ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

Case File No. 004/2/07-09-2009-ECCC/OCIJ(PTC60)

REPORT OF THE CASE & APPEALS

I- INTRODUCTION

This report is issued on behalf of the whole Pre-Trial Chamber. It sets out the relevant facts and procedural history of Case 004/2, as well as the details of the appeals currently before this Chamber.

II- IDENTIFICATION OF THE CHARGED PERSON

The Charged Person is AO An—whose birth name is recorded as OAM Yoeung or AO Yoeung—a Cambodian male born in 1933 in Taing Svay Village, Peam Commune, Kampong Tralach District, Kampong Chhnang Province. He currently resides in Battambang Province.[1] AO An has provided the Pre-Trial Chamber with a medical report stating that for health reasons he is unfit to travel the long distance to the Court.

AO An is represented by Defence Co-Lawyers Mr. MOM Luch, Mr. Richard ROGERS and Mr. Göran SLUITER.

[1] [redacted]

III- CASE BACKGROUND

On 20 November 2008, the International Co-Prosecutor brought a disagreement before the Pre-Trial Chamber, pursuant to Internal Rule 71(2), reporting that the National Co-Prosecutor disagreed with prosecuting new crimes identified in additional submissions.[2] On 18 August 2009, the Pre-Trial Chamber issued considerations on this disagreement.[3] A number of confidential disagreements were also registered between the Co-Investigating Judges in this case, but none of these disagreements were brought before the Pre-Trial Chamber.

On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, followed by six supplementary submissions, requesting the Co-Investigating Judges to open a judicial investigation against AO An, among others, in relation to allegations of crimes against humanity, genocide, grave breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code, committed in Sectors 41, 42 and 43 of the Central Zone during the Democratic Kampuchea era.[4]

On 27 March 2015[5] and 14 March 2016,[6] the International Co-Investigating Judge charged AO An with genocide, various crimes against humanity and the national crime of premeditated homicide, committed from approximately late 1976 until at least 6 January 1979, in his former capacities as Deputy Secretary of the Central Zone, member of the Central Zone Committee, and Secretary of Sector 41 in the Central Zone. The charges alleged that the crimes were committed at various locations in the Central Zone, including worksites, security centres and execution sites in Sectors 41, 42 and 43.[7] The modes of liability through which AO An was charged vary depending on

---

[2] Disagreement 001/18-11-2008-ECCC/PTC, International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement Pursuant to Rule 71(2), 20 November 2008, D1.
[3] Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3.
[4] Case 004/20-11-2008-ECCC/OCIJ, Co-Prosecutors' Third Introductory Submission, 20 November 2008, D1; Case 004/07-09-2009-ECCC/OCIJ ("Case 004"), Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 15 June 2011, D27; Case 004, Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65; Case 004, Response to Forwarding Order and Supplementary Submission Regarding Wat Ta Meak, 5 August 2011, D254/1; Case 004, Co-Prosecutors' Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191; Case 004, Response to Forwarding Order D237, 4 February 2015, D237/1; Case 004, Response to Forwarding Order dated 5 November 2015 and Supplementary Submission Regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, dated 20 November 2015 and filed on 8 April 2016, D272/1.
[5] Case 004, Written Record of Initial Appearance of AO An, 27 March 2015, D242 ("Written Record of Initial Appearance of AO An (D242)").
[6] Case 004, Written Record of Further Appearance of AO An, 14 March 2016, D303 ("Written Record of Further Appearance of AO An (D303)").
[7] The specific locations mentioned in the charging document are: with respect to genocide, the Central Zone; with respect to crimes against humanity and national crimes, Anlong Chrey Dam, Kok Pring Execution Site, Met Sop (Kor) Security Centre, Tuol Beng Security Centre and Execution Site, Wat Angkuonh Dei, Wat Au Trakuon Security Centre,

the crime and the location, and include: commission via joint criminal enterprise; commission via co-perpetration; planning, ordering or instigating; and superior responsibility.[8] The International Co-Investigating Judge decided not to place AO An in provisional detention during the investigation, but notified him that he must remain at the disposal of the ECCC.[9]

