



**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

**អង្គជំនុំជម្រះ**  
Pre-Trial Chamber  
Chambre Préliminaire

D193/91/7

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC29)

**Before:** Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

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**Date:** 15 February 2017

**PUBLIC REDACTED**

**DECISION ON [REDACTED] CONSOLIDATED APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S CONSOLIDATED DECISION ON [REDACTED] REQUESTS FOR RECONSIDERATION OF DISCLOSURE (D193/76 AND D193/77) AND THE INTERNATIONAL CO-PROSECUTOR'S REQUEST FOR DISCLOSURE (D193/72) AND AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S CONSOLIDATED DECISION ON INTERNATIONAL CO-PROSECUTOR'S REQUESTS TO DISCLOSE CASE 004 DOCUMENT TO CASE 002 (D193/70, D193/72, D193/75)**

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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “████████ Consolidated Appeal Against the International Co-Investigating Judge’s Consolidated Decision on ██████████ Requests for Reconsideration of disclosure (D193/76 and D193/77) and the International Co-Prosecutor’s Request for disclosure (D193/72) and Against the International Co-Investigating Judge’s Consolidated Decision on International Co-Prosecutor’s Requests to disclose Case 004 Documents to Case 002 (D193/70, D193/72, D193/75),” filed by his Co-Lawyers (the “Defence”) on 22 August 2016 in English and on 6 September 2016 in Khmer language (the “Appeal”).<sup>1</sup>

## I. INTRODUCTION

1. This Appeal relates to two Decisions, D193/89 (the “First Impugned Decision”),<sup>2</sup> and D193/90 (the “Second Impugned Decision”),<sup>3</sup> issued by the International Co-Investigating Judge Bolhander (the “ICIJ”) on 13 and 15 July 2016, respectively, regarding requests for disclosure made by the International Co-Prosecutor (the “ICP”) and other requests, made by the Defence for ██████████, for reconsideration of disclosure decisions.

## II. PROCEDURAL BACKGROUND

### 1. Proceedings before the Office of the Co-Investigating Judges (the “OCIJ”)

2. On 8 May and 14 October 2014, the International Co-Investigating Judge Harmon (the “former ICIJ”) issued two decisions dealing with several of ICP’s requests for disclosure (the “former ICIJ Decisions”).<sup>4</sup> On 20 October 2014, the ICP filed a public statement

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<sup>1</sup> ██████████ Consolidated Appeal Against the International Co-Investigating Judge’s Consolidated Decision on ██████████ Requests for Reconsideration of disclosure (D193/76 and D193/77) and the International Co-Prosecutor’s Request for disclosure (D193/72) and Against the International Co-Investigating Judge’s Consolidated Decision on International Co-Prosecutor’s Requests to disclose Case 004 Document to Case 002 (D193/70, D193/72, D193/75 and D193/84), 22 August 2016, D193/91/2.

<sup>2</sup> Consolidated Decision on ██████████ Requests for reconsideration of disclosure (D193/76 and D193/77) and the International Co-Prosecutor’s Request for disclosure (D193/72), 5 July 2016, D193/89.

<sup>3</sup> Consolidated Decision on International Co-Prosecutors’ Requests to Disclose Case 04 Document to Case 002 (D193/70, D193/72, D193/75), 15 July 2016, D193/90. The Pre-Trial Chamber notes that on 1 September 2016, the OCIJ issued a correction of the first page of the Second Impugned Decision, deleting D193/84 from the title (see D193/90/Corr. 1).

<sup>4</sup> Decision on the International Co-Prosecutor’s Request to Disclose Case 004 Interviews Relevant to the Case 002/02, 8 May 2014, D193/1 and Decision on Co-Prosecutor’s Urgent Request to Disclose Case 004 Interviews

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informing that the ICIJ had authorised disclosure of 27 witness interviews from Case 004 to the Trial Chamber and to the other parties in Case 002/19-09-2007-ECCC/OCIJ (“Case 002”).<sup>5</sup> On 24 October 2014, the Defence for ██████ filed before the OCIJ a request for access to five documents mentioned in the ICP’s public statement.<sup>6</sup> On 3 November 2014, the former ICIJ denied ██████ request for access to the five documents on the grounds that, being a suspect, he had no “case to answer”.<sup>7</sup>

3. On 11 March and 18 May 2015, the former ICIJ issued Decisions D193/15 and D193/24, addressing ICP’s disclosure requests D193/7, D193/9 and D193/23,<sup>8</sup> and allowing the disclosure of, amongst other documents, ██████ statements D119/84 and D119/85.<sup>9</sup>

4. On 6 November 2015, the ICIJ issued a *confidential* Memorandum, D273, directed to the Trial and the Supreme Court Chambers, with subject: “Disclosure of material from Cases 003 and 004 to Case 002” (the “Disclosure Memorandum D273”),<sup>10</sup> referring to a “revised practice for conditions of disclosure.”<sup>11</sup>

5. On 9 December 2015, ██████ appeared before the ICIJ who informed him of charges and granted access, to Case 004/07-09-2009-ECCC/OCIJ (“Case 004”) Case File, to his Defence.<sup>12</sup>

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Relevant to 1st Segment Of Case 002/02 Trial, 14 October 2014, D193/4. *See also* Appeal, para. 29 and footnote 44.

<sup>5</sup>International Co-Prosecutor's Disclosure of Statements from Case File 004, 20 October 2014, E319, para. 4.

<sup>6</sup> ██████ urgent request for the five documents referred to in the “international co-prosecutor’s disclosure of statements from case file 004”, 24 October 2014, D226.

<sup>7</sup> Decision on Suspect’s Request for Five Documents, 3 November 2014, D226/1, para. 11.

