



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា
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Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D292/1/1/4

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 (PTC30)

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

Date: 15 February 2017

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DECISION ON [REDACTED] APPLICATION TO ANNUL DECISIONS D193/55, D193/57, D193/59 AND D193/61

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of an “Application to Annul Decisions D193/55, D193/57, D193/59 and D193/61”, filed by ██████ (aliases “██████” and “██████”) Co-Lawyers (the “Defence”), on 8 September 2016 (the “Application”).¹

I. INTRODUCTION

1. The Application was referred to the Pre-Trial Chamber, on 24 August 2016, by the International Co-Investigating Judge (the “ICIJ”), pursuant to Internal Rule 76(3) (the “Referral Decision”).²

II. PROCEDURAL BACKGROUND

2. On 7 September 2009, the acting International Co-Prosecutor (the “ICP”) filed the Third Introductory Submission with the Office of the Co-Investigating Judges (the “OCIJ”), alleging ██████ involvement in criminal acts.³

3. On 7 August 2013, the ICP informed the Trial Chamber (the “TC”) of the existence of written records of interview and audio recordings of interviews in Case Files 003 and 004 that, the ICP stated, may fall within his disclosure obligations in relation to Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) trial proceedings.⁴ On 16 August 2013, the TC responded that, “[a]s the Co-Investigating [J]udges are seised of Cases 003 and 004 and the concerned written statements are covered by the confidentiality of the ongoing judicial investigations, the Co-Investigating [J]udges must first decide whether to grant leave to disclose these written

¹ Application to Annul Decisions D193/55, D193/57, D193/59 and D193/61, 8 September 2016, D292/1/1/1.

² Decision on ██████ Application to Seise the Pre-Trial Chamber with a View to Annulment of Decisions D193/55, D193/57, D193/59 and D193/61, 19 August 2016, D292/1; *see also* Letter from OCIJ Greffier to Case File Officer Regarding Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D292/1, 24 August 2016, D292/1/1.

³ Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1, para. 117(c); *see also* Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁴ International Co-Prosecutor’s Disclosure of Written Records of Interview from Case Files 003 and 004, 7 August 2013, E127/7.



statements to the Chamber,” ordering the ICP “to direct the request to disclose these written statements to the Co-Investigating Judges.”⁵

4. Since October 2015, the ICP sought leave from the OCIJ to disclose material from Case 004/07-09-2009-ECCC/OCIJ (“Case 004”) investigations into Case 002 trial proceedings, by filing requests D193/45⁶, D193/46⁷, D193/48⁸, D193/50⁹, D193/52¹⁰ and D193/58¹¹, submitted on 7, 16, 21, 26 and 30 October and 1 December 2015, respectively (altogether the “ICP Requests”). The Defence responded to the ICP Requests in filings D193/47¹², D193/49¹³, D193/51¹⁴, D193/53¹⁵ and D193/60¹⁶, submitted on 19, 23, 28 October, 3 November and 4 December 2015, respectively (the “Defence Responses”). In the first and the second Responses, the Defence requested that the OCIJ either declines disclosure requests, or orders the ICP to demonstrate exceptional circumstances warranting the disclosure of each requested document.¹⁷ In the third and fourth responses, the Defence noted that they would not oppose to the disclosure of the requested documents, provided that the order granting disclosure is made jointly by the

⁵ Trial Chamber Memorandum: Information concerning Case 003 and 004 Witness Statements that may be relevant to Case 002, 16 August 2013, E127/7/1.

⁶ International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 7 October 2015, D193/45.

⁷ International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 16 October 2015, D193/46.

⁸ International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 21 October 2015, D193/48.

⁹ International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 26 October 2015, D193/50.

¹⁰ International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 30 October 2015, D193/52.

¹¹ International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 1 December 2015, D193/58.

¹² [REDACTED] Response to the International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 19 October 2015, D193/47.

¹³ [REDACTED] Response to the International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 23 October 2015, D193/49.

¹⁴ [REDACTED] Response to the International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 28 October 2015, D193/51.

¹⁵ [REDACTED] Response to the International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 3 November 2015, D193/53.

¹⁶ [REDACTED] Response to the International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 4 December 2015, D193/60.

