



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

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**DECISION ON AO AN'S REQUEST FOR CLARIFICATION ON
THE CONSEQUENCES OF A DISAGREEMENT**

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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, and 22 January 2015.
2. On 16 December 2016, the CIJs filed the *Notice of Conclusion of Judicial Investigation Against Ao An*¹ (“Notice of Conclusion”) and an *Order for Severance of AO An from Case 004*² (“Severance Order”).
3. On 22 December 2016, the Ao An Defence (“Defence”) filed the *Request for Clarification* (“Request”).³

II. SUBMISSIONS

4. In the Request, the Defence note that the *Notice of Conclusion of Judicial Investigation Against Ao An*⁴ and the *Order for Severance of Ao An from Case 004*⁵ contain identical footnotes that read:

While the CIJs are issuing this notice jointly, the National CIJ notes, for the record, that documents placed on Case File 004 should 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 (“RICIJ”).

5. The Defence submit that the meaning and legal effect of this statement (“Statement”) is unclear; that it is unclear what the International CIJ’s position is on the matter; if the CIJs’ positions are different; and how the disagreement affects the case and Ao An’s interests.
6. Therefore, the Defence request the CIJs to clarify:
 - a. The precise meaning of the Statement, in particular, how the documents will be numbered in the Case File;
 - b. The legal effect, if any, on the orders and decision of the RICIJ;
 - c. Whether the intended or actual legal effects of the statement extend to rogatory letters and other investigative acts of the RICIJ, as well as subsequent investigative acts flowing from the RICIJ’s acts;
 - d. What the International CIJ’s position, if any, is on the matter; and
 - e. If the International CIJ’s position is different from the National CIJ’s position, how this disagreement affects the Case File numbering and legal force of the RICIJ’s actions.

¹ Case File No. 004-D334, *Notice of Conclusion of Judicial Investigation Against AO An*, 16 December 2016, (“Notice of Conclusion”).

² Case File No. 004-D334/1, *Order for Severance of AO An from Case 004*, 16 December 2016, (“Severance Order”).

³ Case File No. 004/2-D341, *Request for Clarification*, 22 December 2016, (“Request”).

⁴ Notice of Conclusion, Footnote 5.

⁵ Severance Order, Footnote 2.



III. DISCUSSION

7. Preliminarily, we recall that, as stated in previous decisions and confirmed by the Pre-Trial Chamber (“PTC”), disagreements are confidential and their content and details are not, as a rule, accessible by the parties unless they are brought before the PTC for resolution by the CIJs under Internal Rule 72.⁶ However, in the exercise of our discretion on this matter,⁷ we have decided to make the essence of the disagreement on the numbering of Case File 004 known to the parties.

A. Numbering of Documents on the Case File

8. The disagreement does not affect the numbering of the Case File in practice. The International CIJ will continue to number documents in the current manner and in the current sequence. No retroactive changes to documents currently on the Case File are planned.
9. The National Co-Investigating Judge, according to a disagreement registered already with Judge Mark Harmon, holds the view that the D numbers of documents on Case File 004 should continue from the D number of the last document filed before the resignation of Judge Blunk; he considers the numbers used by the RICIJ to have been incorrectly and unlawfully assigned.

B. Legal Effects, if any, on the orders and decisions of RICIJ Kasper-Ansermet

10. The position of the International CIJ is that all orders and decisions of RICIJ are legally valid, unless over-ruled by the International CIJ.⁸
11. The National CIJ considers orders by the RICIJ invalid since in his opinion he did not have the status of International CIJ pursuant to Articles 26 and 27 (new) of the ECCC Law and Articles 3 and 5 of the ECCC Agreement.⁹
12. Given that it is public knowledge from the quarterly Completion Reports that we are following broadly different strategies in the investigations, any effects of this divergence will at best be felt at the Closing Order stage.

C. Effects of the statement on rogatory letters and other investigative acts of the RICIJ and on related investigative actions

13. The National CIJ considers all actions performed by the RICIJ to be invalid.

D. Judge Bohlander’s position on this matter

14. As stated under B, the International CIJ considers the actions performed by the RICIJ to be valid.

⁶ 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.

⁷ 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.

⁸ For example, I vacated the decision by the RICIJ on the ECCC’s personal jurisdiction over Meas Muth (Case File No. 003-D181, *Consolidated Decision on Meas Muth’s Requests on Personal Jurisdiction*, 1 February 2016, paras 27, 43).

⁹ Press Statement by National Co-Investigating Judge, 26 March 2012, available at <https://www.eccc.gov.kh/en/articles/press-statement-national-co-investigating-judge-0>.



E. If the CIJs disagree on this matter, how this affects the Case File numbering and the legal force of the RICIJ's actions

15. This sub-question is in effect repetitive and has already been answered above. As stated under A, the numbering on the Case File will in practice continue to be the same as it has been so far.

FOR THE FOREGOING REASONS, WE:

NOTIFY the Parties of our views as set out above.

Phnom Penh, Dated 20 January 2017

សហចៅក្រមស៊ើបអង្កេត

Co-Investigating Judges

Co-juge d'instruction

The signature is written in black ink over a circular official seal. The seal contains the text 'CO-INVESTIGATING JUDGES' and 'ECCC' around a central emblem. The signature is a cursive script that appears to read 'YOU Bunleng' and 'Michael BOHLANDER'.

YOU Bunleng Michael BOHLANDER