

D351/4

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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FINAL SUBMISSION
CONCERNING AO AN PURSUANT TO INTERNAL RULE 66

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1. Introduction

1. On 19 May 2017, the Co-Investigating Judges (CIJs) forwarded the case file, pursuant to the Internal Rules¹ (IR), to the Co-Prosecutors for the purpose of their final submission. Pursuant to IR 66(5), the Co-Prosecutors shall issue a written, reasoned final submission and return the case file to the CIJs.

2. Procedural History

2. On 18 November 2008, the National and International Co-Prosecutors discussed a disagreement on additional prosecutions and suspects at the ECCC so as to forward them to the CIJs to open investigations. The International Co-Prosecutor (ICP) indicated during the discussion that he wished to get additional suspects for Cases 003 and 004 investigated, while the National Co-Prosecutor (NCP) disagreed to the investigations against additional suspects beyond those described in Cases 001 and 002.²
3. The ICP decided to bring the disagreement before the Pre-Trial Chamber (PTC) through his Written Statement of Facts and Reasons for Disagreement dated 20 November 2008,³ which he forwarded to the Office of Administration of the ECCC. On 3 December 2008, the Office of Administration sent a copy of this Statement to the NCP pursuant to IR 71.2.⁴
4. On 20 November 2008, pursuant to IR 53, the ICP issued the Third Introductory Submission ("The Introductory Submission") in which the ICP alleged that AO An bears criminal responsibility for national and international crimes committed during the Democratic Kampuchea regime from 17 April 1975 to 6 January 1979.⁵

¹ Case File 004/2, D351, Co-Investigating Judges' Forwarding Order pursuant to Internal Rule 66(4), 19 May 2017.

² Minutes of the Meeting on Disagreement between the National and International Co-Prosecutors on Additional Prosecutions and Suspects, 18 November 2008.

³ International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2).

⁴ Internal Rule 71(2).

⁵ Case File 004, D1, Co-Prosecutors' Third Introductory Submission, 20 November 2008.

Thereafter, the ICP filed the Supplementary Submissions alleging that AO An bears criminal responsibility for further crimes.⁶

5. On 29 December 2008, the NCP filed a response to the ICP's Written Statement of Facts and Reasons for Disagreement⁷ to the Pre-Trial Chamber (PTC) pursuant to Article 20 new of the ECCC Law and IR 71.2 after the PTC granted the request for time extension to file a response. In the response, the NCP raised the reasons why the NCP disagreed to the ICP's Supplementary Submission and New Introductory Submission (Case Files 003 and 004).
6. On 6 February 2009, the PTC invited the Co-Prosecutors to file further submissions, if any, in respect of these disagreement proceedings.⁸
7. On 19 February 2009, the ICP informed the PTC that "he does not have any further observations beyond those described in the present submissions filed on 1 December 2008."⁹ The NCP submitted a set of documents that are related to the debates in the National Assembly of the Kingdom of Cambodia and discussions between the Royal Government of Cambodia and the United Nations about the establishment of the ECCC.
8. On 24 April 2009, the PTC issued Directions to Provide Further Particulars and Scheduling Order to both Co-Prosecutors, attaching its observations and a number of questions it wishes the Co-Prosecutors to answer.¹⁰
9. The NCP filed a Response to the PTC's Direction to Provide Further Particulars and Additional Observations on 22 May 2009¹¹ in which the NCP held the stance that

⁶ Case File 004/2, D65, [Co-Prosecutors'] Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011. Case File 004/2, D191, International Co-Prosecutor's Supplementary Submission regarding Forced Marriage [and Sexual] or Gender-based Violence, 24 April 2014. Case File 004/2, D254/1, Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak, 4 August 2015. Case File 004/2, D272/1, Response to Forwarding Order, 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015.

⁷ International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 29 December 2008.

⁸ Pre-Trial Chamber's Invitation to the Co-Prosecutors to Submit Further Submissions, 6 February 2009.

⁹ International Co-Prosecutor's Response to the Pre-Trial Chamber's Invitation to File Further Submissions, 19 February 2009.

¹⁰ Pre-Trial Chamber's Directions to Provide Further Particulars and Scheduling Order, 24 April 2009.