¹⁷ [REDACTED] Response to the International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 19 October 2015, D193/47, paras. 45 and 46. [REDACTED] Response to the International Co-Prosecutor’s Requests D193/46 and D193/48 to Disclose Case 004 Documents into Case 002, 23 October 2015, D193/49, paras. 19 and 20.



Co-Investigating Judges.¹⁸ On 4 November 2015, the ICP filed a consolidated reply to the Defence Responses submitting that Rule 56(3), read together with Rule 72, gives to each Co-Investigating Judge the authority for unilateral disclosure and that the ICP Requests meet the correct criteria for disclosure.¹⁹ On 6 November 2015, the ICIJ authorised the disclosure sought by the ICP in, *inter alia*, his requests dated 16 and 26 October 2015, subject to various restrictions and modalities to protect the integrity of the judicial investigation (the “First Impugned Decision”).²⁰

5. On 10 November 2015, the Defence filed a request before the OCIJ seeking clarification as to whether the ICIJ had taken into account the Defence Responses when issuing the First Impugned Decision (the “Clarification Request”).²¹

6. On 17 November 2015, the ICIJ issued another decision authorising the disclosure of documents sought by the ICP in his request dated 30 October 2015, subject to various restrictions and modalities to protect the integrity of the judicial investigation (the “Second Impugned Decision”).²²

7. On 1 December 2015, the ICP filed another disclosure request.²³ On 2 December 2015, the ICIJ issued a decision authorising disclosure of the requested documents (the “Third Impugned Decision”).²⁴ On 4 December 2015, the Defence filed a response to the ICP’s disclosure request, reiterating their request that all orders regarding disclosure be issued jointly by the Co-Investigating Judges.²⁵

¹⁸ [REDACTED] Response to the International Co-Prosecutor’s Urgent Request D193/50 to Disclose Case 004 Documents into Case 002, 28 October 2015, D193/51. [REDACTED] Response to the International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 3 November 2015, D193/53.

¹⁹ International Co-Prosecutor’s Reply to [REDACTED] Responses (D193/47, D193/49, D193/51 & D193/53) to the International Co-Prosecutor’s Requests to Disclose Case 004 Documents into Case 002, 4 November 2015, D193/54.

²⁰ Decision on International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002/01, 6 November 2015, D193/55.

²¹ Request for Clarification of Decision on International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002/01, 10 November 2015, D193/56.

²² Decision on the International Co-Prosecutor’s Disclosure Request D193/52, 17 November 2015, D193/57.

²³ International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002, 1 December 2015, D193/58.

²⁴ Decision on the International Co-Prosecutor’s Disclosure Request D193/58, 2 December 2015, D193/59.

²⁵ [REDACTED] Response to the International Co-Prosecutor’s Urgent Request D193/58 to Disclose a Case 004 Document into Case 002, 4 December, D193/60, para. 2.



8. On 17 December 2015, the ICIJ issued a decision authorising the disclosure of the documents requested by the ICP in, *inter alia*, his requests dated 7 and 21 October 2015 (the “Fourth Impugned Decision”).²⁶
9. On 18 December 2015, the ICIJ issued a decision rejecting the Clarification Request (the “Clarification Order”).²⁷ In the Clarification Order, the ICIJ considered it unnecessary to cease the practice of unilateral disclosure,²⁸ or to vary the conditions for disclosure. The ICIJ clarified that, in issuing the First Impugned Decision, he had taken into account the Defence arguments,²⁹ and noted that he is “not obliged to expressly address every party’s submissions on a legal issue when making a decision”.³⁰ On 15 January 2016, the Defence appealed the Clarification Order to the Pre-Trial Chamber, requesting it to order the ICIJ to revoke all previous orders and decisions on disclosure (the “Clarification Appeal”).³¹ The Pre-Trial Chamber dismissed this Appeal as inadmissible on 31 March 2016.³²
10. On 22 January 2016, the Defence filed, before the OCIJ, a request to seise the Pre-Trial Chamber with an annulment application against the First, Second, Third and Fourth Decisions.³³ On 19 August 2016, the ICIJ granted the Defence’s request³⁴ and, on 24 August 2016, the ICIJ referred the Application to the Pre-Trial Chamber.³⁵
11. On 31 August 2016, the Pre-Trial Chamber issued Instructions to the Parties, which were notified by a Case Filing Officer’s email, instructing ██████████ Defence to file an application

²⁶ Decision on the International Co-Prosecutor’s Disclosure Requests D193/29, D193/35, D193/38, D193/39, D193/42, D193/45, D193/46 and D193/48, 17 December 2015, D193/61.

