28. First, it is important to note that nothing in the Preamble of the ECCC Agreement indicates that it is intended as part of the test for personal jurisdiction. Concerns about national reconciliation were addressed by restricting the scope of personal jurisdiction to senior leaders and those most responsible—a small group relative to the whole of the Khmer Rouge. As the UN Group of Experts on Cambodia stated in their report to the Secretary-General in 1999, "Accountability for the past and national reconciliation for the future are thus not innate opposites or even competing goals. [...] if justice is brought about with sensitivity to a country's own situation, accountability and national reconciliation are, in fact, complementary, even inseparable."[43]

29. More importantly, there is simply no indication whatsoever that an independent judicial resolution of Cases 004/2, 004, and 003 on the merits—whatever that resolution might be—would threaten the peace and security of Cambodia. As the ICP has previously observed, the resolutions of Cases 001 and 002 with convictions and life sentences have not negatively affected national reconciliation or peace; to the contrary, the convictions were widely lauded both within and outside of Cambodia and they appear to have *promoted* reconciliation.[44] These cases involved accused both more junior than Ao An (Duch) and those far above him in the CPK hierarchy (Nuon Chea and Khieu Samphan). In addition, there have been no negative public reactions to the announcements that Ao An and Meas Muth have been indicted or that Yim Tith is under judicial investigation[45] and therefore no reason to believe that sending Ao An to trial would threaten national reconciliation. Moreover, Cambodia has now enjoyed over two decades of peace and stability.[46] There are no armed groups exercising power over Cambodian territory. The Khmer Rouge has ceased to exist as a political or military organisation, former cadres

43 UN Group of Experts Report, para. 3.
44 Case 004-**D378/2** International Co-Prosecutor's Rule 66 Final Submission Against Yim Tith, 4 June 2018 ("ICP Case 004 Final Submission"), para. 1151.
45 Case 004-**D378/2** ICP Case 004 Final Submission, para. 1152.
46 Even in 1998, during the visit of the Group of Experts to Cambodia, members of the Cambodian public and of the government did not express support for the absolute precedence of issues of security over the interest of justice. As the Group of Experts observed, "Concerning public opinion, the Group did hear a strong desire among Cambodians in and out of Government for peace. But none suggested that peace and trials were irreconcilable, or that Cambodians saw peace as a substitute for justice." *See* UN Group of Experts Report, para. 99.

are now elderly, the Pol Pot regime is almost universally reviled, and there is no evidence of any support for a resurgence of the movement.[47] A revived Khmer Rouge armed insurrection is simply not a plausible possibility in Cambodia today.

30. In contrast, there are strong indications that victims do not agree with the NCP Appeal's contention that no further justice is needed after the trial of Cases 001 and 002. Since the inception of the ECCC, several studies concerning the Cambodian public's perception of the ECCC have been published. While these studies all differ in their approach, target groups, and research questions, they all indicate that the Cambodian public has a strong interest in seeing the remaining cases proceed.

31. The most recent study was published in November 2018 and was conducted by the Marburg Centre for Conflict Studies, the Phnom Penh Centre for the Study of Humanitarian Law, and Swiss Peace (the "Marburg Study").[48] The study focused on victim participation, so it surveyed 439 victims of the Khmer Rouge who were randomly selected from four predetermined groups.[49] Notably, when asked whether the ECCC should address Cases 003 and 004 (also encompassing Case 004/2), 80.2 percent of the respondents were in favour of the cases going ahead. The five main reasons cited, from most to least frequent, were (1) it would provide the respondent with a sense of justice, (2) it would mean justice for the victims generally, (3) it would mean Khmer Rouge leaders could not escape justice, (4) it would provide more truth about the Khmer Rouge regime, and (5) it would bring justice to Cambodia.[50] Only 2.77 percent of the respondents believed the cases should not proceed because they could lead to conflict, but the authors of the study believed this fear of unrest could be linked to the "adamant

---

47 Case 004-**D378/2** ICP Case 004 Final Submission, para. 1153.

48 Williams, T., et al., "Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process", Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: swisspeace, November 2018 ("Marburg Study"). Data collection for the study ran from 29 January until 7 June 2018 (*see* Marburg Study, p. 23).

49 ECCC civil party applicants comprised the first group, accounting for more than half of the respondents. These civil party applicants were divided into eight subgroups with varying degrees of participation in the proceedings, and some were civil parties in Cases 003 and 004 (Case 004 was used as an umbrella term to also encompass Case 004/2). The second group was comprised of complainants, *i.e.* individuals registered with the Court because they provided information, but they had not applied to become civil parties. The third group contained victims who had participated in NGO activities related to transitional justice in Cambodia. The fourth group was made up of individuals who neither took part in ECCC proceedings nor in such NGO projects. As all but two of the respondents considered themselves victims of the Khmer Rouge, the average age of the respondents was 62.4 years. *See* Marburg Study, pp. 19, 21-22, 28.