¹¹ National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, 24 April 2009, and National Co-Prosecutor's Additional Observations, 22 May 2009 (D17).

there was no personal jurisdiction in regards to those named in the New Introductory Submission and Supplementary Submissions. This means those named in the two Submissions abovementioned were neither “senior leaders” nor “those most responsible”.

10. The PTC did not receive the affirmative vote of at least four judges required to have a decision on the Disagreement.¹²
11. The PTC concluded that as it has not reached a decision on the disagreement brought before it, pursuant to IR 74.1, the ICP shall forward the New Introductory Submission to open judicial investigations pursuant to IR 53.1.¹³
12. In accordance with the PTC’s considerations regarding the disagreement of 18 August 2009 between the Co-Prosecutors pursuant to IR 71,¹⁴ on 7 September 2009, the Acting ICP forwarded to the CIJs the Introductory Submissions regarding Case Files 003 and 004 to open judicial investigations of the two Cases.¹⁵
13. On 27 March 2015, the International Co-Investigating Judge (ICIJ) issued a notification charging AO An with crimes set out in the Introductory Submission, the First Supplementary Submission, and the Second Supplementary Submission as follows:
 - Violation of Articles 209, 210, 500, 501, 503, 504, 505, 506, 507, and 508 of 1956 Penal Code (Homicide, Torture, Religious Persecution);
 - Violation of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide of the Khmer Krom, Cham, and Vietnamese);
 - Crimes Against Humanity (Murder, Extermination, Enslavement, Imprisonment, Torture, Rape, Persecution on Political, Racial and Religious Grounds, and Other Inhuman Acts); and

¹² Pre-Trial Chamber’s D1/1.1 and D1/1.3, 18 August 2009.

¹³ Pre-Trial Chamber’s D1/1.1, 18 August 2009.

¹⁴ D1/1.3, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009.

¹⁵ D1/1, Acting International Co-Prosecutor’s Notice of Filing of the Second and Third Introductory Submissions, 7 September 2009.

- Grave Breaches of the Geneva Conventions of 1949 (Wilful Killing, Wilfully Causing Great Suffering or Serious Injury to Body or Health, Unlawful Deprivation or Transfer, and Unlawful Confinement of a Civilian).¹⁶
14. In conjunction with the aforementioned allegations, the ICIJ charges AO An in particular in his capacity as the Secretary of Sector 41 and Deputy Secretary of the Central Zone. The crimes with which AO An is charged were committed within the territory of Cambodia during the period from approximately late 1976 to 6 January 1979. AO An is charged with the following offences:
- Violation of Articles 501 and 506 of the 1956 Penal Code (Premeditated Homicide) defined and punishable under Articles 3 (new) and 39 of the ECCC Law;
 - Crimes Against Humanity including murder, extermination, persecution on political or religious grounds, imprisonment and other inhuman acts defined and punishable under Articles 5 and 39 of the ECCC Law.¹⁷
15. The ICIJ advised AO An that he may decide to charge AO An with additional crimes based on allegations in the Introductory Submission, First Supplementary Submission, and Second Supplementary Submission, should there be clear and consistent evidence indicating that AO An may be responsible for such crimes.¹⁸
16. As there is clear and consistent evidence indicating that AO An may be responsible for genocide committed in the Central Zone against the Cham of Kampong Cham Province, on 14 March 2016, AO An is charged by the ICIJ of genocide crimes and further charges of crimes against humanity.¹⁹
17. On 16 December 2016, the CIJs issued Notice of Conclusion of Judicial Investigation against AO An, notifying the parties that they shall have 15 days to request further investigation action, and ordered the severance of AO An from Case File 004.²⁰ On 26

¹⁶ Case File 004/2, D242, Written Record of Initial Appearance, 27 March 2015, page 4 (English).

¹⁷ Case File 004/2, D242, Written Record of Initial Appearance, 27 March 2015, pages 6-7 (English).

¹⁸ Case File 004/2, D242, Written Record of Initial Appearance, 27 March 2015, page 8 (English).

¹⁹ Case File 004/2, D303, Written Record of Further Appearance, 14 March 2016, page 4 (English).