²⁷ ICIJ’s Order on ██████████ Responses D193/47, D193/49, D193/51, D193/53, D193/56, and D193/60, 18 December 2015, D284.

²⁸ Clarification Order, para. 20: “I find that the disclosure of Case 004 materials by a single CIJ is not prohibited by Internal Rule 56(2), which concerns access to the press or the public, be it the wider public or a specific institution, and not disclosure to parties before other judicial bodies of the ECCC. *I have consulted my national colleague on my understanding of the ambit of this Internal Rule under Cambodian law and he shares this legal opinion*”.

²⁹ Clarification Order, para. 23.

³⁰ *Ibid.*

³¹ ██████████ Appeal Against Order on ██████████ Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 15 January 2016, D284/1/2.

³² Case 004/07-09-2009-ECCC/OCIJ (“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 (“Decision on Case 004 (PTC25)”), D284/1/4.

³³ Application to Seise the Pre-Trial Chamber with a View to Annulment of Decisions D193/55, D193/57, D193/58 and D193/61, 22 January 2016, D292.

³⁴ Referral Decision.

³⁵ Letter from OCIJ Greffier to Case File Officer Regarding Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D292/1, 24 August 2016, D292/1/1.



before the Pre-Trial Chamber within 10 days from the notification and that, if an Application is not filed within the set deadline, the Pre-Trial Chamber shall take note of the Application as filed before the OCIJ.³⁶ On 8 September 2016, the Defence filed the Application before the Pre-Trial Chamber.³⁷ On 19 September 2016, the ICP filed a Response to the Application (the “Response”).³⁸ On 22 September 2016, the Defence filed a Reply to the Response (the “Reply”).³⁹

III. ADMISSIBILITY

12. Internal Rule 76(4) directs that the Pre-Trial Chamber may declare an application for annulment inadmissible where it: i) relates to an order that is open to appeal; ii) is manifestly unfounded; or ii) does not set out sufficient reasons.⁴⁰ Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment specified the parts of the proceedings which are prejudicial to the rights and interests of the Applicant,⁴¹ made plain the prejudice,⁴² and, if so and where necessary, adduced sufficient evidence to sustain the allegations.⁴³

13. The Pre-Trial Chamber is satisfied that the conditions of Internal Rule 76(4) are met. The Pre-Trial Chamber first notes that the Impugned Decisions are not open to appeal under the

³⁶ Case File Officer Notification, 31 August 2016, Pre-Trial Chamber’s Instruction to the Parties in Case File No 004/07-09-2009- ECCC/OCIJ (PTC30).

³⁷ Application to Annul Decisions D193/55, D193/57, D193/59 and D193/61, 8 September 2016, D292/1/1/1.

³⁸ International Co-Prosecutor’s Response to [REDACTED] Application to Annul Decisions D193/55, D193/57, D193/59 and D193/61, 19 September 2016, D292/1/1/2.

³⁹ [REDACTED] Reply to International Co-Prosecutor’s Response to [REDACTED] Application to Annul Decisions D193/55, D193/57, D193/59 and D193/61, 22 September 2016, D292/1/1/3.

⁴⁰ Case No. 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC28), Decision Related to (1) [REDACTED] Appeal Against Decision on Nine Applications to Seize the Pre-Trial Chamber With Requests for Annulment and (2) the Two Requests for Annulment Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, para. 55.

⁴¹ Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC41), Decision on IENG Thirith’s Appeal against the Co-Investigating judges’ Order Rejecting the Request to Seize the Pre-trial Chamber with a view to Annulment of all Investigations, 25 June 2010, D263/2/6 (“IENG Thirith Decision”), para. 24; *see also* Case 002 (PTC30), Decision on KHIEU Samphan’s Appeal against the Order on the Request for Annulment for Abuse of Process, 4 May 2010, D197/5/8, para. 24.

⁴² *See* Case 002 (PTC06), Decision on NUON Chea’s Appeal against Order Refusing Request for Annulment, D55/1/8, 26 August 2008 (“NUON Chea Decision”), para. 40 (“a proven violation of a right [...], recognised in the ICCPR would qualify as a procedural defect [...]. In such cases, the investigative or judicial action may be annulled”), and para. 42 (“[In other cases] the party making the application will have to demonstrate that its interests were harmed by the procedural defect”).