<sup>8</sup> International Co-prosecutor’s Request to Disclose Case 004 Interviews Relevant to the Case 002/02 Trial and Case 002/01 Appeal, 15 December 2014, D193/7; International Co-Prosecutor’s Request To Disclose Case 004 Statement Relevant To The Case 002/02 Trial, 29 January 2015, D193/9; International Co-Prosecutor's Request To Disclose Case 004 Statements Relevant To Case 002, 21 April 2015, D193/23.

<sup>9</sup> Decision on the International Co-Prosecutor's Case 002 Disclosure Requests D193, D193/7 and D193/9, 11 March 2015, D193/15; Decision on The International Co-Prosecutor's Case 002 Disclosure Requests D193, D193/7 and D193/23, 18 May 2015, D193/24.

<sup>10</sup> Memorandum from ICIJ to Trial Chamber and Supreme Court Chamber concerning ‘Disclosure of material from Cases 003 and 004 to Case 002’, 6 November 2015, D273.

<sup>11</sup> *Ibid.*, para. 3.

<sup>12</sup> [Corrected1] Written Record of Initial Appearance of ██████, 9 December 2015, D281.

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6. On 4 May 2016, the ICIJ issued Decision D193/69, granting ICP's Request D193/68 for disclosure of ██████████ statement D219/488, and revising – by reference to the Disclosure Memorandum D273 - the conditions for disclosure of ██████████ other statements, D119/85, D119/86 and D119/87, which were previously disclosed by Decision D193/24.<sup>13</sup>

7. On 4, 10 and 12 May 2016, the ICP filed disclosure Requests D193/70,<sup>14</sup> D193/72 (the "Request D193/72"),<sup>15</sup> and D193/75, respectively.<sup>16</sup> In Request D193/72, the ICP asked for disclosure of four attachments to ██████████ previously disclosed statements, namely D119/84.1, D119/85.1, D119/85.2 and D119/87.1.

8. On 19 May 2016, the Defence filed a request for the reconsideration of Decision D193/69 (the "First Reconsideration Request").<sup>17</sup> On 23 May 2016, the Defence filed another request for the partial reconsideration of former ICIJ Decisions D193/15 and D193/24 and response to ICP's Request D193/72 (the "Second Reconsideration Request").<sup>18</sup>

9. On 13 July 2016, the ICIJ issued the First Impugned Decision denying Defence's First and Second Reconsideration Requests and partially granting ICP's Request D193/72. On 15 July 2016, the ICIJ issued the Second Impugned Decision granting the disclosure Requests D193/70, D193/72 and D193/75.

10. On 1 August 2016, the Defence filed before the OCIJ a Notice of consolidated Appeal against the First and Second Impugned Decisions.<sup>19</sup>

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<sup>13</sup> Decision on International Co-Prosecutor's Request to Disclose one Case 004 Document to Case 002, 4 May 2016, D193/69.

<sup>14</sup> International Co-Prosecutor's Request to Disclose Case 004 Documents into Case 002 and Remove Redactions, 4 May 2016, D193/70.

<sup>15</sup> International Co-Prosecutor's Request to Disclose Attachments to Disclosed Documents Into Case 002, 10 May 2016, D193/72.

<sup>16</sup> International Co-Prosecutor's Request to disclose Case 004 documents into Case 002, 12 May 2016, D193/75.

<sup>17</sup> ██████████ Request for reconsideration of the Decision on International Co-Prosecutor's Request to disclose one Case 004 document to Case 002 (D193/69), 19 May 2016, D193/76.

<sup>18</sup> ██████████ Request for partial reconsideration of D193/15 and D193/24 and Response to International Co-Prosecutor's disclosure Request D193/72, 23 May 2016, D193/77.

<sup>19</sup> Appeal Register of ██████████ Notice of Consolidated Appeal Against the International Co-Investigating Judge's Consolidated Decision on ██████████ Requests for Reconsideration of Disclosure (D193/76 and D193/77) and the International Co-Prosecutor's Request for Disclosure (D193/72) and Against the International

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## 2. Proceedings before the Pre-Trial Chamber

11. On 22 August 2016, the Defence filed before the Pre-Trial Chamber, in English only, the consolidated Appeal which was followed by a Request, dated 24 August 2016, for leave to file the Appeal in one language first with the translation to follow (the “Defence Language Request”).<sup>20</sup> According to the Defence Language Request, the Appellant received notice of the First Impugned Decision on 22 July 2016<sup>21</sup> and of only the English version of the Second Impugned Decision in an email dated 18 July 2016.<sup>22</sup> The Khmer translation of the Appeal was filed on 31 August 2016.

12. On 6 September 2016, having considered that: i) the Defence Language Request provided acceptable reasons; ii) the ICP did not raise any objections; iii) the English version of the consolidated Appeal was filed as soon as 22 August 2016; and that iv) by the time it filed the English version of the consolidated Appeal, the Appellant had yet to receive the Khmer version of the Second Impugned Decision;<sup>23</sup> the Pre-Trial Chamber granted the Defence Language Request and allowed notification of the consolidated Appeal. Whereas the Internal Rules do not provide for “consolidated” appeal submissions against a “plurality” of decisions,<sup>24</sup> the Pre-Trial Chamber allowed a *consolidated* appeal against *both* Impugned Decisions, since no objections were raised in this regard and, most importantly, having considered that both Impugned Decisions: i) deal with the same subject matter of disclosure of investigation documents into trial proceedings; ii) the reasoning of both Decisions suggest a reading in context with other ICIJ disclosure decisions, referred to therein; and iii) *inter alia*, address the same ICP Request D193/72 and concern the disclosure of witness [REDACTED] statements and attachments thereof, which clearly gave rise to most of Defence’s contentions.