²⁰ Case File 004/2, D334, Notice of Conclusion of Judicial Investigation against AO An, 16 December 2016. Case File 004/2, D334/1, Order for Severance of AO An from Case 004, 16 December 2016.

December 2016, the ICIJ extended time limit for requesting further investigative action until 16 January 2017.²¹

18. On 19 december 2016, AO An Defence submitted an Application to Seize the Pre-Trial Chamber with a view to Annulment of Written Records of Interview of the Three Investigators of the OCIJs.²² On 23 January 2017, the ICIJ granted the request and instructed the OCIJ Greffier to forward Case File 004/2 to the Pre-Trial Chamber pursuant to IR 76(3).²³ On 11 May 2017, the PTC dismissed the Application.²⁴
19. On 21 December 2016, AO AN Defence requested to place certain documents pertaining to Henri Locard on the Case File.²⁵ The Co-Prosecutors did not submit [their] response to the request.
20. On 21 December 2016, the ICP submitted a request for investigative action to place maps and Case File 002 materials onto Case File 004/2.²⁶ The Defence did not submit their response to the request.
21. On 16 January 2017, the Defence submitted the thirteenth request for investigative action, requesting the CIJs to provide an analysis verifying the errors in the Written Records of Interview.²⁷ The Co-Prosecutors did not submit their response to the request.
22. On 8 February 2017, the ICIJ issued Decision on *Request to Place Certain Documents pertaining to Henri Locard on the Case File* and Decision on International Co-

²¹ Case File 004/2, D340/1, Decision on AO An's Request for Extension of Time Limit for Requesting Further Investigative Action Following Rule 66 Notice, 26 December 2016.

²² Case File 004/2, D338, Application to Seize the Pre-Trial Chamber with a view to Annulment of Written Records of Interview of Three Investigators, 19 December 2016.

²³ Case File 004/2, D338/1, Decision on AO An's Application to Seize the Pre-Trial Chamber with a view to Annulment of Written Records of Interview of Three Investigators, 23 January 2017.

²⁴ Case File 004/2, D338/2[1]/5, Decision on AO An's Application to Annul Written Records of Interview of Three Investigators, 11 May 2017.

²⁵ Case File 004/2, D339, Request to Place Certain Documents pertaining to Henri Locard on the Case File, 20 December 2016.

²⁶ Case File 004/2, D342, International Co-Prosecutor's Request for Investigative Action to Place Maps and Case 002 Materials onto Case File 004/2, 21 December 2016.

²⁷ Case File 004/2, D345, AO An's Thirteenth Request for Investigative Action, 16 January 2017.

Prosecutor's Request for Investigative Action to Place Maps and Case File 002 Materials onto Case File 004/2.²⁸

23. On 16 March 2017, the CIJs issued Decision on AO An's Thirteenth Request for Investigative Action.²⁹
24. On 29 March 2017, the CIJs issued Second Notice of Conclusion of Judicial Investigation against AO An and informed the parties that no period for further investigative action is required under the Internal Rules and hence none is granted.³⁰
25. On 2 May 2017, the Defence filed their Notice of Appeal with the PTC against the ICIJ's Notification on the Interpretation of 'Attack against the Civilian Population' in the Context of Crimes against Humanity with regard to a State's or Regime's Own Armed Forces.³¹
26. On 3 May 2017, the Defence filed their Application to Seize the Pre-Trial Chamber with a view to Annulment of the Investigation in its entirety, or a stay to allow the Defence to conduct investigative acts necessary to re-file their investigative requests.³² On 8 May 2017, the ICIJ denied the Application.³³ On 11 May 2017, the Defence submitted their Notice of Appeal against Decision on AO An's Application to Annul the Entire Investigation.³⁴

3. Applicable Laws

27. The ECCC Law requires the Court *to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious*

²⁸ Case File 004/2, D339/1, Decision on Request to Place Certain Documents pertaining to Henri Locard on the Case File, 8 February 2016. Case File 004/2, D342/1, Decision on International Co-Prosecutor's Request for Investigative Action to Place Maps and Case 002 Materials onto Case File 004/2, 8 February 2016.

²⁹ Case File 004/2, D345/1, Decision on AO An's Thirteenth Request for Investigative Action, 16 March 2017.