⁴³ Case 003 (PTC 20), Decision on [REDACTED] Appeal Against Co-Investigating Judge Harmon’s Decision on [REDACTED] Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (“[REDACTED] Decision on Two Applications”), para. 22.



Internal Rules.⁴⁴ Furthermore, the Pre-Trial Chamber considers that nothing in the application suggests that it is evidently or very apparently unfounded in fact or in law such as to deprive it of any prospect of success. The Pre-Trial Chamber is of the further view that the reasoning set forth in the Application is sufficient since it contains logically consistent submissions underpinned by legal reasoning, whose grounds are set forth, or by factual material pinpointed in the case file.

14. The Pre-Trial Chamber therefore finds the Application admissible.

IV. CONSIDERATION OF THE MERITS

A. Submissions of the Parties

1. *The Application*

15. The Defence requests the Pre-Trial Chamber to annul the Impugned Decisions on the basis that they are procedurally defective and that such defects violate ████████ fair trial rights.⁴⁵ According to the Defence, the Impugned Decisions are procedurally defective because they: i) were not notified to the Defence, which violates the requirements of Internal Rule 46 and of Articles 2.5, 3.15 and 11.1 of the Practice Direction on Filing and of Article 2(d)(ii) of the Practice Direction on Classification;⁴⁶ and ii) did not acknowledge Defence's relevant filings or address the arguments contained therein, which violates Rule 77(14) pursuant to which the Co-Investigating Judges have a duty to make sufficiently reasoned decisions, which "implies that the parties' arguments on the matter being disposed of must, at the very least, be given a minimum of acknowledgment and assessment."⁴⁷

⁴⁴ Decision on Case 004 (PTC25), para. 22. *See also* Case 004 (PTC29), Decision on ████████ 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), 15 February 2017, D193/91/7, para. 32.

⁴⁵ Application.

⁴⁶ Application, paras. 40-42 and footnotes 57-59.

⁴⁷ Application, paras. 44-45 *referring to* Case 002 (PTC67), Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes, 15 June 2010, D365/2/10, paras. 22, 24-25.



16. The Defence contends that these procedural defects infringe upon the Applicant's fundamental rights, such as the right to appeal judicial decisions, the right to reasoned decisions, the right to equality before the court and equality of arms, and the right to effective participation, impartiality and integrity of the investigation.⁴⁸ As to the right to appeal, the Defence firstly claims that: it "is well established at the ECCC" that ██████ has a right to appeal "any" order issued in his case;⁴⁹ and secondly alleges that, in the instant case, ██████ right to appeal the Impugned Decisions has been violated as a result of the procedural defects set out in the Application, namely: i) the lack of notification to the Defence of the Impugned Decisions, which precluded ██████ from submitting timely notices and submissions of appeal; and ii) the lack of sufficient reasons in the Impugned Decisions, which further undermined ██████ ability to appeal.⁵⁰ Moreover, in the Defence's view, "in addition to being a constituent element of the right to appeal, the right to a reasoned decision is in itself a fundamental fair trial right", and the lack of acknowledgment of Defence's filings and arguments in the Impugned Decisions constitutes a violation of this fundamental right.⁵¹ The Defence further submits that ██████ rights to equal treatment and equality of arms have been violated because, whereas the ICP retained all his procedural rights, ██████ was unduly deprived since the Impugned Decisions: i) were notified only to the ICP; and ii) acknowledged, and expressly considered, only ICP's filings and arguments.⁵² According to the Defence, there is no objective or reasonable grounds for this inequality of treatment.⁵³ The Defence further claims that, the lack of notification of the Impugned Decisions unduly restricted ██████ ability to follow proceedings and give instructions where necessary, hence violating his right to effective participation.⁵⁴ In addition, the inequality with which ██████ filings and arguments were treated, vis-à-vis those of the ICP, has created a perception of bias.⁵⁵ Lastly, the Defence avers that, in aggregate, these violations undermine the integrity of the investigation.⁵⁶

⁴⁸ Application, paras. 47-60.

⁴⁹ Application, para. 48 referring to Application, para. 32: "[t]he ECCC is required to protect the rights enshrined by the ICCPR in accordance with the Agreement [...] and the ECCC [Law]."