At his initial appearance before the International Co-Investigating Judge, AO An expressed regret for the suffering of the victims during the Khmer Rouge regime, but he denied having any criminal responsibility for that suffering.[10]

On 16 December 2016, the International Co-Investigating Judge decided to reduce the scope of the investigation by excluding all allegations related to, *inter alia*, crime sites in Sectors 42 and 43 and arrests and executions of Cham in the Eastern Zone.[11] As such, these allegations could no longer form the basis for any charges against AO An.[12] Also on 16 December 2016, both Co-Investigating Judges ordered the severance of the investigation against AO An from Case 004 and the creation of Case 004/2.[13]

On 29 March 2017, the Co-Investigating Judges issued a final notice of conclusion of the judicial investigation,[14] and on 19 May 2017 they forwarded the Case File to the Co-Prosecutors, pursuant to Internal Rule 66(4), inviting them to file their final submission within three months.[15] On 18 August 2017, the National Co-Prosecutor filed a final submission requesting all allegations be dismissed,[16] while on 21 August 2017, the International Co-Prosecutor filed a final submission requesting AO An be indicted and sent to trial.[17] AO An filed a response to the Co-Prosecutors' Final Submissions on 24 October 2017, arguing the case should be dismissed.[18]

Wat Batheay Security Centre, Wat Phnom Pros Execution Site, Wat Ta Meak Security Centre, Chamkar Svay Chanty Security Centre, Wat Baray Chan Dek Security Centre, Wat Srange Security Centre, and Kampong Siem and Prey Chhor Districts. *See* Written Record of Further Appearance of AO An (D303).

[8] Written Record of Further Appearance of AO An (D303).

[9] Written Record of Initial Appearance of AO An (D242), p. 8; Written Record of Further Appearance of AO An (D303), p. 10.

[10] Written Record of Initial Appearance of AO An (D242), p. 5.

[11] Case 004/2, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 16 December 2016, D337, paras 4, 13. *See also* Case 004/2, Notification Pursuant to Internal Rule 66 *bis* (2), 9 November 2016, D307/4. Also excluded were allegations of torture at Wat Angkuonh Dei and Tuol Beng Security Centre and Execution Site, and of imprisonment and persecution at Wat Phnom Pros Execution Site.

[12] Internal Rule 66*bis*(5).

[13] Case 004, Order for Severance of AO An from Case 004, 16 December 2016, D334/1.

[14] Case 004/2, Second Notice of Conclusion of Judicial Investigation Against AO An, 29 March 2017, D334/2.

[15] Case 004/2, Forwarding Order Pursuant to Internal Rule 66(4), 19 May 2017, D351.

[16] Case 004/2, Final Submission Concerning AO An Pursuant to Internal Rule 66, 18 August 2017, D351/4.

[17] Case 004/2, International Co-Prosecutor's Rule 66 Final Submission, 21 August 2017, D351/5.

[18] Case 004/2, AO An's Response to the Co-Prosecutors' Rule 66 Final Submissions, 24 October 2017, D351/6.

IV- THE CLOSING ORDERS UNDER APPEAL

A. Introduction

Pursuant to Internal Rule 67, "[t]he Co-Investigating Judges shall conclude the investigation by issuing a [reasoned] Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case."[19] An indictment must set "out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility."[20] "The Co-Investigating Judges shall issue a Dismissal Order" where: (a) the acts in question do not amount to crimes within the ECCC's jurisdiction; (b) the perpetrators of the acts have not been identified; or (c) there is not sufficient evidence against the Charged Person of the charges.[21]

On 18 September 2017, the Co-Investigating Judges informed the parties that they considered separate and opposing closing orders to be generally permitted under the applicable law.[22] They registered a disagreement regarding the issuance of opposing closing orders on 12 July 2018, but this disagreement was not brought before the Pre-Trial Chamber.

