



ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ  
Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសេសវិសេសសាលាដំបូងកម្ពុជា

Royaume du Cambodge  
Nation Religion Roi

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

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

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**DECISION ON AO AN'S REQUEST FOR CLARIFICATION**

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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, 22 January 2015, and 16 January 2017.
2. On 20 November 2008, the International Co-Prosecutor (“ICP”), pursuant to Internal Rule 53, issued the *Co-Prosecutors’ Third Introductory Submission* (“Introductory Submission”) where he alleged, *inter alia*, that Ao An was criminally responsible for a number of national and international crimes.<sup>1</sup> Due to a disagreement between the Co-Prosecutors, the Introductory Submission was forwarded to the CIJs by the Acting International Co-Prosecutor on 7 September 2009.<sup>2</sup>
3. On 18 July 2011, 24 April 2014, 4 August 2015, and 20 November 2015, the ICP filed supplementary submissions, thereby seising the CIJs of new allegations against Ao An, pursuant to Internal Rule 55(3).<sup>3</sup>
4. On 27 March 2015, after signing a disagreement with the National CIJ, former International CIJ Harmon charged Ao An with violations of Articles 501 and 506 of the 1956 Penal Code (homicide) and the crimes against humanity of murder, extermination, persecution on political and religious grounds, imprisonment, and other inhumane acts.<sup>4</sup> On 14 March 2016, International CIJ Bohlander charged Ao An with genocide and additional counts of crimes against humanity.<sup>5</sup>
5. On 16 December 2016, the CIJs issued the *Notice of the Conclusion of the Judicial Investigation Against Ao An* pursuant to Internal Rule 66(1) and ordered the severance of Ao An from Case File 004.<sup>6</sup>
6. On 29 March 2017, following the completion of further investigative acts, the CIJs issued the *Second Notice of Conclusion of Judicial Investigation against Ao An* pursuant to Internal Rule 66(1).<sup>7</sup>
7. On 19 May 2017, the CIJs forwarded the Case File to the Co-Prosecutors for the purpose of their final submission pursuant to Internal Rule 66(4).<sup>8</sup>
8. On 25 July 2017, the defence for Ao An (“Defence”) filed a *Request for Clarification* in relation to the possibility of separate final submissions being filed by the Co-Prosecutors (“Request”).<sup>9</sup>
9. On 18 August 2017, the National Co-Prosecutor (“NCP”) filed her final submission in Case 004/2.<sup>10</sup>

<sup>1</sup> Case File No. 004/2-D1, *Co-Prosecutors’ Third Introductory Submission*, 20 November 2008.

<sup>2</sup> Case File No. 004/2-D1/1, *Acting International Co-Prosecutors’ Notice on Filing of the Third Introductory Submission*, 7 September 2009.

<sup>3</sup> Case File No. 004/2-D65, *Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011; Case File No. 004/2-D191, *Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence*, 24 April 2014; Case File No. 004/2-D254/1, *Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak*, 4 August 2015; Case File No. 004/2-D272/1, *Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4*, 20 November 2015.

<sup>4</sup> Case File No. 004/2-D242, *Written Record of Initial Appearance*, 27 March 2015.

<sup>5</sup> Case File No. 004/2-D303, *Written Record of Further Appearance*, 14 March 2016.

<sup>6</sup> Case File No. 004/2-D334, *Notice of Conclusion of Judicial Investigation against Ao An*, 16 December 2016; Case File No. 004/2-D334/1, *Order for Severance of Ao An from Case 004*, 16 December 2016.

<sup>7</sup> Case File No. 004/2-D334/2, *Second Notice of Conclusion of Judicial Investigation against Ao An*, 29 March 2017.

<sup>8</sup> Case File No. 004/2-D351, *Forwarding Order pursuant to Internal Rule 66(4)*, 19 May 2017.

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

<sup>10</sup> Case File No. 004/2-D351/4, *Final Submission Concerning Ao An Pursuant to Internal Rule 66*, 18 August 2017.