⁵⁰ Application, paras. 48-51.

⁵¹ Application, para. 52.

⁵² Application, paras. 53-55.

⁵³ Application, para. 56.

⁵⁴ Application, para. 58.

⁵⁵ Application, paras. 59.

⁵⁶ Application, para. 60.



2. *The ICP Response*

17. The ICP submits that, while Internal Rule 46 does require parties to be notified of decisions, it does not set out any required form of notification.⁵⁷ The ICP refers to the jurisprudence of the Pre-Trial Chamber to argue that there is no specific requirement in the applicable law for reasoned disclosure decisions.⁵⁸ According to the ICP, the Applicant failed to establish any prejudice resulting from the rights violations he claims.⁵⁹ In the ICP's view, the rights violations alleged by the Applicant have already been cured by the Clarification Order⁶⁰ which, the ICP underlines, was already appealed and the Pre-Trial Chamber has disposed of these arguments.⁶¹

3. *The Defence Reply*

18. The Defence reiterates the arguments for procedural defect⁶² and further contends that ICP's reliance in Pre-Trial Chamber's jurisprudence to establish that "reasons are not required" is misplaced since, in the context of the cited decision, the lack of detailed reasoning was justified by the fact that the ICIJ had set out his reasons in a previous memorandum, whereas in the present case, Defence's arguments had not been addressed in any previous decision or memorandum.⁶³ According to the Defence, the Clarification Order did not address the defects raised in the Application, nor were these defects litigated or disposed of in the appeal.⁶⁴ Moreover, due to the lack of notification, the three Impugned Decisions were discovered late by the Defence and therefore the Clarification Decision and subsequent appeal did not cure the fact that ██████ lost the right to appeal those decisions individually.⁶⁵ Lastly, the Defence submits that the ICP conflates the issue of prejudice caused by the disclosures with that caused by lack of sufficient reasoning in, and notification of, the Impugned Decisions.⁶⁶

⁵⁷ ICP Response, para. 14.

⁵⁸ ICP Response, para. 15 *referring* in footnote 30 to Case 004 (PTC26), Decision on International Co-Prosecutor's Appeal Concerning Testimony at Trial in Closed Session, 20 July 2016, D309/6, ("Decision on Case 004 (PTC26)"), para. 38.

⁵⁹ ICP Response, para. 21.

⁶⁰ ICP Response, para. 18.

⁶¹ ICP Response, para. 19.

⁶² Reply, para. 4.

⁶³ Reply, para. 5.

⁶⁴ Reply, para. 6.

⁶⁵ Reply, para. 6 *referring to* the Second, Third and Fourth Decisions.

⁶⁶ Reply, para. 7.



B. Discussion

19. The Pre-Trial Chamber recalls that annulment is foreseen under Internal Rule 48, which provides: “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application”.⁶⁷ Accordingly, a procedural irregularity which is not prejudicial to an applicant does not result in annulment.⁶⁸ The Pre-Trial Chamber shall now turn to the Applicant’s arguments for procedural defect and infringement of rights in the instant case.

B.1. Reasoned decisions

20. The Pre-Trial Chamber makes reference to the provisions of Internal Rule 77(14), which in relevant part, read:

“[a]ll decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors.”

21. The Pre-Trial Chamber further recalls its jurisprudence, relevant to the requirement for reasoned decisions, stating that it is an international standard that *all decisions of judicial bodies are required to be reasoned*.⁶⁹ As regards the standard for specificity of reasoning, according to the Pre-Trial Chamber:

“the Co-Investigating Judges *have the discretion* – reviewable by the Pre-Trial Chamber (...) - *to determine the degree of specific detail that is required* by the legal framework of the ECCC. The Co-Investigating Judges *must be guided in their discretion by the purposes of the requirement in [the specific Rule]* to issue a reasoned rejection... [It was not necessary to] have exhaustively presented every detail of all the “information already existing on the Case File.” Rather, [...] *the Co-Investigating Judges should have provided, at a minimum, a representative sample of such information, including, where appropriate, the relevant Document numbers*”.⁷⁰

22. Moreover, the Pre-Trial Chamber has indicated that the Co-Investigating Judges “are not obliged to indicate a view on all the factors [in the specific Internal Rule] as the *obligation to*

⁶⁷ ECCC Internal Rules (Rev.9), as revised on 16 January 2015, (the “Internal Rules”).