On 16 August 2018, the International Co-Investigating Judge issued the Closing Order (Indictment), sending AO An to trial,[23] while the National Co-Investigating Judge issued the Closing Order (Dismissal), dismissing all charges against him.[24] The issuance of two conflicting closing orders in a single case is unprecedented.

We will now provide a brief overview of each Closing Order issued in this case.

B. Closing Order (Indictment)

In the Closing Order (Indictment), the International Co-Investigating Judge found that sometime between late 1976 and early 1977, AO An travelled with a group of Southwest Zone cadres to the Central Zone, where he was appointed Secretary of Sector 41 by KE Pauk, a position he held until the end of the Democratic Kampuchea period and which automatically made him a member of

[19] Internal Rule 67(1).
[20] Internal Rule 67(2).
[21] Internal Rule 67(3).
[22] Case 004/2, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D355/1, paras 13-16.
[23] Case 004/2, Closing Order (Indictment), 16 August 2018, D360 ("Closing Order (Indictment) (D360)").
[24] Case 004/2, Order Dismissing the Case Against AO An, 16 August 2018, D359 ("Closing Order (Dismissal) (D359)").

the Central Zone Committee.[25] In this role, AO An exercised complete military and civilian authority over Sector 41.[26] The Judge additionally found that the evidence sufficiently showed AO An held the position of Deputy Secretary of the Central Zone from late 1977 until the end of the regime, served as Acting Central Zone Secretary in KE Pauk's absence,[27] and played a key role in zone-level administration, with his authority extending to zone military and security matters.[28]

The International Co-Investigating Judge found that from approximately late 1976 or early 1977 until at least 6 January 1979, AO An, KE Pauk and other Communist Party of Kampuchea (or "CPK") cadres shared the common purpose of implementing four CPK policies in the Central Zone of Democratic Kampuchea, through the commission of various crimes against humanity and genocide.[29] The policies included: (1) the establishment and operation of cooperatives and worksites; (2) the re-education of "bad elements" and killing of "enemies"; (3) the targeting of specific groups, including Central Zone CPK cadres, former Khmer Republic officials, "17 April people", people from the East Zone, the Cham, and their families; and (4) the regulation of marriage.[30]

According to the International Co-Investigating Judge, AO An played a crucial role in implementing these policies.[31] For example, the Judge found that he had the defining role in orchestrating and implementing the genocide of the Cham in the Central Zone, particularly across Sector 41.[32]

The Closing Order (Indictment) provides "a very conservative calculation" that "a minimum of 17,115 Cham were killed in the Central Zone during [AO] An's reign".[33] It also states that "[a]t the security centres and execution sites that [AO] An [was] responsible for, a conservative minimum estimate of 12,944 people (including a minimum of 1743 Cham), and very likely many more, were killed", while "thousands of people were compelled to work under extremely difficult conditions and the threat of death" at worksites for which AO An was responsible.[34]

[25] *See* Closing Order (Indictment) (D360), paras 242-250.
[26] Closing Order (Indictment) (D360), paras 256-263.
[27] *See* Closing Order (Indictment) (D360), paras 250-255; *see also* paras 700-705.
[28] Closing Order (Indictment) (D360), paras 256-263.
[29] Closing Order (Indictment) (D360), paras 195, 824.
[30] Closing Order (Indictment) (D360), paras 195, 824.
[31] Closing Order (Indictment) (D360), paras 264-319, 712.
[32] Closing Order (Indictment) (D360), para. 708.
[33] Closing Order (Indictment) (D360), para. 709.
[34] Closing Order (Indictment) (D360), para. 711.