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Co-Investigating Judge's Consolidated Decision on International Co-Prosecutor's Requests to Disclose Case 004 Document to Case 002 (D193/70, D193/72, D193/75 and D193/84), 1 August 2016, D193/91.

<sup>20</sup> Request to File [REDACTED] Consolidated Appeal Against the International Co-Investigating Judge’s Decisions D193/89 and D193/90 on one Language, 24 August 2016, D193/91/1.

<sup>21</sup> *Ibid.*, para. 1.

<sup>22</sup> *Ibid.*, para. 2.

<sup>23</sup> Defence Language Request, para. 2. *See also* Case 004/07-09-2009-ECCC/OCIJ (“Case 004”) (PTC26) Decision on International Co-Prosecutor’s Appeal Concerning Testimony at Trial in Closed Session, 20 July 2016, D309/6, para. 14: “since no Khmer translation of the Impugned Order has yet been notified, the Notice of Appeal and Appeal were filed within the time limit applicable under Internal Rules.”

<sup>24</sup> ECCC Internal Rules (Rev.9), as revised on 16 January 2015, (the “Internal Rules”), Internal Rule 75(3).

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13. On 8 September 2016, the ICP filed a Request for extension of time to respond and for leave to file the Response in one language first with the translation to follow,<sup>25</sup> which was granted by the Pre-Trial Chamber on 15 September 2016.<sup>26</sup> On 20 September 2016, the ICP filed the Response in English, which was followed by the filing of the Khmer version on 31 October 2016 (the “Response”).<sup>27</sup> The Defence Reply to the ICP Response was filed on 1 November 2016 (the “Reply”).<sup>28</sup>

### III. ADMISSIBILITY

#### 1. Submissions

14. The Defence for ██████ submits that the Appeal satisfies the criteria set for admissibility of appeals under Rule 21.<sup>29</sup> According to the Defence, the Impugned Decisions infringe upon his rights to legal certainty, to equal treatment, and to procedural fairness, which are protected under Internal Rule 21 and other applicable legal instruments.<sup>30</sup>

15. The Defence submits that the Impugned Decisions breach ██████ right to legal certainty<sup>31</sup> because they “set out a ‘revised practice’ for disclosure”<sup>32</sup> and the ICIJ introduced

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<sup>25</sup> International Co-Prosecutor’s Request for extension of time and leave to respond in one language to ██████ consolidated Appeal against the International Co-Investigating Judge’s consolidated Decisions D193/89 and D193/90 concerning disclosure from Case 004 to Case 002, 8 September 2016, D193/91/3.

<sup>26</sup> Decision on International Co-Prosecutor’s Request for extension of time and leave to respond in one language to ██████ consolidated Appeal against the international Co-Investigating Judge’s consolidated Decision D193/89 and D193/90 concerning disclosure from Case 004 to Case 002, 15 September 2016, D193/91/4.

<sup>27</sup> International Co-Prosecutor’s Response to ██████ Consolidated Appeal Against the International Co-Investigating Judge’s Consolidated Decisions D193/89 and D193/90 concerning Disclosure from Case 004 to Case 002, 20 September 2016, D193/91/5.

<sup>28</sup> ██████ Reply to the International Co-Prosecutor’s Response to His Consolidated Appeal Against the International Co-Investigating Judge’s Consolidated Decisions D193/89 and D193/90, 1 November 2016, D193/91/6.

<sup>29</sup> Appeal, paras. 24-26 referring to Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6 (the “IENG Thirith Decision”), paras. 13-14; Case 002 (PTC11), Decision on KHIEU Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A1 90/I/20 (the “KHIEU Samphan Decision”), para. 36; Case 002 (PTC71), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Decision Refusing to Accept the Filing of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for a Stay of the Proceedings, 20 September 2010, D390/1/2/4 (the “IENG Sary Decision”), para. 13.

<sup>30</sup> Appeal, paras. 27-39 and footnotes 38 and 46.

<sup>31</sup> Appeal, para. 27, first sentence.

<sup>32</sup> Appeal, para 27, second sentence.

a “*new test*” for disclosure,<sup>33</sup> one year after the former ICIJ’s October 2014 disclosure Decision.<sup>34</sup> The Defence avers that the “[new] test takes into account three criteria when deciding on requests to disclose”, including: i) responsibility to protect confidentiality and integrity of the investigation; ii) the relevance of material related to issues in Case 002; and iii) the rights of Case 002 parties.<sup>35</sup> The Defence argues that the new test “significantly differs to the disclosure test set out by the former ICIJ [...] which casts the disclosure decision as weighing up the ‘competing interests of maintaining the integrity and confidentiality of the ongoing investigation in Case 004 and the timely disclosure of materials to the parties in Case 002/02’.”<sup>36</sup> Furthermore, according to the Defence, the new test is also “not set out or based upon any of the applicable Rules” and “it breaches Rule 56(1), which guarantees the confidentiality of an investigation, subject to very limited exceptions set out in Rule 56(2).”<sup>37</sup> In breaching Rule 56, the Defence submits, the new test contradicts the approach adopted by the Pre-Trial Chamber, which “found that Rule 56 governed the powers of the CIJs to handle confidentiality issues and disclosure [of] judicial investigations”.<sup>38</sup> As a result, the Defence claims, documents keep being disclosed “without any certainty that a correct and consistent [disclosure] test has been applied,” which violates ██████████ right to legal certainty since he is “entitled to consistent decisions from the OCIJ regarding the issue of disclosure, in accordance with the Rules”.<sup>39</sup>

16. The Defence further alleges that the denial, by the Impugned Decisions, of his requests to determine the legality of disclosures made under the former ICIJs disclosure regime, “offends the principle of equal treatment between Charged Persons.”<sup>40</sup> According to the Defence, whereas ██████████ “did not have standing to make submissions on disclosure requests until he was charged on 9 December 2015”, ██████████ and ██████████, who were

<sup>33</sup> Appeal, para. 27, third sentence, referring, in footnote 39, to Memorandum D273, para. 3

<sup>34</sup> Appeal, para. 28.