10. On 21 August 2017, the ICP filed his final submission in Case 004/2.<sup>11</sup>

## II. SUBMISSIONS

### A. Indication of multiple final submissions

11. The Defence submit that they are unclear whether to expect one or two final submissions from the Co-Prosecutors as it is unclear what role the NCP has played in the case since a disagreement on the filing of the *Third Introductory Submission* was filed, the references in an ICP filing (and my response thereto) are to “his” and the “ICP’s” final submission respectively, and in Case 004/1 the ICP and NCP filed separate final submissions.<sup>12</sup>
12. Therefore, for the purposes of transparency, legal certainty, and safeguarding Ao An’s right to adequate time and facilities to respond to the final submission(s), the Defence seek clarification regarding the Co-Prosecutors’ intentions (“Request 1”).<sup>13</sup>

### B. Lawfulness of filing multiple final submissions

13. The Defence submit that the wording of Internal Rule 66(5) and Article 16 of the ECCC Law indicate that only one final submission should be filed by the Office of the Co-Prosecutors per case.<sup>14</sup> Further, the provision of a mechanism to settle disagreements regarding a final submission (found in Internal Rule 71(3)(c)), “strongly suggests” that it was not intended that two contradictory final submissions be filed. The Defence argue that doing so would permit the CIJs to “effectively usurp the exclusive authority” of the Pre-Trial Chamber (“PTC”) to settle disputes relating to a final submission.<sup>15</sup>
14. The Defence submit that logic and the principle of *in dubio pro reo* suggest that a prosecutor’s office that cannot agree on the merits of a case should not pursue it and question which of two equally weighted but contradictory final submissions they should consider to represent the prosecution’s case.<sup>16</sup> Finally, it is submitted that the lack of challenge to the legality of the filing of two final submissions in Case 004/1 does not prevent such a challenge in Case 004/2.<sup>17</sup>
15. The Defence therefore, in the interest of safeguarding Ao An’s right to be investigated and tried in accordance with the law, request clarification regarding whether the filing of two final submissions in the same case is compliant with ECCC Law and the Internal Rules (“Request 2”).<sup>18</sup>

### C. Internal Rule 71 disagreement mechanism

16. The Defence submit that on a plain reading of Article 20 new of the ECCC Law and Internal Rule 71, disagreements between the Co-Prosecutors regarding a final submission “shall” be settled in accordance with the settlement mechanism provided for.<sup>19</sup> Further, as the filing of final submissions is mandatory under Internal Rule 66(5), any dispute must relate to the *contents* of a final submission.<sup>20</sup>

<sup>11</sup> Case File No. 004/2-D351/5, *International Co-Prosecutor’s Rule 66 Final Submission*, 21 August 2017.

<sup>12</sup> Request, paras 2-3, 21-24.

<sup>13</sup> *Ibid.*, para. 24.

<sup>14</sup> *Ibid.*, para. 25.

<sup>15</sup> *Ibid.*, paras 27, 34.

<sup>16</sup> *Ibid.*, para. 26.

<sup>17</sup> *Ibid.*, para. 28.

<sup>18</sup> *Ibid.*, paras 29, 34.

<sup>19</sup> *Ibid.*, para. 30.

<sup>20</sup> *Ibid.*, para. 31.



17. For these reasons, and for those summarised in the section above, the Defence submit that the Co-Prosecutors have an obligation to pursue all available means under Internal Rule 71 to settle a dispute relating to a final submission, rather than filing two contradictory final submissions.<sup>21</sup> Failing to do so, the Defence submit, would deprive Ao An of his “right” to a reasoned decision on the disagreement, as per Internal Rule 71(4)(d). Further, Ao An has “a reasonable expectation” that the PTC will settle such disputes, as intended by the parties to the UN-RGC Agreement.<sup>22</sup>
18. The Defence, noting that the Internal Rules do not specify the earliest point at which a disagreement regarding a final submission can be recorded, and averring that the Co-Prosecutors must, considering the importance of the issues at stake, make an informed decision on their respective positions, submit that the disagreement mechanism can only be triggered once both final submissions are finalised.<sup>23</sup>
19. Therefore, the Defence request clarification of the Co-Prosecutors’ obligations under Internal Rule 71 (including whether they are obliged to use the full complement of settlement measures and the earliest that they should be commenced) (“Request 3”).<sup>24</sup>