In light of AO An's position and conduct as well as the character and magnitude of his crimes, the International Co-Investigating Judge concluded that he was one of the persons most responsible for the crimes committed during the Democratic Kampuchea era, and thus falls within the ECCC's personal jurisdiction.[35]

After reviewing the evidence[36] and concluding that the legal elements of the crimes and modes of liability were established,[37] the International Co-Investigating Judge indicted AO An and committed him for trial for:

- Genocide against the Cham of Kampong Cham Province by killing members of the group and causing serious bodily or mental harm to members of the group, through commission via joint criminal enterprise; planning, ordering or instigating; or superior responsibility;
- Crimes against humanity—including murder, extermination, torture, imprisonment, enslavement, persecution on political and religious grounds, and other inhumane acts (such as, *inter alia*, forced marriage)—committed at nine crime sites in Sector 41 of the Central Zone—including Anlong Chrey Dam Forced Labour Site, Kok Pring Execution Site, Met Sop (Kor) Security Centre, Tuol Beng and Wat Angkuonh Dei Security Centres, Wat Au Trakuon Security Centre, Wat Batheay Security Centre, Wat Phnom Pros Execution Site, Wat Ta Meak Security Centre, and Kampong Siem and Prey Chhor Districts—through commission as a direct perpetrator and/or via joint criminal enterprise; or through planning, ordering or instigating; or through superior responsibility;
- and for premeditated homicide in violation of Articles 501 and 506 of the 1956 Cambodian Penal Code, committed at eight crime sites in Sector 41 of the Central Zone—including Anlong Chrey Dam Forced Labour Site, Kok Pring Execution Site, Met Sop (Kor) Security Centre, Tuol Beng and Wat Angkuonh Dei Security Centres, Wat Au Trakuon Security Centre, Wat Batheay Security Centre, Wat Phnom Pros Execution Site and Wat Ta Meak Security Centre—through commission via co-perpetration or alternatively planning or ordering.[38]

[35] Closing Order (Indictment) (D360), paras 697-712.
[36] Closing Order (Indictment) (D360), section 6.
[37] Closing Order (Indictment) (D360), sections 8-9.
[38] Closing Order (Indictment) (D360), pp. 409-415.

The Judge additionally dismissed certain charges of persecution, extermination and genocide due to insufficient evidence,[39] and decided that pre-trial detention was not necessary pursuant to Internal Rule 63(3)(b).[40]

C. Closing Order (Dismissal)

In the Closing Order (Dismissal), the National Co-Investigating Judge decided not to characterise the crimes or modes of liability[41] but did consider the facts relevant to alleged and charged crime sites in the Central Zone in his assessment of whether AO An falls within the ECCC's personal jurisdiction.[42] In this regard, he found evidence of acts such as, *inter alia*, killings, arrests, detention, torture, rapes, disappearances and beatings occurring at security centres, execution sites and forced labour sites in Sectors 41, 42 and 43,[43] as well as forced marriage in Kampong Siem and Prey Chhor Districts of Sector 41 and genocide of the Cham in Kampong Cham Province.[44]

The National Co-Investigating Judge moreover accepted that AO An served as Sector 41 Secretary for over a year and as Deputy Secretary of the Central Zone for a brief period, despite the absence of an official DK record corroborating the appointment.[45] He also discussed evidence of AO An visiting and receiving information about various crime sites, giving instructions on implementing CPK policies, ordering killings at security centres and execution sites and giving orders to arrest and kill the Cham in the districts of Kampong Cham Province, although he noted that some witnesses said the orders likely originated with the upper echelon.[46]

However, the National Co-Investigating Judge found that AO An does not fall within the personal jurisdiction of the ECCC as either a senior leader or one of those most responsible, in light of his role and participation in criminal acts and the CPK, the general characteristics of the DK regime and its policies and the genuine intent of the negotiators of the Agreement to establish the ECCC.[47]