<sup>35</sup> Appeal, para. 28 referring to the First Impugned Decision, paras. 72-73 and 77-79.

<sup>36</sup> Appeal, para. 29, referring to Decision on Co-Prosecutor’s Urgent Request to Disclose Case 004 Interviews Relevant to 1st Segment Of Case 002/02 Trial, 14 October 2014, D193/4, para. 11.

<sup>37</sup> Appeal, para. 30.

<sup>38</sup> Appeal, para. 31 referring to Case 004 (PTC 25), Decision on Appeal Against Order on ██████████ Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, D284/1/4 (“Decision on Case 004 (PTC25)”), para. 23.

<sup>39</sup> Appeal, para. 32.

<sup>40</sup> Appeal, para. 33.



charged earlier, “were afforded 9 months in which to respond to ICP disclosure requests.”<sup>41</sup> This has resulted in “numerous disclosure decisions that cannot be considered or challenged by the Defence for ██████, placing him at a significant disadvantage to the other Charged Persons in Case 004,” which causes “irremediable” harm that “can only be addressed by the [Pre-Trial Chamber] reversing the ICIJ’s decision disallowing him from reviewing the relevant disclosure decisions.”<sup>42</sup>

17. Lastly, the Defence submits that the Impugned Decisions result in a breach of procedural fairness which is “due to the ICIJ’s refusal to remedy the procedural injustice arising out of ██████ being charged at a much later stage than the other Charged Persons in Case 004.”<sup>43</sup> According to the Defence, although both the ICIJ<sup>44</sup> and the former ICIJ<sup>45</sup> recognize that ██████ late charging may result in inequality, the “ICIJ fails to remedy this inequality, instead casting it as ‘intentional and systemic’.”<sup>46</sup> The Defence submits this breach of procedural fairness is irremediable, “unless the ICIJ’s decisions are revisited by the [Pre-Trial Chamber].”<sup>47</sup>

18. In Response the ICP submits that the Appeal is inadmissible under Rule 21 because the Defence misconstrues the concepts of legal certainty, equal treatment and procedural fairness,<sup>48</sup> and fails to articulate how the Impugned Decisions cause irremediable damage warranting PTC’s intervention.<sup>49</sup> According to the ICP, Defence’s argument, that the ICIJ has adopted a new test, is based on a fundamental misunderstanding to the concept of legal certainty and on an exaggeration of the extent to which the new test is different from the prior one.<sup>50</sup> In the ICP’s view: the concept of legal certainty allows for the refinement and development of jurisprudence, especially with respect to procedural matters;<sup>51</sup> and both

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<sup>41</sup> Appeal, paras. 34-35.

<sup>42</sup> Appeal, para. 36.

<sup>43</sup> Appeal, para. 37.

<sup>44</sup> Appeal, para. 38 *referring to* the First Impugned Decision, para. 82.

<sup>45</sup> Appeal, para. 38 *referring*, in footnote 50, to the former ICIJ’s Decision on Request for Five Documents (D226/1), para. 12.

<sup>46</sup> Appeal, para. 39 *referring to* the First Impugned Decision, para. 82.

<sup>47</sup> Appeal, para. 39.

<sup>48</sup> Response, para. 16.

<sup>49</sup> Response, para. 16.

<sup>50</sup> Response, para. 18.

<sup>51</sup> *Ibid.*, *referring to* Response, paras. 10-12 and to jurisprudence from the Supreme Court Chamber (“SCC”).

disclosure tests are very similar in substance, since they both “recognize the need to balance a CIJ’s responsibility to protect the confidentiality and integrity of an investigation with the needs of Case 002”.<sup>52</sup> Furthermore, the ICP suggests, there is no indication that the new test would be disapproved by the Pre-Trial Chamber either.<sup>53</sup> As regards any harm claimed, the ICP submits that the Defence has failed to articulate it since: disclosure of documents into Case 002 does not make it more difficult for ██████ to prepare his defence; does not increase the likelihood that he would be sent for trial; and since “harm to a charged person’s reputation and privacy does not warrant the intervention of the PTC pursuant to Rule 21.”<sup>54</sup> The ICP further submits that no inequality issue arises from the fact that ██████ did not have the same opportunity, as ██████ and ██████, to challenge disclosure decisions, because the difference in treatment “did not arise as a result of arbitrary discrimination”, it rather “arose from the fact that ██████ and ██████ were charged prior to ██████ and the fact that the Internal Rules [...] treat suspects and charged persons differently.”<sup>55</sup> Lastly, noting that the argument for procedural unfairness “is premised on the assumption that” inequality has occurred, the ICP argues that the ICIJ has no duty to remedy consequences of a difference in treatment that was “based on objective criteria”.<sup>56</sup>

19. The Defence replies that, the correct interpretation of the principle of legal certainty is that it ensures consistency of decision-making bodies<sup>57</sup> and that, the correct approach to applying this principle to the development of procedural law is set out in Rule 21(1) which “reflects the duties of a Judge in the civil law system to interpret procedural law in favour of the accused.”<sup>58</sup> The Defence further submits that the ICP conflates the right to equal treatment, which is protected by Article 14 of the ICCPR,<sup>59</sup> with the right to non-discrimination, which is protected by Article 26 of the ICCPR,<sup>60</sup> and notes that according to

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<sup>52</sup> Response, para. 19.

