



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

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**DECISION ON THE JOINT DEFENCE REQUEST FOR
RECLASSIFICATION OF RULINGS AND FILINGS
CONCERNING RESOURCES**

Distribution:

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Ao An Defence

MOM Luch
Richard ROGERS
Göran SLUITER

Yim Tith Defence

SO Mosseny
Suzana TOMANOVIĆ

Civil Party Lawyers

CHET Vanly
HONG Kimsuon
KIM Mengkhy
LOR Chunthy
SAM Sokong
SIN Soworn
TY Srinna
VEN Pov

Linda BEHNKE
Laure DESFORGES
Herve DIAKIESE

Ferdinand DJAMMEN-
NZEPA

Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Emmanuel JACOMY
Martine JACQUIN
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Beini YE



I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, 22 January 2015, and 21 October 2015.
2. On 16 March 2016, the Ao An Defence filed a request asking the CIJs to order the Defence Support Section (“DSS”) to increase the Defence’s funding so as to facilitate the appointment of an additional Senior and Junior International Legal Consultant (“Ao An Resources Request”).¹
3. On 18 March 2016, I issued my first decision on that request in which I sought further particulars from the Defence and invited the DSS to file a response.² On 24 and 31 March 2016 respectively, the Defence and the DSS filed their further particulars and response.³
4. On 26 April 2016, I issued a second decision on the Ao An Resources Request in which I requested further action from the DSS and the Defence and asked them to report back to me.⁴ I received reports from the Defence and the DSS on 4 and 5 May 2016 respectively.⁵
5. On 9 May 2016, I issued a third decision on the Ao An Resources Request.⁶
6. On 2 June 2016, the Yim Tith Defence filed a request asking the CIJs to direct the DSS to, *inter alia*, provide the Defence with the resources it was originally allocated (“Yim Tith Resources Request”).⁷
7. On 7 June 2016, I sought further particulars of the request from the Defence and invited the DSS to provide an explanation for certain matters alleged by the Defence.⁸ The Defence and the DSS filed further particulars on 8 and 10 June 2016 respectively.⁹
8. On 14 June 2016, I issued a second decision on the Yim Tith Resources Request.¹⁰

¹ Case File No. 004-D304, *Urgent Request for Additional Resources*, 16 March 2016, para. 18.

² Case File No. 004-D304/1, *Decision on Ao An’s Request to Order DSS to Provide Additional Resources*, 18 March 2016.

³ Case File No. 004-D304/2, *Urgent Provision of Further Particulars Following the Decision on Ao An’s Request to Order DSS to Provide Additional Resources*, 24 March 2016; Case File No. 004-D304/3, *DSS Response to the Ao An Defence Request for Additional Resources*, 31 March 2016.

⁴ Case File No. 004-D304/4, *Further Decision on Ao An’s Request to Order DSS to Provide Additional Resources*, 26 April 2016.

⁵ Case File No. 004-D304/5, *Urgent Report on the Ao An Defence’s Meeting with DSS Pursuant to the International Co-Investigating Judge’s Further Decision on Additional Resources*, 4 May 2016; Case File No. 004-D304/6, *DSS Report to the International Co-Investigating Judge Regarding the Ao An Defence Request for Additional Resources*, 5 May 2016.

⁶ Case File No. 004-D304/7, *Decision on Resources to be Provided to the Ao An Defence*, 9 May 2016.

⁷ Case File No. 004-D312, *Yim Tith’s Urgent Request for the Co-Investigating Judges to Direct the Defence Support Section to Provide the Yim Tith Defence Team with the Resources it was Originally Allocated*, 1 June 2016.

⁸ Case File No. 004-D312/1, *Decision on Yim Tith’s Urgent Request Concerning Defence’s Resources*, 7 June 2016.

⁹ Case File No. 004-D312/2, *Further Information Provided Pursuant to D312/1*, 8 June 2016; Case File No. 004-D312/3, *DSS Report to the Co-Investigating Judges on Yim Tith’s Urgent Request Concerning Defence Resources*, 10 June 2016.

¹⁰ Case File No. 004-D312/4, *Second Decision on Yim Tith’s Urgent Request Concerning Defence Resources*, 14 June 2016.



9. On 28 July 2016, the Ao An and Yim Tith Defence (collectively, “Case 004 Defence”) filed a joint request for reclassification of rulings and all related filings concerning the Ao An and Yim Tith Resources Requests (“Request”).¹¹
10. On 3 August 2016, the International Co-Prosecutor informed my staff that the Co-Prosecutors do not intend to file a response to the Request.

II. SUBMISSIONS

11. The Case 004 Defence request that I reclassify from “Confidential” to “Public” the ten filings relating to the Ao An and Yim Tith Resources Requests referred to in paragraph 2 of the Request (“Documents”), or in the alternative, that I place the Documents on all active case files.¹²
12. The Case 004 Defence submit that the reclassification of the Documents to “Public” will not prejudice the investigation as the filings have no direct bearing upon the facts under investigation.¹³ Where information does not strictly relate to the facts under investigation, the Case 004 Defence argue that it should not be kept confidential.¹⁴
13. The Case 004 Defence submit that the Documents are relevant to rulings on fair trial and administrative issues and should be disclosed in accordance with principles of justice and transparency as set out in Internal Rule 21(1).¹⁵ The Case 004 Defence submit that the reclassification of the Documents will aid in ensuring that similar issues arising in the future are dealt with in accordance with the principles established in my rulings on the Ao An and Yim Tith Resources Requests, thus safeguarding the charged persons’ rights to a fair trial and to adequate time and facilities.¹⁶

III. DISCUSSION

14. The Request confuses transparency with publicity; there is no discernible interest of the public at this time to know about the criteria for allocating resources to defence counsel.
15. The CIJs have a wide discretion to reclassify documents submitted or created during the investigation. The rule, unlike at the trial stage, is that everything is confidential. In other words, the public has in principle no right to know about the details of the investigations.
16. Exceptions can be made if there is an overriding and justified public interest in reclassifying material. I cannot see that the public would take an interest in such administrative matters, important as they may be for the defence teams; there is at this time no case to be made for reclassification under the criteria of education or legacy building, either.
17. The current state of affairs already provides full transparency to everyone who needs to be involved. Transparency of the process does not *eo ipso* equate with its

¹¹ Case File No. 004-D304/9, *Joint Defence Request for Reclassification of Rulings and Related Filings Concerning Resources*, 28 July 2016.

¹² Request, paras 2-3.

¹³ Request, paras 27, 28.

¹⁴ Request, para. 28.

¹⁵ Request, paras 27, 29, 30

¹⁶ Request, para. 32.



publicity, especially if the procedural default condition is confidentiality. The DSS knows the position of the International CIJ and is expected to abide by it, and the parties in Case 004 know it. I will naturally apply the same principles in Case 003 as and when the issue will arise.

18. I also note that each case turns on its own facts and publicising the Documents will not pre-determine the actual outcome of any future requests.
19. Finally, the parties in Case 004 have no standing to argue on behalf of the parties in Case 003, especially the Defence. In the case of a filing by the Defence in Case 003, redacted versions of the necessary material, i.e. previous confidential Case 004 decisions, will be attached to the decision as has been the practice to date. The Defence in Case 004 is not prejudiced by keeping the current classification since it has full access to the Documents.

FOR THE FOREGOING REASONS, I:

20. **DENY** the Request.

Dated: 31 August 2016, Phnom Penh



Judge Michael Bohlander

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**International Co-Investigating Judge
Co-juge d'instruction international**