---

[39] Closing Order (Indictment) (D360), pp. 407-408.
[40] Closing Order (Indictment) (D360), para. 853.
[41] Closing Order (Dismissal) (D359), para. 2.
[42] Closing Order (Dismissal) (D359), paras 285-418.
[43] Specifically, Wat Phnom Pros, Wat Au Trakuon, Wat Batheay, Met Sop (Kor), Kok Pring, Anlong Chrey Dam, Wat Ta Meak, Tuol Ta Phlong, Wat Kandal, Chamkar Svay Chanty, Wat Baray Chan Dek, Wat Srange, Wat Angkuonh Dei and Tuol Beng.
[44] Closing Order (Dismissal) (D359), paras 289-418.
[45] Closing Order (Dismissal) (D359), paras 199-200, 242-245, 495, 545.
[46] Closing Order (Dismissal) (D359), paras 289-418, *in particular* paras 292, 294-295, 308-309, 328-330, 338, 348, 398, 401-402, 404, 410-411, 413, 415-418.
[47] Closing Order (Dismissal) (D359), paras 17, 492.

In particular, the National Co-Investigating Judge found that AO An was not a member or candidate member of the CPK Central Committee and thus was not a "senior leader".[48] He additionally found that AO An controlled administrative work and general management in Sector 41, but there was no evidence confirming that he was responsible for any military, security or economic work at the Zone level or that he participated in making CPK policies.[49] The Judge rather considered that the evidence demonstrated that AO An acted under the orders and instructions of KE Pauk, the Central Zone Secretary.[50]

The National Co-Investigating Judge further questioned the reliability of any evidence indicating AO An's involvement in the alleged crimes, including arrests and executions, the treatment of the Cham in Kampong Cham Province and forced marriages in Sector 41,[51] and considered that any such involvement was in line with the CPK top-down systematic policy, which cadres had to implement without fail or risk being purged.[52] AO An himself asserted that he had to absolutely comply with all orders and feared for his life if he did not.[53]

Finally, the National Co-Investigating Judge found that before and during the negotiations to create the ECCC, the Cambodian side intended personal jurisdiction to be narrow and selective, with the category of "those most responsible" extending only to KAING Guek Eav *alias* Duch.[54] According to the Judge, AO An's participation was non-autonomous, inactive, non-creative and indirect in comparison to Duch's direct and highly active role in the commission of crimes.[55] As such, the National Co-Investigating Judge concluded that AO An does not fall within the ECCC's personal jurisdiction and dismissed the charges against him.[56]

V- OVERVIEW OF THE APPEAL PROCEEDINGS & ISSUES RAISED

[48] Closing Order (Dismissal) (D359), paras 472, 507, 523.
[49] Closing Order (Dismissal) (D359), paras 496, 553.
[50] Closing Order (Dismissal) (D359), paras 496, 510-511, 518, 552.
[51] Closing Order (Dismissal) (D359), paras 497-506.
[52] Closing Order (Dismissal) (D359), paras 501, 533-535.
[53] Closing Order (Dismissal) (D359), para. 533.
[54] Closing Order (Dismissal) (D359), paras 467-484, 536-542.
[55] Closing Order (Dismissal) (D359), paras 543-551, 553.
[56] Closing Order (Dismissal) (D359), paras 554-555.

There are three appeals before the Pre-Trial Chamber regarding the Closing Orders issued in Case 004/2. The National Co-Prosecutor[57] and AO An[58] filed Appeals against the Closing Order (Indictment) on 17 December 2018 and 20 December 2018, respectively, while the International Co-Prosecutor filed an Appeal against the Closing Order (Dismissal) on 20 December 2018.[59] Responses were filed by AO An and the International Co-Prosecutor on 21,[60] 22[61] and 27[62] February 2019, and they filed their Replies on 1[63] and 3[64] April 2019. The National Co-Prosecutor did not file any response or reply.

Although the parties will present their submissions on appeal in more detail during the *in camera* portion of this hearing, the Chamber considers it beneficial, in the interests of transparency, to now provide a brief summary of the issues raised in these proceedings. Due to time constraints, only the Appeals will be summarised, not the Responses or Replies.

