

អប្ប / N°: D555/T



ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ  
Kingdom of Cambodia  
Nation Religion King

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

Royaume du Cambodge  
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត  
Office of the Co-Investigating Judges  
Bureau des co-juges d'instruction

Case File No: 004/2/07-09-2009-ECCC-OCIJ

Before: The Co-Investigating Judges  
Date: 18 September 2017  
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**DECISION ON AO AN'S URGENT REQUEST FOR DISCLOSURE OF  
DOCUMENTS RELATING TO DISAGREEMENTS**

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## I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, 21 October 2015, and 16 January 2017.
2. On 28 August 2017, the Defence for Ao An (“Defence”) filed its *Urgent Request for Disclosure of Documents Relating to Disagreements* (“Request”).<sup>1</sup>
3. On 4 September 2017, the Co-Prosecutors informed the CIJs that they did not intend to respond to the Request.<sup>2</sup>

## II. SUBMISSIONS

4. We refer to the Request for the details of the submissions. The Defence argue in essence that:
  - a. given the fact that the National Co-Prosecutor (“NCP”) and International Co-Prosecutor (“ICP”) have submitted opposing final submissions, with the main difference especially for the NCP being the question of personal jurisdiction,<sup>3</sup> they need to have access to all the documents underlying disagreement proceedings pursuant to Internal Rule 71 between the Co-Prosecutors in order to inform their own response to the Co-Prosecutors’ final submissions;<sup>4</sup>
  - b. they also need to have access to the full and unredacted documentation of the disagreement proceedings related to Ao An before the Pre-Trial Chamber (“PTC”),<sup>5</sup> and
  - c. they need to have access to any filings, orders and decisions relating to a disagreement between the CIJs relating to the question of personal jurisdiction over Ao An.<sup>6</sup>
5. The Defence allege that they require said access in order to effectively exercise the fair trial rights of their client and to counter an inequality of arms, because the NCP and ICP are aware of each other’s views, and that the Defence is put at a material disadvantage by the lack of full knowledge of the three categories of documents mentioned above.<sup>7</sup>

## III. DISCUSSION

6. The Request is unfounded.
7. Any disagreement procedure between the Co-Prosecutors is confidential and its underlying documentation not part of the case file. The CIJs do not have access to it, nor do the CIJs have the power to order the NCP or ICP to disclose their disagreements onto the case file unless they choose to do so themselves.
8. The same applies to any documentation generated in disagreement proceedings before the PTC. It is for the PTC to decide, after consultation with the Co-Prosecutors, whether it wants to release any documentation from those proceedings.

<sup>1</sup> Case File No. 004/2-D355, *Urgent Request for Disclosure of Documents relating to Disagreements*, 28 August 2017 (“Request”).

<sup>2</sup> Case File No. 004/2-D355/1.1, *Email from Travis Michael Farr to Filippo de Minicis*, 4 September 2017.

<sup>3</sup> Request, paras 36, 37.

<sup>4</sup> Request, para. 41(a).

<sup>5</sup> Request, para. 41(b).

<sup>6</sup> Request, para. 41(c).

<sup>7</sup> Request, para. 38.