⁶⁸ [REDACTED] Decision on Two Applications, para 26 referring to IENG Thirith Decision, para. 21.

⁶⁹ Case 001/18-07-2007-ECCC/OCIJ (“Case 001”) (PTC02), Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “Duch”, 5 December 2008, D99/3/42, para. 38. See also NUON Chea Decision, para. 21.

⁷⁰ Case 002 (PTC46), Decision on Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284, 14 July 2010, D300/1/5, para 43. See also Case 002 (PTC62), Decision on the Ieng Thirith Defence Appeal against ‘Order on Requests for Investigative Action by the Defence for Ieng Thirith’ of 15 March 2010, 14 June 2010, (the “IENG Thirith PTC62 Decision”) D353/2/3, para. 30.



state reasons only indicates that they set out the legal grounds and facts taken into account before coming to a decision".⁷¹ For those instances where a party's request has been rejected, the Pre-Trial Chamber has stated that:

"[b]oth the party whose request is rejected by the Co-Investigating Judges and the Pre-Trial Chamber need to know the reasons for rejection in sufficient detail in order to permit an appellant to decide whether or not to appeal and on what basis [...] and for the Pre-Trial Chamber to be able to determine whether or not the Co-Investigating judges erred"⁷².

23. Most relevant to the instant case, when faced with another appeal against an ICIJ disclosure decision, the Pre-Trial Chamber observed:

"by contrast with the express obligation to set out reasons for the rejection of investigative actions under Rule 55(10), [...] *there is no specific onus for the Co-Investigating Judges to provide reasoned disclosure orders under the applicable provisions concerning investigations before the ECCC*."⁷³

24. In that decision, the Pre-Trial Chamber also made a finding that: "the [ICIJ] gave *sufficient reasons* when holding in the Impugned Order that it *has "reviewed the list of witnesses and their disclosed material"* and that the ICIJ assigned special disclosure measures to some witnesses "owing to the confidential and sensitive nature of the ongoing investigations".⁷⁴

25. Turning to the Defence arguments on this point, the Pre-Trial Chamber observes that the Impugned Decisions do provide reasoning that meets the standards set by the Pre-Trial Chamber's jurisprudence for reasons to be provided in OCIJ disclosure decisions.⁷⁵ As regards Defence's argument that the Impugned Decisions' reasons suffer, because the ICIJ does not *acknowledge* Defence's filings, the Pre-Trial Chamber firstly recalls that the standards set for reasoning of decisions do not require explicit "acknowledgment of parties' filings", and secondly notes that the ICIJ has nevertheless explicitly acknowledged the Defence Responses, which contain identical arguments for each disclosure request, in the Second Impugned Decision, where

⁷¹ Case 002 (PTC03), Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/73, para 66.

⁷² IENG Thirith PTC62 Decision, para. 28.

⁷³ Decision on Case 004 (PTC26), para 38.

⁷⁴ *Ibid.*

⁷⁵ First Impugned Decision, D193/55, paras. 9-11; Second Impugned Decision, D193/57, paras. 10-12; Third Impugned Decision, D193/59, paras. 7-9; Fourth Impugned Decision, D193/61, paras. 18-22.



he states that, considering the urgent nature of a disclosure request, the Responses will be addressed “in a forthcoming decision,”⁷⁶ which he subsequently did in the Clarification Order.⁷⁷

26. Therefore, the Pre-Trial Chamber finds that the Impugned Decisions meet the standards set for reasoning of OCIJ’s disclosure decisions, hence no procedural defect has been established.

B.2. Notification of decisions

27. The Pre-Trial Chamber makes reference to the provisions of Internal Rule 46(1) which, in relevant part, read:

“[a]ll orders of the Co-Investigating Judges or the Chambers shall be notified to the parties or their lawyers, if any, either orally or at their last known address, (...) using any appropriate means.”

28. Furthermore, reference is made to the provisions of Articles 2.1, 2.5, 3.15 and 11.1 of the Practice Direction on Filing and of Article 2(d)(ii) of the Practice Direction on Classification, which provide, in relevant parts, as follows:

Article 2.1 of the Practice Direction on Filing

“Any filing of documents before the ECCC, and any communication from or to the person entitled to file a document, shall be made directly to the greffier of the Office of the Co-Investigating Judges”

Article 2.5 of the Practice Direction on Filing

The primary method for submitting filings shall be electronic.