<sup>53</sup> Response, para. 21.

<sup>54</sup> Response, paras, 22-23 *referring to* Decision on Case 004 (PTC25), para. 23.

<sup>55</sup> Response, para. 24.

<sup>56</sup> Response, para. 26.

<sup>57</sup> Reply, para. 9.

<sup>58</sup> Reply, para. 11.

<sup>59</sup> International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A(XXI) of 16 December 1966, entered into force on 23 March 1976 (“ICCPR”).

<sup>60</sup> Reply, paras. 14-21.

the Human Rights Committee “procedural inequality must be based on ‘reasonable and objective grounds’ not entailing actual disadvantage or other unfairness.”<sup>61</sup> In the Defence’s view, “the ICP fails to grasp that the procedural unfairness identified [...] goes beyond the differences in law between a suspect and a charged person”,<sup>62</sup> because “the ICP does not address the length of time that ██████████ had the status of Suspect” which “was not due to ‘objective criteria’” and “never ‘justified’”, and “accordingly, the ICIJ had a duty to remedy any procedural unfairness arising out of ██████████ late charging.”<sup>63</sup> This argument, the Defence avers, “differs from the [...] argument on equal treatment, which is based on the difference in treatment with ██████████ and ██████████”.<sup>64</sup> Lastly, the Defence submits, it has identified the relevant irremediable damage for each of the breaches.<sup>65</sup>

## 2. Discussion

20. The Defence submits that the Appeal is admissible under Rule 21. The Pre-Trial Chamber makes reference to the provisions of Rule 21 and recalls that it has previously held that Internal Rule 21 does not provide an automatic avenue for admissibility of appeals raising fair trial rights issues.<sup>66</sup> For the Pre-Trial Chamber to exercise appellate jurisdiction under the said rule, the appellant must demonstrate that, in the particular circumstances of the case at stake, the Pre-Trial Chamber’s intervention is necessary to prevent irremediable damage to the fairness of the proceedings or to the appellant’s fair trial rights.<sup>67</sup>

21. As regards the jurisprudence relied upon in the Appeal,<sup>68</sup> the Pre-Trial Chamber notes that it found IENG Sary’s appeal admissible under Rule 21, because the defence demonstrated that, unless the Pre-Trial Chamber intervened at the stage when the appeal was

<sup>61</sup> Reply, para. 19.

<sup>62</sup> Reply, para. 23.

<sup>63</sup> Reply, para. 24.

<sup>64</sup> Reply, para. 25.

<sup>65</sup> Reply, paras. 27-31 *referring to* Appeal paras. 32, 36 and 39.

<sup>66</sup> Decision on NUON Chea and IENG Thirith’s Appeals against Closing Order, date 15 February 2011, D427/2/15, paras 72, 73. Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49. *See also* Appeal, para. 25 *referring in* footnote 34 to Pre-Trial Chamber’s Decision D239/I/8.

<sup>67</sup> Case002 (PTC31) Decision on Admissibility of IENG Sary’s Appeal Against the OCIJ’s Constructive Denial of IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2009, D130/7/3/5, para. 39; Case004 (PTC11) Decision on ██████████ Appeal against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, para. 7; Decision on Case 004 (PTC25) , para. 21.

<sup>68</sup> Appeal, footnote 37. *See supra* footnote 29.

filed, IENG Sary's right to equal treatment would be irreparably harmed.<sup>69</sup> KHIEU Samphan's appeal, also, was found inadmissible,<sup>70</sup> upon a conclusion that no violation of rights was evident,<sup>71</sup> in the specific circumstances of that case.<sup>72</sup> The Decision on IENG Thirith's appeal is not relevant to the case at hand since, in the IENG Thirith case the Chamber found that, in rendering the impugned Order, the Co-Investigating Judges had not considered the issue of their jurisdiction over the Request,<sup>73</sup> which compelled the Chamber to assume jurisdiction over the Request as a court of first instance,<sup>74</sup> given the "inherent systemic conflict" involved.<sup>75</sup>

22. Therefore, the Pre-Trial Chamber shall examine whether, in the particular circumstances of this case, its intervention at this stage is necessary to prevent irremediable infringement of ██████ rights to legal certainty, equality and procedural fairness.

### *1. Right to Legal Certainty*

23. The Pre-Trial Chamber recalls that the Defence argues legal uncertainty on the grounds that a "new" test for disclosure, identified in the Impugned Decisions: i) differs significantly from the test used in the previous disclosure decisions issued by the former ICIJ (the "consistency ground");<sup>76</sup> and ii) is not based on the applicable Rules and breaches Rule 56(1), which guarantees the confidentiality of investigations, subject to exceptions under Rule 56(2), therefore contradicting the Pre-Trial Chamber's approach (the "legality ground").<sup>77</sup> The Pre-Trial Chamber shall consider these two grounds in turn.

#### *i) The consistency ground*

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<sup>69</sup> IENG Sary's Decision, para. 7 referring to IENG Sary's expedited Appeal against the OCIJ's Decision refusing to accept the filing of IENG Sary's Rresponse to the Co-Prosecutors' Rule 66 Final Submission and additional observations, and Request for stay of the proceedings, D390/1/2/1, 6 September 2010., pages 1 and 13. In the specific circumstances of that case, the Defence submitted that, unlike IENG Sary, a Charged Person in Case 002, Kaing Guek Eav, a Charged Person in Case 001, was actually allowed by the OCIJ to respond to the Co-Prosecutors' Final Submission and, therefore, unless the Pre-Trial Chamber intervened at the stage when the appeal was filed, IENG Sary's right to equal treatment would be irreparably damaged.