#### **D. Impact on the timing of the final submissions**

20. Finally, given that they have the right to know when disagreements affect Ao An’s rights and interests, the Defence request clarification regarding the effect, if any, that disagreement between the Co-Prosecutors is likely to have on the timing of the final submission (“Request 4”).<sup>25</sup>

### **III. DISCUSSION**

21. Our considerations in respect of the Co-Prosecutors’ obligations under Internal Rule 71 are relevant to our considerations in respect of the lawfulness, under the ECCC’s legal framework, of filing two final submissions, and both are relevant regarding Request 1. We will accordingly address the matters in that order.

#### **A. Internal Rule 71 disagreement mechanism (Request 3)**

22. Supervising the internal affairs of the Co-Prosecutors, including in relation to disagreements between them (which are confidential<sup>26</sup>) is outside the remit of the CIJs.<sup>27</sup> Notwithstanding this, the question of whether filings made by the Co-Prosecutors are compliant with the ECCC Law, Internal Rules and relevant practice directions, and if they are therefore admissible, is a consideration that the CIJs must address.
23. As the filing of two final submissions evidences a disagreement between the Co-Prosecutors, the question of whether the Co-Prosecutors are obliged to use the full complement of disagreement settlement measures, in other words, whether the mechanisms in Internal Rule 71 are mandatory or discretionary, does therefore fall within our remit, as it relates to the admissibility of the final submissions. However, the broader aspect of Request 3, to clarify the obligations of the Co-Prosecutors under Internal Rule

<sup>21</sup> *Ibid.*, para. 31.

<sup>22</sup> *Ibid.*, para. 31.

<sup>23</sup> *Ibid.*, para. 32.

<sup>24</sup> *Ibid.*, paras 33, 34.

<sup>25</sup> *Ibid.*

<sup>26</sup> Pursuant to Internal Rule 71(2), the written statement of facts and reasons for a disagreement are not placed on the Case File.

<sup>27</sup> See the considerations of the international PTC judges in Case File No. 003-D20/4/4, [Redacted] *Considerations on Investigative Requests Regarding Case 003*, 2 November 2011, International Judges’ Opinion, para. 8.



- 71 generally, is insufficiently specific and we will not presuppose the aspects in respect of which the Defence require clarification.
24. While Article 20 new of the ECCC Law provides that if the Co-Prosecutors are in disagreement, the settlement procedure “shall” apply, the immediately following provision is seemingly clear that engaging the settlement procedure is discretionary: “*the prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions*”.<sup>28</sup> This reflects the UN-RGC Agreement<sup>29</sup> and aligns with the wording of Internal Rule 71, which, containing an additional prior step of recording a disagreement, provides that, in the event of a disagreement, “*either or both of them may record*” it in a register of disagreements, and within 30 days of such registration, “*either Co-Prosecutor may bring the disagreement before the Pre-Trial Chamber*”.<sup>30</sup>
25. Notwithstanding the above, the national judges of the PTC have previously stated that a Co-Prosecutor cannot act unilaterally unless the power to do so has been delegated pursuant to Internal Rule 13(3) or the PTC has been seised with the settlement of the disagreement.<sup>31</sup> However, in a later, unanimous decision, the PTC recalled that it had previously confirmed that a Co-Prosecutor or CIJ can act unilaterally if a disagreement has been recorded and the period for bringing it before the PTC has elapsed.<sup>32</sup> Recalling this decision, the PTC has since stated that a unilateral summons is valid “*where the disagreement procedure set forth in Internal Rule 72 has been complied with and the 30 day time period to bring it before the Pre-Trial Chamber has elapsed*”.<sup>33</sup> That a referral to the PTC is not required prior to undertaking unilateral action finds further support in a PTC decision regarding the confidentiality of disagreements between the CIJs.<sup>34</sup>
26. The national and international judges of the PTC differ on the question of whether a Co-Prosecutor can take unilateral action without recording a disagreement. The international judges of the PTC, in contrast to their national colleagues,<sup>35</sup> have considered that the recording of a disagreement is not a prerequisite for unilateral action if the disagreeing Co-Prosecutor had decided, at the time the disagreement arose, not to seise the PTC.<sup>36</sup>
27. To conclude that recording a disagreement is mandatory but that seising the PTC is not mandatory not only requires contradictory interpretations of the word “*may*” (without any indications as to why such contortion is required), but also asserts that, as Internal Rule 71 contains the additional prior step of recording a disagreement, Internal Rule 71