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9. The disagreements between the CIJs are confidential and we do not see any reason to reveal anything more than the fact that disagreements exist (see para. 1 above), something we do not even have to do under the Internal Rules.
10. We fail to see why the Defence needs to have access to our disagreements in order to respond to the Prosecution's submissions. The Co-Prosecutors have no access to them, either, and hence could not base their own submissions on them.
11. We will make up our mind about the content of the closing order only after receiving the submissions from both sides and hence any relevant current disagreement might in theory become moot.
12. There is no material disadvantage, either, for the Defence. The CIJs are not bound by the Prosecution's submissions, including those on personal jurisdiction. The NCP requests a dismissal, something that poses no grievance for the Defence. They thus have to defend only against the request for an indictment by the ICP, and that includes presenting their own evaluation of the evidence – including the issue of personal jurisdiction – in the same way as they would have to do against a joint request for indictment. We already set out our own views on the general criteria relevant to personal jurisdiction in the Closing Order (Reasons) in Case 004/1.<sup>8</sup>
13. We anticipate that the Request was possibly meant as a preparation for the next logical step, if one accepts the Defence's point of view, and that is a clarification request, much in the same way as was filed by the Defence for separate and opposing final submissions by the Prosecution,<sup>9</sup> asking for our view on whether the law applicable before the ECCC allows separate and opposing closing orders.
14. To pre-empt any future litigation of this point and in order to save the Parties time, we hereby state that we consider separate and opposing<sup>10</sup> closing orders as generally permitted under the applicable law, for very much the same reasons which we found regarding opposing final submissions.<sup>11</sup> We also publicly hinted at this possibility in the last revision of the quarterly completion report.<sup>12</sup>
15. We are aware of the problem this raises at the appeals stage. Internal Rule 77(13) only addresses the scenario of a joint dismissal or indictment; not that of split closing orders. However, this is no justification to argue that therefore split closing orders are prohibited. On the contrary, the Supreme Court Chamber in its appeal judgement in Case 001<sup>13</sup> explicitly acknowledged the scenario of the CIJs reasonably disagreeing over personal jurisdiction, for example, and that in the context of the disagreement procedure the investigation shall proceed.
16. We are of the view that the investigation stage ends at the very latest with the decision of the PTC on any appeal against the closing order. If there were to be no supermajority in the PTC for upholding one of the closing orders, both would appear to stand under the application of Internal Rule 77(13), however, there would be in our view no more *investigation stricto sensu* that could proceed. Yet, the solution of that scenario is squarely within the jurisdiction of the PTC.

<sup>8</sup> Case File No. 004/1-D308/3, *Closing Order (Reasons)*, 10 July 2017.

<sup>9</sup> Case File No. 004/2-D353, *Request for Clarification*, 25 July 2017.

<sup>10</sup> This would, in theory, also include two indictments differing in substance.

<sup>11</sup> Case File No. 004/2-D353/1, *Decision on Ao An's Request for Clarification*, 4 September 2017.

<sup>12</sup> ECCC Completion Plan – Revision 13, 17 July 2017, para. 23, note 12, available at <https://www.eccc.gov.kh/en/eccc-completion-plan-revision-13>.

<sup>13</sup> Case File No. 001-F28, *Appeal Judgement*, Supreme Court Chamber, 9 April 2012, para 65.



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- 17. We assume that this decision will also be of interest of the parties in Case 004.
- 18. The International CIJ will issue a separate instruction regarding the placement of a copy of this decision on Case File 003.

**FOR THE FOREGOING REASONS, WE<sup>14</sup>**

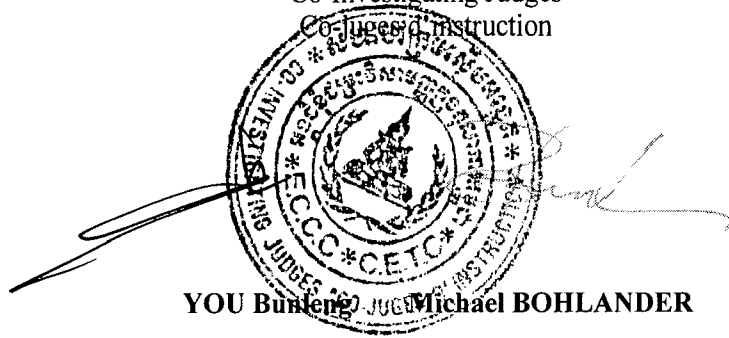
- 19. **DENY** the Request; and
- 20. **INSTRUCT** the Greffier to place a confidential copy of this decision on Case File 004.

Dated 18 September 2017, Phnom Penh

**សហចៅក្រមស៊ើបអង្កេត**

Co-Investigating Judges

Co-Judges of Instruction



YOU Bunleng Michael BOHLANDER

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<sup>14</sup> While both Judges sign this decision jointly, the National CIJ wishes to recall that he does not recognise or accept as valid any documents created and/or filed by former International Reserve CIJ Laurent Kasper-Ansermet, and hence the Case File document numbering should run from the last document put on the Case File by former International CIJ Blunk and not count any documents filed by Judge Kasper-Ansermet.