<sup>70</sup> KHIEU Samphan Decision, page 14.

<sup>71</sup> KHIEU Samphan Decision, para. 50.

<sup>72</sup> See especially KHIEU Samphan Decision, para 43: "depending on the specific circumstances of a case".

<sup>73</sup> IENG Thirith Decision, para. 11.

<sup>74</sup> IENG Thirith Decision, para. 18.

<sup>75</sup> IENG Thirith Decision, para. 17.

<sup>76</sup> Appeal, paras. 28 and 29 and footnotes 41-44.

<sup>77</sup> Appeal, 30-31.

24. The Pre-Trial Chamber observes that both the Impugned Decisions and the former ICIJ's Decisions address the disclosure requests by, in principle, applying the same balancing process between the ICIJ's responsibility to ensure integrity and confidentiality of investigations<sup>78</sup> on the one hand, and the ICIJ's responsibility to cooperate in the Trial Chamber's process of administration of justice in Case 002<sup>79</sup> on the other. In the Pre-Trial Chamber's view, each of ICIJ's specific considerations - over "timely disclosure of materials to the parties in Case 002", or "the rights of Case 002 parties", or over "relevance of Case 004 material to issues in Case 002" – do not represent new disclosure criteria, as put by the Defence, they rather represent underlying considerations aimed at ultimately ensuring that, in deciding in favour of or against disclosure, the ICIJ complies with his two "primary responsibilities" to cooperate with the Trial Chamber's process of administration of justice in Case 002 to an extent that the integrity and confidentiality of investigations are not jeopardized. Therefore, the Pre-Trial Chamber finds no merit in the Defence's consistency argument.

ii) *The legality ground*

25. According to the Defence, the new test is not set out or based upon any of the applicable Rules; breaches Rule 56(1), which guarantees the confidentiality of an investigation, subject to very limited exceptions set out in Rule 56(2); and, in breaching Rule 56, contradicts the approach adopted by the Pre-Trial Chamber, which according to the Defence, "found that Rule 56 governed the powers of the CIJs to handle confidentiality issues *and disclosure* [of] judicial investigations".<sup>80</sup>

26. At the outset, the Pre-Trial Chamber notes that the second prong of the legality ground, submitting that "the novel test contradicts the approach adopted by the Pre-Trial Chamber", is based on an incorrect reading of this Chamber's jurisprudence, which does not state that "Rule 56 governs *disclosure*" in particular, as the Defence puts it, and reads:

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<sup>78</sup> First Impugned Decision, paras. 73 and 75 - 77. D193/1, paras. 9 and 11. D193/4, para. 19.

<sup>79</sup> First Impugned Decision, paras. 77 and 78. D193/1, paras. 9 and 11. D193/4, para. 19.

<sup>80</sup> Appeal, para 31 *referring to* Decision on Case 004 (PTC25), para. 23.

“The Pre-Trial Chamber underlines that the ECCC legal framework, particularly under Internal Rule 56, gives a broad discretion to the Co-Investigating Judges in handling confidentiality issues and granting limited access to the judicial investigations.”<sup>81</sup>

27. In the Pre-Trial Chamber’s view, while Internal Rule 56(1) gives broad discretion to the Co-Investigating Judges to handle *confidentiality of investigations* issues, Rule 56(2) is not relevant for decisions on “disclosure” of investigative documents to other “judicial bodies”, including the Trial Chamber.

28. Firstly, the Pre-Trial Chamber focuses on the title and context of Internal Rule 56. The title of Internal Rule 56 is “[p]ublic Information by the Co-Investigating Judges”.<sup>82</sup> The French and the Cambodian Code of Criminal Procedure, on which the Internal Rules are mainly based, do not contain any “disclosure” related provisions and only provide on “publicity” related issues, as well.<sup>83</sup> Furthermore, the Pre-Trial Chamber recalls its finding that the Internal Rules must “be read in context and in accordance with [their] object and purpose”,<sup>84</sup> and notes that Internal Rule 56 falls under sub-section “C” of the Internal Rules, which is titled “*Judicial Investigations*”. The title and context of Internal Rule 56 are indicative of a specific provision relating to *publicity* of *judicial investigations*. Moreover, the Pre-Trial Chamber observes that Internal Rule 56 falls under Chapter “III” of the Internal Rules, which is titled “Procedure”. Its overall object, therefore, is to *regulate the “proceedings” for publicity of judicial investigations*.

29. Secondly, the Pre-Trial Chamber takes a close look at the specific provisions of Internal Rule 56(2)(b) in order to find the meaning of the term “non-parties” and whether it

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<sup>81</sup> Decision on Case 004 (PTC25), para. 23.

<sup>82</sup> Internal Rule 54 has an equivalent title also and unequivocally deals only with ‘public information’ related issues.

<sup>83</sup> See Article 121 of the Cambodian Code of Criminal Procedure and Article 11 of the French Code of Criminal Procedure.