<sup>28</sup> ECCC Law, Article 20 new (emphasis added).

<sup>29</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea (“UN-RGC Agreement”), Article 6(4).

<sup>30</sup> Internal Rule 71(1), (2) (emphasis added).

<sup>31</sup> Case File No. 003-D20/4/4, [Redacted] *Considerations on Investigative Requests Regarding Case 003*, 2 November 2011, National Judges’ Opinion, paras 7, 11.

<sup>32</sup> Case File No. 004-A122/6.1/3, *Decision on Im Chaem’s Urgent Request to Stay the Execution of Her Summons to an Initial Appearance*, 15 August 2014, para. 14.

<sup>33</sup> Case File No. 003-D117/1/1/2, [Redacted] *Decision on Meas Muth’s Appeal Against the International Co-Investigating Judge’s Order on Suspect’s Request Concerning Summons Signed by one Co-Investigating Judge*, 3 December 2014, para. 16.

<sup>34</sup> Case File No. 004-D208/1/1/2, *Decision on Ta An’s Appeal against the Decision Rejecting His Request for Information concerning the Co-Investigating Judges’ Disagreement of 5 April 2013*, 22 January 2015, para. 10, where the PTC stated that a disagreement shall not be placed on the Case File “*except where a disagreement is brought before the Pre-Trial Chamber for resolution...*” (emphasis added).

<sup>35</sup> Case File No. 003-D20/4/4, [Redacted] *Considerations on Investigative Requests Regarding Case 003*, 2 November 2011, National Judges’ Opinion, paras 7, 11.

<sup>36</sup> Case File No. 003-D20/4/4, [Redacted] *Considerations on Investigative Requests Regarding Case 003*, 2 November 2011, International Judges’ Opinion, para. 4.



- prevails over the UN-RGC Agreement and the ECCC Law, notwithstanding that the latter two are hierarchically superior sources of the law to the Internal Rules. We therefore consider that it is clear, notwithstanding the differing views of the PTC judges as noted above, that under the ECCC Law and the Internal Rules the recording of disagreements between the Co-Prosecutors is discretionary. Therefore we do not consider that the Co-Prosecutors have an obligation to use the full complement of settlement measures. While in Case 004/1, both the NCP and the ICP referred to their disagreement in their final submissions, it was within their discretion to do so.<sup>37</sup>
28. We accordingly reject the Defence's submission<sup>38</sup> that the Co-Prosecutors have an obligation to pursue all available means under Internal Rule 71. We also do not consider that Ao An has the right under Internal Rule 71(4)(d) to a reasoned decision on the Co-Prosecutors' disagreement.<sup>39</sup> Such a right can only arise *if* the PTC is seised of a disagreement, and in any event, charged persons do not have an automatic right to reasoned decisions on disagreements,<sup>40</sup> unless, in the exceptional circumstances of the case, the lack of information about the disagreement impairs the charged person's fair trial rights.<sup>41</sup>
29. Regarding Ao An's "*reasonable expectation*" that such disputes be settled by the PTC, we do not consider that such an expectation exists given that it is within the Co-Prosecutors' discretion to seise the PTC – indeed, the ECCC Law and the UN-RGC Agreement expressly provide that, where settlement does not occur, the case shall proceed.<sup>42</sup>
30. With respect to the earliest point at which a disagreement regarding a final submission may be recorded,<sup>43</sup> this is a matter for the Co-Prosecutors to determine, however we do consider it possible that the parameters of a disagreement may be sufficiently well defined in advance of a party finalising its position on the matter to consider the disagreement mechanism relevant. Further, to definitively conclude otherwise undermines the purpose of the mechanism, which is to resolve disputes, not entrench them.
31. Regarding the Defence's concern at being presented with two final submissions, we do not consider that any prejudice necessarily arises given that they will be given adequate time to respond, as set out in the Forwarding Order.<sup>44</sup>