³⁰ Case File 004/2, D334/2, Second Notice of Conclusion of Judicial Investigation against AO An, 29 March 2017.

³¹ Case File 004/2, D347.1, Notification on the Interpretation of 'Attack against the Civilian Population' in the Context of Crimes against Humanity with regard to a State's or Regime's Own Armed Forces, 10 February 2017. Case File 004/2, D347.1/3[1], Appeal against the ICIJ's Notification on the Interpretation of 'Attack against the Civilian Population' in the Context of Crimes against Humanity with regard to a State's or Regime's Own Armed Forces, 2 May 2017.

³² Case File 004/2, D350, Application to Seize the Pre-Trial Chamber with a view to Annulment of the Investigation, 3 May 2017.

³³ Case File 004/02, D350/1, Decision on AO An's Application to Annul the Entire Investigation, 8 May 2017.

³⁴ Case File 004/2, D350/1/1, Notice of Appeal against Decision on AO An's Application to Annul the Entire Investigation

*violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April to 6 January 1979.*³⁵

4. Submissions and Arguments

28. The NCP hereby holds the stance that all charged persons named in Case File 004, in particular AO An (Case File 004/2) were neither *senior leaders* nor *those who were most responsible for the crimes and serious violations of Cambodian criminal laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979*, thus not falling under the ECCC jurisdiction.³⁶ The NCP therefore wishes to maintain the documents submitted as mentioned in the National Co-Prosecutor's Responses dated 29 December 2008 and 22 May 2009.³⁷
29. The ECCC Law³⁸ and Agreement between the Royal Government of Cambodia and the United Nations (Agreement)³⁹ have clearly defined the purpose of this court, that is, to bring to trial only "senior leaders of Democratic Kampuchea" and "those who were most responsible" for the crimes falling under the ECCC jurisdiction.
30. The ECCC Law and Agreement have specified the suspects' positions to be brought to trial, namely only two categories as specified above. The charged person AO An's position was neither a senior leader of Democratic Kampuchea nor the one who was most responsible to be brought to trial at the ECCC.
31. It should be noted that both Co-Prosecutors have concurred and agreed to select five suspects⁴⁰ for prosecution, by forwarding the allegations to the CIJs as the Co-

³⁵ Articles 1 and 2 new of the ECCC Law, and the Agreement between the Royal Government of Cambodia and the United Nations.

³⁶ As described in D7, National Co-Prosecutor's Response to the International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71.2, 29 December 2008 and D17, National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, 24 April 2009, and National Co-Prosecutor's Additional Observations, 22 May 2009.

³⁷ D7, 29 December 2008 and D17, 22 May 2009 as abovementioned.

³⁸ Article 1 of the ECCC Law.

³⁹ Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia.

⁴⁰ NUON Chea, KHIEU Samphan, IENG Sary, IENG Thirith and KAING Guek Eav, *alias* Duch.

Prosecutors consider them “senior leaders of Democratic Kampuchea”⁴¹ and “those who were most responsible” for crimes falling under the ECCC jurisdiction.

32. When deciding on the selection of the five suspects, the NCP finds that:
- NUON Chea** was the party’s deputy secretary of the Community Party of Kampuchea (CPK), a permanent member of CPK, and the chairman of the People’s Representative Assembly of the Democratic Kampuchea regime and held other positions.⁴²
- IENG Sary** was a permanent member of CPK, a deputy prime minister and a minister of Foreign Affairs and held other positions.⁴³
- KHIEU Samphan** was the head of state and a member of the Central Committee of CPK and held other positions.⁴⁴
- IENG Thirith** was a member of the Party Centre of CPK and the minister of Social Affairs of the Democratic Kampuchea government and held other positions.⁴⁵
- KAING Guek Eav alias Duch** was the chairman of S-21 Security Office with the most special characteristics and held other functions.⁴⁶
33. The NCP takes the view that AO An who has been named in this case was neither a “senior leader of Democratic Kampuchea” nor one among “those who were most responsible” for the crimes falling under the ECCC jurisdiction.⁴⁷
34. According to the general principles of criminal law, criminal actions can be taken against any person. The ECCC Law and Agreement depart from the general laws as this law requires prosecution of only two categories of persons⁴⁸ who have committed crimes falling under the ECCC jurisdiction. This means that the ECCC Law and Agreement aim to both bring prosecutions against such persons and achieve national reconciliation and unification and in particular to leave a legacy for the next

⁴¹ As indicated in D17, National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, 24 April 2009, and National Co-Prosecutor’s Additional Observations, Para. 52, ERN 00329333 (English).