<sup>84</sup> Case 002, Pre-Trial Chamber’s Common Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, D404/2/4, 24 June 2011 (the “Decision on Civil Party Appeals in Case 002”), para. 60: “The Pre-Trial Chamber observes that the International Criminal Court in its application of the Rules sought guidance from the principles enshrined in the Vienna Convention on the Law of Treaties. It found that “the provisions *must be read in context and in accordance with its object and purpose*” and that this principle “applies to the Rules.” It explained that “*the context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety*” and that “*its objects may be gathered from the Chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor.*” The Pre-Trial Chamber considers such guidance on the application of the rules appropriate.”

encompasses terms such as “judicial bodies”, or more specifically “Trial Chamber”. To start with, the Pre-Trial Chamber observes that the use of the term “non-parties” as an alternative<sup>85</sup> to the term “media” indicates that “non-parties” must have equivalent levels of status and interest as those of the “media”, whose principal interest is to “inform the public” and whose status is that of a person “not involved in any way in the judicial proceedings”. Therefore, the term “non-parties” cannot be construed to encompass terms such as “judicial bodies” which, by definition,<sup>86</sup> are involved in the judicial proceedings and whose principal mission is, not to inform the public, but rather to find the truth in cases before the ECCC.<sup>87</sup> Whereas publicity is a principal requirement for *trial* hearings,<sup>88</sup> this does not confer upon a trial Chamber an interest similar to that of the media. Furthermore, any reasonable reader would understand the term “non-parties” within the context of the whole text of Internal Rule 56(2)(b) which warns the “media or other non-parties” that non-respect, of any conditions imposed, may bring sanctions under Internal Rules 35 to 38, whose subjects are clearly not the judicial bodies of the ECCC. The Pre-Trial Chamber, therefore, concludes that the term “non-parties” under Internal Rule 56(2)(b) does not encompass “the ECCC” in general or the “Trial Chamber” in particular.

30. Thirdly, the Pre-Trial Chamber observes that Internal Rules 56(2)(a) and (b), which provide on, either the “issuance of information” or on the “granting of access”, should be read to *serve the same overall object and purpose* of Internal Rule 56, which is to regulate proceedings for “publicity” of judicial investigations. Sub-rule 56(2)(b) cannot be read as regulating proceedings that serve an object and purpose different from that of sub-rule 56(2)(a).<sup>89</sup> The Pre-Trial Chamber considers that ICP requests for disclosure are not aimed at *publicizing* the judicial investigations, but are rather premised on a necessity to produce

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<sup>85</sup> Note the use of “or” in Internal Rule 56(2)(b).

<sup>86</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, (“ECCC Law”), Article 2new. Internal Rule 17(1).

<sup>87</sup> ECCC Law (*see especially* Chapter II). 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, 6 June 2003 (“Agreement”), Article 2(1).

<sup>88</sup> Agreement, Article 13(1).

<sup>89</sup> *See also* sub-rule 56(3) which points together at “*matters referred to in sub-rule 2 above*”, rather than referring to 56(2)(a) separately from 56(2)(b).

evidence, before another judicial body of the ECCC, for the purposes of “ascertaining the truth”, hence *servicing purposes other than the publicity*, as that provided for in Rule 56.

31. Therefore, the Pre-Trial Chamber concludes that, proceedings on disclosures, as those requested by the ICP, based on the instructions of the Trial Chamber, are not regulated by Internal Rule 56(2)(b).

32. The Pre-Trial Chamber agrees with the ICIJ that there is lacuna in the applicable law as regards the procedure to be applied when requests for disclosure are brought before the OCIJ.<sup>90</sup> Pursuant to Article 12(1) of the Agreement, Article 23new of the ECCC Law and Internal Rule 2, where the applicable law does not deal with a particular matter, guidance can be sought in the procedural rules established at the international level, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. The Pre-Trial Chamber notes that, in the Impugned Decision, the ICIJ sought guidance in the rules established at international level,<sup>91</sup> and in French jurisprudence,<sup>92</sup> and found: 1) that according to international human rights jurisprudence, “the right to presumption of innocence does not prohibit the disclosure”;<sup>93</sup> 2) that “it is fair to say that disclosure between separate criminal proceedings concerning different accused [...] has been authorised” by the International Criminal Tribunal for the former Yugoslavia (ICTY);<sup>94</sup> and 3) that, according to the French Court of Cassation: “(i) there is no legal provision that prohibits the use of evidence obtained in an investigation into another criminal proceeding that may contribute to the ascertainment of the truth, on the condition that the disclosure is of an adversarial nature and the documents are subjected to discussion by the parties; and (ii) the confidentiality of the investigation does not obstruct the disclosure or use of evidence obtained in the investigation in another criminal proceeding that may contribute

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<sup>90</sup> See First Impugned Decision, para 63: “The Internal Rules do not specifically regulate the disclosure of material from the investigation to the Trial Chamber, a conclusion which my predecessor also reached. Nor is the practice regulated in Cambodian criminal procedure.”

<sup>91</sup> First Impugned Decision, para 63 and footnote 95 *referring to* jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court of Human Rights (ECtHR). *Note that the ECtHR reviews mostly civil law jurisdictions.*

<sup>92</sup> First Impugned Decision, paras. 68-71.

<sup>93</sup> First Impugned Decision, para. 57.

<sup>94</sup> First Impugned Decision, para. 63.



to the ascertainment of the truth in that proceeding”;<sup>95</sup> “jurisprudence does not require that disclosure be permitted only in exceptional cases;”<sup>96</sup> and “the bar for disclosure is set low – the evidence need only contribute to the ‘ascertainment of the truth’, a principle also subscribed to the law before the ECCC in Internal Rules 85(1), 87(4) and 91(3).”<sup>97</sup>

33. The Pre-Trial Chamber considers that the findings of the ICIJ are in concert with: i) the fundamental requirement set in Internal Rule 21 for a balancing of interests and rights involved in the proceedings before the ECCC; and with ii) a reading of the Rules in their “context and in accordance with their object and purpose”, as set in the ECCC Law and Agreement.<sup>98</sup> Within this legal context, the ICIJ is correct that, to be legitimate, disclosure proceedings have to be carried out in a manner that ensures that: i) before a decision on disclosure is rendered, the parties to the investigation are allowed the possibility of an adversarial debate over disclosure requests;<sup>99</sup> and that ii) the OCP is enabled to pursue its mandate to prosecute in Case 002,<sup>100</sup> and the TC is assisted in fulfilling its mandate to find the truth in Case 002, within a reasonable time.<sup>101</sup>

34. Therefore, the Pre-Trial Chamber concludes: i) the Impugned Decision does not breach Internal Rule 56; and ii) is based upon the applicable rules, read in context and in accordance with their object and purpose, as set in the ECCC Law and Agreement, and in light of the fundamental principles of procedure set in Internal Rule 21.