<sup>37</sup> Case File No. 004/1-D304/1, *Final Submission Concerning Im Chaem Pursuant to Internal Rule 66*, 27 October 2016, paras 2-11; Case File No. 004/1-D304/2, *International Co-Prosecutor's Rule 66 Final Submission Against Im Chaem*, 27 October 2016, para. 11.

<sup>38</sup> Request, para. 31.

<sup>39</sup> *Ibid.*, para. 31.

<sup>40</sup> Internal Rule 71(4)(d) requires that, in respect of communicating the PTC's decision, the PTC Greffier shall forward the decision to the Director of the Office of Administration, who shall notify the Co-Prosecutors. This is in conformity with the requirement in Internal Rule 71(2) that information regarding disagreements are not to be placed on the Case File. Internal Rule 71(4)(d) is to be contrasted with Internal Rule 72(4)(e) which applies to decisions on CIJ disagreements *mutatis mutandis*, save for an additional requirement that the parties are also to be notified of PTC decisions where they relate to CIJ disagreements on decisions against which a party would have a right to appeal. The PTC affirmed this reading of Internal Rule 72(4)(e) (*see* Case File No. 004/2-D208/1/1/2, *Decision on Ta An's Appeal against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013*, 22 January 2015, para. 10). We thus consider Internal Rule 71(4)(d), when read in the context of Internal Rules 71(2), and 72(4)(e) as evincing an intention to keep deliberations between the Co-Prosecutors as confidential between them.

<sup>41</sup> Case File No. 004/2-D208/1/1/2, *Decision on Ta An's Appeal against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013*, 22 January 2015, para. 10.

<sup>42</sup> ECCC Law, Article 20 new; UN-RGC Agreement, Article 6(4).

<sup>43</sup> Request, para. 32.

<sup>44</sup> Forwarding Order, para. 11.



## B. Lawfulness of filing multiple final submissions (Request 2)

32. While we agree with the Defence that one reading of Internal Rule 66(5) envisages one final submission, the language does not *require* a joint final submission, nor does it *exclude* the filing of separate submissions, which could have been achieved, for example, with the language “*their final submission*” or “*a joint final submission*”. While the Co-Prosecutors are required to work together to prepare indictments,<sup>45</sup> that they may disagree is recognised in the UN-RGC Agreement which requires them to “*cooperate with a view to arriving at a common approach to the prosecution*”<sup>46</sup> and, of course, in the fact that a disagreement resolution mechanism is provided for, which, in the UN-RGC Agreement, explicitly envisages a disagreement on “*whether to proceed with a prosecution*”.<sup>47</sup>
33. A further consideration is that, while they are of course given due consideration in accordance with our obligation to provide reasons in our closing order, we are not bound to accept the contents of any final submissions (nor the Defence’s response thereto) and as the Defence will be given adequate time to respond<sup>48</sup> no prejudice necessarily arises simply from the filing of two, contradictory final submissions.
34. Regarding the submission that filing two final submissions effectively usurps the PTC’s “*exclusive authority*” to settle disputes,<sup>49</sup> as set out above, we do not consider that seising the PTC is mandatory, and accordingly, there is no exclusive authority to be usurped.
35. We find the Defence’s argument with respect to which of two final submissions they would be required to respond to unpersuasive.<sup>50</sup> The Defence will respond to either or both, as they deem appropriate, and will be given adequate time to do so. Since the brief submission of the NCP is in any event in favour of the Defence by denying personal jurisdiction, there is no discernible additional argument for the Defence to contest, and hence no prejudice arises. With respect to “*logic and the principle of in dubio pro reo*” suggesting that the failure of the Co-Prosecutors to agree on the merits of a case should result in a case not being pursued, as set out above, the ECCC Law expressly provides that where the disagreement mechanism “*fails*”, the case shall proceed, while the UN-RGC Agreement explicitly envisages that the Co-Prosecutors may disagree on the most fundamental aspect of their office and provides that, in such situations, the case shall proceed.<sup>51</sup> Furthermore, after being seised of an investigation, the CIJs have responsibility for determining whether a person is indicted or not, not the Co-Prosecutors.<sup>52</sup>
36. Finally, the Defence do not substantiate how Request 2 is in the interest of safeguarding Ao An’s right to be investigated and tried in accordance with the law. In the absence of specific submissions regarding any alleged infringement of this right, we do not consider it necessary to address this point any further.
37. We consider that the filing of two final submissions is compliant with the ECCC legal framework.