A. AO An's Appeal against the Closing Order (Indictment)

AO An raises 18 grounds of appeal in support of his argument that the Pre-Trial Chamber must overturn the Closing Order (Indictment) and dismiss his case.

In his first ground of appeal, AO An argues that the unprecedented issuance of two separate and conflicting closing orders is incompatible with the ECCC's legal framework and violates his fundamental rights and the principle of legal certainty. He contends that doubt resulting from the

[57] Case 004/2, National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/02, 14 December 2018, notified in Khmer on 17 December 2018 and in English on 28 January 2019, D360/8/1 ("National Co-Prosecutor's Appeal (D360/8/1)").
[58] Case 004/2, AO An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment), 19 December 2018, notified in English on 21 December 2018 and in Khmer on 23 January 2019, D360/5/1 ("AO An's Appeal (D360/5/1)").
[59] Case 004/2, International Co-Prosecutor's Appeal of the Order Dismissing the Case Against AO An, 20 December 2018, notified in English on 21 December 2018 and in Khmer on 22 January 2019, D359/3/1 ("International Co-Prosecutor's Appeal (D359/3/1)").
[60] Case 004/2, AO An's Response to the International Co-Prosecutor's Appeal of the Order Dismissing the Case Against AO An (D359), 20 February 2019, filed and notified in English on 21 February 2019 and in Khmer on 19 March 2019, D359/3/4.
[61] Case 004/2, International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment, 22 February 2019, notified in English on 25 February 2019 and in Khmer on 15 March 2019, D360/9.
[62] Case 004/2, International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 004/2 Indictment, 27 February 2019, notified in English on 28 February 2019 and in Khmer on 15 March 2019, D360/10.
[63] Case 004/2, Reply to the International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment, 1 April 2019, notified in English on 3 April 2019 and in Khmer on 23 April 2019, D360/11.
[64] Case 004/2, International Co-Prosecutor's Reply to AO An's Response to the Appeal of the Order Dismissing the Case Against AO An (D359), 3 April 2019, notified in Khmer on 22 April 2019, D359/3/5.

issuance of an indictment in conjunction with a conflicting dismissal order must be resolved in his favour, and thus the Closing Order (Indictment) must be overturned.[65]

In Grounds 2 through 7 of his Appeal, AO An alleges the International Co-Investigating Judge's determination that he is amongst those most responsible and thus within the Court's personal jurisdiction was based on numerous legal and factual errors which invalidate the Closing Order (Indictment).[66]

Grounds 8 through 17 of AO An's Appeal concern alleged errors on the substantive law relevant to the International Co-Investigating Judge's assessment of personal and subject-matter jurisdiction.[67]

In his eighteenth and final ground of appeal, AO An contends that the International Co-Investigating Judge erred or abused his discretion in failing to dismiss or stay Case 004/2 to safeguard the fairness and integrity of proceedings and his rights.[68]

B. National Co-Prosecutor's Appeal against the Closing Order (Indictment)

In her Appeal, the National Co-Prosecutor requests the Pre-Trial Chamber to dismiss the case against AO An based on her viewpoint that AO An is free of liability and does not fall within the ECCC's personal jurisdiction.[69]

With regard to her first point, the National Co-Prosecutor considers that the evidence shows AO An had no autonomy or *de facto* authority despite his positions within the CPK hierarchy,[70] and he merely acted at the behest of the upper echelon, especially KE Pauk.[71]

With respect to her second point, the National Co-Prosecutor argues that the Royal Government of Cambodia, as one of the founders of the ECCC, may restrict the Court's personal jurisdiction, and the International Co-Investigating Judge and Pre-Trial Chamber should act in line with the Government's view that "senior leaders" covers only a small number of individuals who