Article 3.15 of the Practice Direction on Filing

A filing party who submits a document with the proposed classification of ‘Strictly Confidential’ must list, on the first page of the document (Appendix B), under the title ‘Distribution to:’ the names of all individuals, other than Court staff, who it proposes should be given access to the document.

Article 11.1 of the Practice Direction on Filing

“The person filing a document shall be notified electronically of any document filed by the relevant greffier. Such person filing a document shall notify the relevant greffier of the preferred email address for service.”

⁷⁶ Second Impugned Decision, D193/57, para. 10: “Considering the urgent nature of the ICP’s request in relation to D219/297, I dispose of D193/29 only insofar as it overlaps with the Request. The submissions of the [REDACTED] Defence on the ongoing disclosure of Case 004 material to Case 002 will be addressed separately in a forthcoming decision”. See also Second Impugned Decision, footnote 13.

⁷⁷ Clarification Order, para. 23: “the arguments set forth in Response D193/47, and incorporated by reference in D193/49, D193/51, and D193/53, were taken into consideration in issuing Decision D193/55.”



Article 2(d)(ii) of the Practice Direction on Classification

“Confidential” means open only to the Judges, the Co-Prosecutors, lawyers for the civil parties, defence counsel, authorised court staff and any other person expressly given access by the Court.

29. The Pre-Trial Chamber first notes that the suggested articles of the Practice Direction on Filing have to be read in conjunction with its Article 2.1, according to which the requirements set in said articles are set for the filings made by the parties and not for the decisions issued by the Co-Investigating Judges or any Chambers. Internal Rule 46, on the other hand, provides no exception to the rule that “all” orders of the Co-Investigating Judges shall be notified to the “parties”. The Pre-Trial Chamber observes that each Impugned Decision in the first page contains only the names of the Co-Prosecutors and either the Trial Chamber or the Supreme Court Chamber. The Defence complains it was not notified with the Impugned Decisions,⁷⁸ except for the First Impugned Decision.⁷⁹ The Pre-Trial Chamber finds that, pursuant to Internal Rule 46, the ICIJ was required to notify the Defence with the Impugned Decisions. The Chamber shall now turn to the Applicant’s arguments for breach of his fundamental rights.

B.3. ██████’s rights

30. As regards the right to appeal, reference is made to the provisions of Internal Rule 75(1), (3) and to Article 270 of the Cambodian Code of Criminal Procedure, which provide that the deadline to file an appeal starts to run from the “date that notice of the decision or order *was received*”. The Pre-Trial Chamber firstly observes that, although admitting that he received notice of the First Impugned Decision, ██████ did not file any appeal within the legal deadline,⁸⁰ but instead, opted to seek clarification from the ICIJ⁸¹ and to appeal the Clarification Order.⁸² Secondly, the Pre-Trial Chamber finds that, insofar as ██████ has not been notified with or received the Second, Third and Fourth Impugned Decisions, he still retains formal right to appeal against the Decisions.

⁷⁸ Application, para 2(a).

⁷⁹ Application, footnote 5: “With the exception of Decision D193/55 (6 November 2015 Decision), which was notified to the Defence by email but did not list the Defence as a recipient in the 'Distribution' section.” See also Clarification Request, para. 1: “On 6 November 2015, ██████, through his Co-Lawyers ('Defence'), was notified of the International Co-Investigating Judge's ('ICIJ') Decision on International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002/01 (ICIJ Decision)” and footnote 1 referring to D193/55.

⁸⁰ Internal Rule 75(3).

⁸¹ Clarification Request.

⁸² Clarification Appeal.