⁴² As indicated in D17, National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, 24 April 2009, and National Co-Prosecutor’s Additional Observations, Para. 40, ERN 00329327-00329328 (English).

⁴³ D17, *Ibid.*, Para. 40, ERN 00329327-00329328 (English).

⁴⁴ D17, *Ibid.*, Para. 40, ERN 00329328-00329329 (English).

⁴⁵ D17, *Ibid.*, Para. 40, ERN 00329329-00329330 (English).

⁴⁶ D17, *Ibid.*, Para. 40, ERN 00329330-00329331 (English).

⁴⁷ D17, *Ibid.*, Para. 40, ERN 00329331-00329332 (English).

⁴⁸ Senior leaders of Democratic Kampuchea and those who were most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979.

generations to be able to understand the brutal and heinous Democratic Kampuchea regime.

35. With regard to crimes committed in Cambodia, not only did they occur within the ECCC jurisdiction, they took place since the Khmer Republic regime led by Marshal Lon Nol as well. During the Khmer Republic regime, extensive bombing caused deaths, disabilities and serious damage to houses and properties in many areas.⁴⁹ Therefore, the provisions of the ECCC Law and Agreement do not fulfil the requirements of criminal law.
36. Despite the charges against this charged person, justice cannot fully be fulfilled, nor does it expand the ECCC's ability to record the history of Democratic Kampuchea and render justice to the victims, since many of those who have committed crimes are not prosecuted.
37. The NCP therefore adheres to the Preamble to the Agreement that requires the Co-Prosecutors to take into account the pursuit of national reconciliation, stability, peace and security before bringing any prosecution.⁵⁰ Furthermore, the NCP maintains the stance contained in the NCP's Responses dated 29 December 2008 and 22 May 2009, especially the fulfilment of the principles of justice and national reconciliation,⁵¹ the purpose of the ECCC Law and Agreement,⁵² practice procedure,⁵³ preliminary investigation⁵⁴ and selective prosecutions which are the jurisprudence of a number of international criminal courts⁵⁵ and so on.
38. Having examined the results of the preliminary investigation carried out by the ICP and the conclusion of the investigation by the CIJs, the NCP finds that the charged person AO An does not fall under the jurisdiction of the ECCC since this charged person was neither a **senior leader** nor one among **those who were most responsible**

⁴⁹ Searching for the Truth, No. 3, June 2000, P. 9.

⁵⁰ Para. 2 of the Preamble to the Agreement between the United Nations and the Royal Government of Cambodia.

⁵¹ D7, 29 December 2008, Paras. 8, 9, 10, 11, 14, 15, ERN 00267922-00267925 (English).

⁵² D7, 29 December 2008, Paras. 42-49, ERN 00267933-00267935 (English).

⁵³ D7, 29 December 2008, Paras. 50-54, ERN 00267936-00267937 (English).

⁵⁴ D17, 22 May 2009, Paras. 18, 19, 20, 21, 22, 23, ERN 00329323-00329324 (English).

⁵⁵ D7, 29 December 2008, Paras. 24-41, ERN 00267928-00267933 (English).

for crimes committed during the period from 17 April 1975 to 6 January 1979 as stated in the ECCC Law.⁵⁶

39. Even if the affirmative votes on the disagreement between the Co-Prosecutors over the New Introductory and Supplementary Submissions could not be reached during the pre-trial stage at which the investigation is required to be carried out until today, the NCP is still of the view that the charged person named in this case does not fall under the personal jurisdiction of the ECCC.

5. Request

40. For the foregoing reasons, the NCP submits Case File 004/2 to the CIJs and requests the CIJs to dismiss all allegations against AO An pursuant to IR 67(3)(a).

Date	Name	Place	Signature
18 August 2017	CHEA Leang National Co-Prosecutor		

⁵⁶ As indicated in D7, 29 December 2008 and D17, 22 May 2009 as abovementioned.