## 2. Right to equality

35. In the Defence’s view, the Impugned Decisions violate ██████████ right to equal treatment because they deny him the opportunity to challenge former ICIJ’s disclosure decisions, whereas ██████████ and ██████████, who were charged earlier than him, were able to

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<sup>95</sup> First Impugned Decision, para. 69.

<sup>96</sup> First Impugned Decision, para. 70.

<sup>97</sup> *Ibid.*

<sup>98</sup> Decision on Civil Party Appeals in Case 002, para. 60.

<sup>99</sup> Pursuant to Internal Rule 56(1) the OCIJ has the responsibility to ensure the confidentiality of the investigation, “in order to preserve the rights and interests of the parties.”

<sup>100</sup> Agreement, Article 6(1). See also Internal Rule 53(4).

<sup>101</sup> Article 2new of the ECCC Law. Article 27(3) of the Agreement. Internal Rules 17(1), 21(4), 80(3), and 87(4).

respond to ICP's disclosure requests addressed by those decisions. The Pre-Trial Chamber observes that the Impugned Decision states, in relevant part:

“[t]his, [...] is a *simple consequence of the different rights to participation* available to persons under investigation in different stages of the proceedings *and as such, not on a par with the case of a person not being given a right they are entitled to*. In other words, that *inequality is [...] not based on an erroneous application of the law*. The Defence have not established how ██████ rights might have been prejudiced in any exceptional way not already envisaged by the drafters of the Internal Rules.”<sup>102</sup>

36. The Pre-Trial Chamber further observes, as also recalled by the Defence that according to the standards established at international level, inequality in treatment is permissible if “based on reasonable and objective grounds not entailing actual disadvantage or other unfairness.”<sup>103</sup>

37. The Pre-Trial Chamber first notes that when Decisions D193/15 and D193/24 were issued, the former ICIJ considered ██████ to be a “Suspect”,<sup>104</sup> and ██████ and ██████ to be “Charged Persons”.<sup>105</sup> The Pre-Trial Chamber further notes that it is not contested that the ICIJs have consistently treated all “Suspects” in Case 004 the same, because none of them were granted participatory rights in the investigation, until they became “Charged Persons.” ██████ is no exception to the rule set by the ICIJs, as far as the difference in participatory rights of “Suspects” and “Charged Persons” is concerned. ██████ and ██████ were given participatory rights because, when the former ICIJ Decisions in question were issued, they enjoyed a status different from that of ██████. The Pre-Trial Chamber finds that the specified difference in treatment is based on reasonable and objective grounds and, in any event, does not put ██████ at a disadvantageous or unfair position *vis a vis* other “Suspects”.

38. Therefore, the Pre-Trial Chamber finds that, in the particular circumstances of this case, the Defence has not demonstrated that the Pre-Trial Chamber's intervention is necessary to protect ██████ right to equality.

### 3. Right to procedural fairness

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<sup>102</sup> First Impugned Decision, para. 82.

<sup>103</sup> Reply, para. 19 *referring to* the ICCPR.

<sup>104</sup> Appeal, para. 34.

<sup>105</sup> Appeal, para. 35.

39. The Defence claims that procedural injustice arises out of ██████ being charged at a much later stage than the other Charged Persons in Case 004,<sup>106</sup> which goes beyond the differences in law between a suspect and charged person.<sup>107</sup> According to the Defence, the fact that ██████ was not charged for a prolonged period of time was not due to objective criteria and the decision to charge ██████ so late in the investigation was never justified. In the Defence's view, this late charging results in inequality of treatment between a suspect and charged person, and the ICIJ's failure to remedy this inequality breaches procedural fairness.<sup>108</sup>

40. As regards reasonableness of the time it took the ICIJ to charge ██████, the Pre-Trial Chamber observes that Internal Rule 55(4) does not set a time requirement for when to charge Suspects named in the Introductory Submission. Depending on the stage of proceedings, such matter rests within the discretion of the investigating judge. More specifically, pursuant to Internal Rule 55(4), Co-Investigating Judges have the discretionary power to charge a person against whom there is clear and consistent evidence indicating that such a person may be criminally responsible for the commission of a crime referred to in an Introductory or Supplementary submission. The Pre-Trial Chamber observes that, apart from merely asserting, that it took a long time for the ICIJ to charge ██████ and claiming that such was "not due to objective criteria" or "justified", the Defence does not offer any evidence showing ICIJ's abuse of discretion for the alleged late charging.

41. Therefore, the Pre-Trial Chamber finds that, in the particular circumstances of this case, the Defence has not demonstrated infringement of ██████ right to procedural fairness.

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<sup>106</sup> Appeal, para. 37.

<sup>107</sup> Reply, para. 23.

<sup>108</sup> Appeal, para. 39.

### 3. Conclusion

42. The Pre-Trial Chamber concludes that the facts and circumstances of the Appeal do not require it to adopt a broad interpretation of the Rules, or to find the Appeal admissible under Rule 21.

### DISPOSITION

**FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY  
HEREBY:**

FINDS the Appeal inadmissible.

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

**Phnom Penh, 15 February 2017**

**President**

**Pre-Trial Chamber**

**PRAK Kimsan Olivier Beauvallet NEY Thol Kang Jin BAIK HUOT Vuthy**