[65] AO An's Appeal (D360/5/1), paras 2, 20-36.
[66] AO An's Appeal (D360/5/1), paras 3, 37-164.
[67] AO An's Appeal (D360/5/1), paras 4, 165-206.
[68] AO An's Appeal (D360/5/1), paras 5, 207-230.
[69] National Co-Prosecutor's Appeal (D360/8/1), paras 68-98.
[70] National Co-Prosecutor's Appeal (D360/8/1), paras 72, 75, 82-83; *see* generally paras 68-83.
[71] National Co-Prosecutor's Appeal (D360/8/1), paras 70-72, 75, 82-83.

were "Members of the Party Central and Standing Committees", while "those who were most responsible" refers only to S-21 Chairman KAING Guek Eav *alias* Duch.[72]

C. International Co-Prosecutor's Appeal against the Closing Order (Dismissal)

In his Appeal, the International Co-Prosecutor raises six grounds arguing that the National Co-Investigating Judge erred in law and fact in finding that AO An is not subject to the personal jurisdiction of the ECCC.[73] First, he contends that the National Co-Investigating Judge committed an error of law in failing to make any legal conclusions as to whether the facts he found established by the evidence amount to crimes within the ECCC's jurisdiction or demonstrate AO An's criminal responsibility.[74] He further avers that the Closing Order (Dismissal) gave excessive weight to coercion, duress and superior orders in determining AO An is not subject to the Court's jurisdiction.[75]

The International Co-Prosecutor additionally argues that the National Co-Investigating Judge's assertion that Duch is "the only most responsible person" is legally incorrect.[76] Moreover, he alleges that the National Co-Investigating Judge incorrectly assessed the credibility of the evidence[77] and made a number of erroneous factual findings regarding AO An's level of responsibility and participation in the crimes.[78] In his final ground of appeal, the International Co-Prosecutor asserts that the National Co-Investigating Judge erred by failing to take into account the impact of AO An's key role in the genocide committed against the Cham on the issue of whether he is one of "those most responsible" for the purposes of personal jurisdiction.[79]

Finally, while not a ground of appeal, the International Co-Prosecutor submits that, in the event that the Pre-Trial Chamber is unable to reach a supermajority on the appeals against the conflicting Closing Orders, the Internal Rules, jurisprudence and legal framework of the ECCC mandate that the case proceed to trial on the basis of the Closing Order (Indictment).[80]

---

[72] National Co-Prosecutor's Appeal (D360/8/1), paras 84-93.
[73] International Co-Prosecutor's Appeal (D359/3/1), para. 13; *see* generally paras 14-99.
[74] International Co-Prosecutor's Appeal (D359/3/1), paras 14-31.
[75] International Co-Prosecutor's Appeal (D359/3/1), paras 32-46.
[76] International Co-Prosecutor's Appeal (D359/3/1), paras 47-57.
[77] International Co-Prosecutor's Appeal (D359/3/1), paras 58-64.
[78] International Co-Prosecutor's Appeal (D359/3/1), paras 65-94.
[79] International Co-Prosecutor's Appeal (D359/3/1), paras 95-99.
[80] International Co-Prosecutor's Appeal (D359/3/1), paras 100-107.

The International Co-Prosecutor therefore requests the Pre-Trial Chamber to reverse the Closing Order (Dismissal), find that AO An was one of "those most responsible" for DK-era crimes and send him for trial on the basis of the Closing Order (Indictment).[81]

VI- CONCLUSION

The Pre-Trial Chamber has provided this brief report on the case and the current appeal proceedings in the interests of justice and transparency, while still recognising the principle of maintaining confidentiality at the pre-trial stage. This report will be placed on the Case File and will be made available to the public on the ECCC's website.

Phnom Penh, 19 June 2019

Pre-Trial Chamber

President

PRAK Kimsan **Olivier BEAUVALLET** **NEY Thol** **Kang Jin BAIK** **HUOT Vuthy**

[81] International Co-Prosecutor's Appeal (D359/3/1), para. 112.