31. Furthermore, with regards to any right to appeal the Impugned Decisions, the Pre-Trial Chamber notes that, in the Application, the Defence claims that the requirement of the applicable law, for the ECCC to protect a Charged Person's rights, brings about [REDACTED] right to appeal "any" order. The Pre-Trial Chamber firstly recalls that it has previously found no legal grounds for appeal in the same *disclosure* case of [REDACTED] regarding the Clarification Order,⁸³ and notes that, in this annulment Application, the Defence has not demonstrated further that [REDACTED] has a right to appeal against disclosure decisions. Secondly, notwithstanding the lack of notification of some of the Impugned Decisions to the Defence, the Pre-Trial Chamber finds that, its intervention to prevent *irremediable* damage to the fairness of proceedings or to [REDACTED] fundamental rights is not necessary, in the particular circumstances of this case, because [REDACTED] has opted to also take advantage of an *available remedy* through the filing of this very annulment Application.⁸⁴ According to the applicable law, parties can file annulment applications "at any time during the judicial investigation."⁸⁵ Finally, as expressed in full above, in section "B.1" of this Decision, the Pre-Trial Chamber finds no merit in Defence's argument for violation of a right to reasoned decisions due to "the lack of acknowledgment of the Defence's filings and arguments in the Impugned Decisions." Therefore, the Pre-Trial Chamber concludes that no violation to any right to appeal has occurred.

⁸³ Decision on Case 004 PTC25. See also Clarification Appeal, paras. 5, 78: "The Defence respectfully requests the PTC to overturn the Impugned Order, and to order the ICIJ to *revoke all previous orders and decisions on the disclosure* of Case 004 materials into Case 002, which were based on the errors raised in this appeal."

⁸⁴ Decision on Case 004 PTC25, para. 21: "the fundamental principles expressed in Internal Rule 21, which reflect the fair trial requirements that the ECCC is bound to apply pursuant to Article 13(1) of the 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] (the "Agreement"), Article 35 new of the [Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004], (the "ECCC Law") and Article 14(3) of the International Covenant on Civil and Political Rights [the "ICCPR"], may warrant that it adopts a liberal interpretation of the right to appeal in order to ensure that the proceedings are fair and adversarial and that a balance is preserved between the rights of the parties. Where the particular facts and circumstances of a case have required, the Pre-Trial Chamber has admitted appeals raising issues of fundamental rights or "serious issue[s] of fairness" under Internal Rule 21. However, Internal Rule 21 does not provide an automatic avenue for appeals raising arguments based on fair trial rights. 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 the appellant's fair trial rights." See also Application, para. 62: "appealing the Impugned Decisions, even if it were procedurally possible, is rendered impossible in practice by the lack of reasoning relating to the Defence's arguments. Consequently, the challenge does not lie against errors of fact, law or discretion, unidentifiable in insufficiently reasoned decisions, but against the procedural defects and resulting rights violations in making them."

⁸⁵ Internal Rule 76(2).



32. The Pre-Trial Chamber has already agreed that the ICIJ was required by Internal Rule 46 to also notify the Defence with the Impugned Decisions, however, given the existence of an effective remedy, finds that no damage is caused to [REDACTED] fundamental rights to equal treatment or equality of arms. The Pre-Trial Chamber further finds that, despite the lack of notification, as demonstrated by the filing of this Application, [REDACTED] ability to follow the proceedings, for the purposes of giving instructions to the Defence, was not impaired.

33. Furthermore, following the findings that: i) no damage is caused to [REDACTED] rights to equality of treatment and equality of arms; and ii) the Impugned Decisions meet the standards set for reasoning of OCIJ's disclosure decisions; the Pre-Trial Chamber finds no merit in the argument that a perception of bias is created as a result of the treatment of [REDACTED] filings and arguments in the Impugned Decisions.

34. Lastly, the Pre-Trial Chamber finds that the argument for undermined integrity of the investigation, which is premised solely upon an assumption that violations of the other rights have occurred, does not stand either. The Pre-Trial Chamber has also found that the applicable law does not confer to the Charged Persons an "inherent right" to integrity in the conduct of the investigations.⁸⁶

35. Therefore, since the lack of notification has not caused any prejudice, the Pre-Trial Chamber holds that the lack of conformity with the requirements of Internal Rule 46, does not amount to procedural defect warranting annulment.

C. Conclusion

36. For all the above mentioned reasons, the Pre-Trial Chamber concludes that the Defence has not made a case warranting annulment of the Impugned Decisions.

⁸⁶ Decision on Case 004 PTC25, para. 23.



DISPOSITION

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

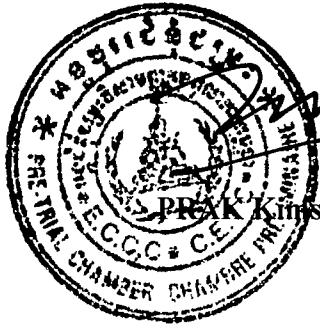
DISMISSES the Application.

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