<sup>45</sup> Request, para. 25; ECCC Law, Article 16.

<sup>46</sup> UN-RGC Agreement, Article 6(4) (emphasis added).

<sup>47</sup> UN-RGC Agreement, Article 6(4).

<sup>48</sup> Forwarding Order, para. 11.

<sup>49</sup> Request, para. 27.

<sup>50</sup> Request, para. 26.

<sup>51</sup> UN-RGC Agreement, Article 6(4).

<sup>52</sup> Internal Rule 67(1).



**C. Indication of multiple final submissions (Request 1)**

38. Request 1 is now moot given that both Co-Prosecutors have filed their final submissions.<sup>53</sup>

**D. Effect of a disagreement on the timing of the final submission(s) (Request 4)**

39. Request 4 is now moot given that both Co-Prosecutors have filed their final submissions.<sup>54</sup>

40. The matters set out in this decision may be of interest to the parties also in the stage of the judicial investigation, accordingly it would be useful to let the parties in Case 004 have access to it.

41. The ICIJ will issue a separate instruction regarding the placement of a copy of this decision on Case File 003.

**FOR THE FOREGOING REASONS, WE<sup>55</sup>:**

42. **INFORM** the Defence that:

- a. the request for clarification as to whether the Co-Prosecutors intend to file one or two final submissions is now moot;
- b. we consider that the filing of two contradictory final submissions is lawful under the ECCC legal framework;
- c. we do not consider that the Co-Prosecutors are obliged to use the full complement of settlement measures under Internal Rule 71; and
- d. the request for clarification on the effect of a disagreement on the timing of the final submissions is now moot;

43. **DENY** the remainder of the Request; and

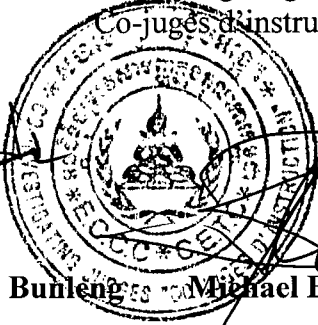
44. **INSTRUCT** the OCIJ Greffier to place this decision on Case File 004.

Dated 5 September 2017, Phnom Penh

**សហចៅក្រមស៊ើបអង្កេត**

Co-Investigating Judges

Co-juges d'instruction



**YOU Bunleng** **Michael BOHLANDER**

<sup>53</sup> See *supra*, paras 9-10.

<sup>54</sup> *Ibid.*

<sup>55</sup> While the CIJs are issuing this notice jointly, the National CIJ notes, for the record, that documents placed on Case File 004 must be numbered sequentially from the last documents placed before the resignation of Judge Siegfried Blunk, without including in the count orders and decisions issued by Reserve CIJ Laurent Kasper-Ansermet.