



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

19 December 2019

PRESS RELEASE

Today, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia issued its considerations on the Appeals against the Co-Investigating Judges’ Closing Orders in Case 004/2.

On 16 August 2018, after the 10-yearlong investigation, the International Co-Investigating Judge issued an indictment sending AO An for trial, while on the same day, the National Co-Investigative Judge issued a dismissal order dismissing all charges against him. The Pre-Trial Chamber was faced with, for the first time in judicial history, two conflicting closing orders, emanating from one single judicial office.

The Pre-Trial Chamber was thereafter seised of the Appeals lodged by the National Co-Prosecutor and the Co-Lawyers for AO An, on 14 December 2018 and 19 December 2018, respectively, against the International Co-Investigating Judge’s Closing Order (Indictment), and the Appeal lodged by the International Co-Prosecutor on 20 December 2018 against the National Co-Investigating Judge’s Order Dismissing the Case against AO An.

On 19, 20 and 21 June 2019, the Pre-Trial Chamber held a hearing in Case 004/2 to hear the arguments of the Parties.

Common Disposition, Unanimously Decided by the Pre-Trial Chamber

First, after a meticulous review of the Case File, the Pre-Trial Chamber concluded that the Co-Investigating Judges’ simultaneous issuance of the two conflicting Closing Orders was illegal, in violation of the very foundations of the ECCC legal framework.

The Pre-Trial Chamber found that the joint conduct of investigations by the National and the International Co-Investigating Judges is a primary fundamental legal principle at the ECCC (at para. 103). More specifically in the case of disagreements related to matters that must be determined by a closing order under Internal Rule 67, the Chamber found that the ECCC legal framework allows only two courses of action pursuant to Article 23^{new} of the ECCC Law and Internal Rule 72(3). The Co-Investigating Judges are obliged either to reach a tacit or express consensus on those matters, or to refer their disagreement on such matters to the Pre-Trial Chamber (at para. 120).

The Pre-Trial Chamber further clarified its authority over the investigative stage (at paras 31-54). The Chamber confirmed that the ECCC is a specialised court within the Cambodian court system (at para. 58), and reaffirmed its unanimous finding in Case 004/1 that the ECCC’s applicable law does not preclude national jurisdiction and that ordinary Cambodian courts inherently have full jurisdiction over matters of criminal justice (at para. 59).

The Pre-Trial Chamber noted the Co-Investigating Judges' issuance of their Closing Orders 16 months after notifying, for the second time, the conclusion of the judicial investigations and found that the Co-Investigating Judges failed to issue the Closing Orders within a reasonable time (at paras 62, 70).

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

National Judges Opinion

In the view of the National Judges, the history of the negotiation that lead to the UN/RGC Agreement contemplates prosecution of only a small limited number of persons before the ECCC (at para. 203) either the senior leaders or among those most responsible. The National Judges concluded that the seven persons, who composed the Standing Committee of the CPK, are considered as the senior leaders of the Democratic Kampuchea regime (at para. 224) while KAING Guek Eav were not the senior leaders of the Democratic Kampuchea regime.

With respect to Case 004/2, the National Judges of the Pre-Trial Chamber considered that the National Co-Investigating Judge carried out the judicial investigation in a comprehensive manner (at para. 282) and found that the National Co-Investigating Judge's Closing Order Dismissing the Case against AO An is thus legally justified and should be upheld.

On the other hand, the National Judges found that the action taken by the International Co-Investigating Judge was contrary to the ideas of the law drafters, the administrative structure of Democratic Kampuchea, international jurisprudence and his own previous assertions (at para. 293). The National Judges also found that the issuance of two conflicting Closing Orders created *lacunae* in law (at para. 295). In the case of *lacunae* like this, the National Judges considered that any law, including Internal Rule 77(13), should be interpreted in favour of the accused in order to resolve the deadlock in Case 004/2 (at paras 296-301). Therefore, the National Judges concluded that the International Co Investigating Judge's Closing Order (Indictment) sending AO An to trial shall be annulled and the National Co Investigating Judge's Closing Order Dismissing the Case against AO An shall stand.

International Judges Opinion

At the outset, the International Judges observed that the Co-Investigating Judges erroneously vested themselves with authority to issue separate and contradicting Closing Orders (at para. 316). The International Judges addressed the validity of each Closing Order as they differ in its conformity with the applicable law before the ECCC (at paras 317-326). The International Judges considered that it is reasonably inferred from the language of Articles 5(4), 6(4) and 7 of the ECCC Agreement, Articles 20^{new} and 23^{new} of the ECCC Law and Internal Rules 13(5), 14(7), 71 and 72 that the key object of the disagreement settlement mechanism is to prevent a deadlock from derailing the proceedings from moving to trial (at para. 323).

The International Judges concluded that the National Co-Investigating Judge's issuance of the Closing Order Dismissing the Case against AO An is *ultra vires* and, therefore, void while the International Co-Investigating Judge's Closing Order (Indictment) stands (at para. 326) and AO An is accordingly indicted and committed for trial in proceedings before the Trial Chamber. After having reviewed all the admissible grounds for Appeals, the International Judges revised the International Co-Investigating Judge's Closing Order (Indictment) for Genocide (at para. 632). Additionally, pursuant to Internal Rule 44 and the facts on the record, the International Judges found that the International Co-Investigating Judge erred by failing to consider any security measures at his disposal. Given the fact AO An is charged with the most serious of crimes, namely genocide, crimes against humanity and murder, the International Judges would have issued an arrest warrant against him (paras 688-693).

As the Pre-Trial Chamber has not reached a decision with an affirmative vote of at least four judges, Internal Rule 77(13) dictates the following procedures. The International Co-Investigating Judge's Closing Order (Indictment) is not reversed and thus stands.

The Pre-Trial Chamber's decision is available at:

https://eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D359_24_EN.PDF

For further information, please contact:

Mr. NETH Pheaktra
Chief of Public Affairs Office, Press Officer
Mobile: +855 (0) 12 488 156
Email: neth.phektra@eccc.gov.kh