50 Marburg Study, p. 63. *Note* that the respondents were allowed to give multiple answers.

rhetoric of the government expressing no intention to support additional cases of the ECCC beyond 002".[51]

32. The Open Society Justice Initiative conducted a study from October 2013 until January 2014 ("OSJI Study") that focused on the impact of the ECCC on ordinary Cambodians.[52] The sample size of the respondents interviewed was smaller than the Marburg Study, but more diverse, including victims/survivors, accused, perpetrators, bystanders, and youth.[53] At the time the data was collected, of the 49 respondents who were asked about and had knowledge of Cases 003 and 004, 29 wanted the cases to continue, while six were ambivalent.[54] The 14 respondents who did *not* want the cases to continue thought the proceedings were too lengthy and/or cited concerns about government interference and fears of unrest in their communities, particularly those who lived in former Khmer Rouge strongholds or were former cadres themselves.[55] The OSJI Study noted, however, that the respondents' fears of unrest were often based on two misconceptions: (1) that Cases 003 and 004 would target low-level leaders, and (2) that cases beyond 003 and 004 would follow, moving further down the DK hierarchy.[56]

33. The WSD HANDA Center for Human Rights and International Justice at Stanford University and the East-West Center conducted a study in 2017 with eight focus groups comprised of 83 students from four universities in Phnom Penh.[57] Although the sample was small, skewed toward those with a prior interest, and comprised solely of young people able to pursue higher education,[58] the participating students identified the most important legacies of the ECCC, in order, as: (1) teaching/advising the next generation about what happened/learning the truth; (2) providing justice and reconciliation for

---

51 Marburg Study, pp. 62-63. Only 14% of the 19.8% of respondents who did not support Cases 003 and 004 cited this reason, comprising only 2.77% of the entire respondent group.

52 Ryan, H. and McGrew, L., "Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia", New York: Open Society Justice Initiative, 2016 ("OSJI Study"), pp. 126-127, en. 210.

53 OSJI Study, pp. 126-127, en. 210. *Note* that the respondents were drawn from OSJI's existing contacts in Cambodia and therefore the sample group was not random. Out of the 122 total respondents, 109 were Cambodian.

54 OSJI Study, p. 82.

55 OSJI Study, pp. 82-83.

56 OSJI Study, p. 83.

57 McCaffrie, C., *et al.*, "So We Can Know What Happened: The Educational Potential of the Extraordinary Chambers in the Courts of Cambodia", Stanford: WSD HANDA Center for Human Rights and International Justice, East-West Center, January 2018 ("Handa Study"), p. 6.

58 Handa Study, p. 7.

victims/Cambodian people; (3) healing/addressing the suffering of the past; (4) preventing repetition of the crimes; and (5) prosecuting and/or punishing the Khmer Rouge leaders.[59] Similarly, a 2011 study conducted by the Human Rights Center at the Berkeley School of Law selected 1,000 participants from 250 randomly chosen villages to assess Cambodians' knowledge, perception and attitudes toward social reconstruction and the ECCC.[60] A large majority (83 percent) agreed that the ECCC should be involved in responding to what happened during the DK regime, 93 percent agreed that it was necessary to find the truth about what happened during the DK period, and 83 percent believed that people could not feel better if they did not know what happened to their loved ones.[61] All of these aims would be further fulfilled by Cases 003, 004, and 004/2 moving ahead (should the evidence warrant it) and were the very goals that led to the establishment of this Court.

34. In light of the results from these studies and considering that Cases 003, 004 and 004/2 all include issues and crime sites that have not been the subject of Cases 001 or 002, there are numerous Cambodians, victims, and family members of victims with a strong interest in hearing the truth about what happened at these locations and about who was responsible for the crimes. The 434 civil party applicants who applied to take part in the Case 004/2 proceedings and have been certified as admissible by the ICIJ[62] certainly did not believe that justice had been fully served by Cases 001 and 002, or they would not have applied to participate in the additional proceedings. Moreover, the civil party applicants who were declared inadmissible by the ICIJ have such a strong interest in participating in Case 004/2 if it goes ahead that they have appealed the ICIJ's admissibility decision in order to do so.[63]

---

59 Handa Study, p. 19.

60 Pham, PN, *et al.*, "After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia", Human Rights Center, University of California, Berkeley, June 2011 ("Berkeley Study"), p. 16. *Note* that although the study was published in June 2011, the information was collected in the first 20 days of December 2010.

61 Berkeley Study, pp. 26, 31. *Note* that these three figures reflect the 2010/2011 study results (rather than the 2008 baseline results).

62 **D362.1** Annex A: Civil Party Applications Declared Admissible, annexed to **D362** International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018.

63 *See* **D362/5** Appeal Against Order on the Admissibility of Civil Party Applicants, 29 November 2018, and its attached annexes.

35. For all of the foregoing reasons, the NCP Appeal's argument that Ao An should not face trial because "justice has been brought" to the victims through the trial of Cases 001 and 002 is unpersuasive.[64]

IV. RELIEF SOUGHT

36. The ICP respectfully requests that the PTC dismiss the NCP's Appeal, uphold the ICIJ's finding that Ao An was one of "those who were most responsible" for crimes during the DK regime, and send Case 004/2 for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

Date	**Name**	**Place**	**Signature**
27 February 2019	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

[64] **D360/8/1** NCP Appeal, para. 96.