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**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**  
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**CONFIDENTIAL**

**DECISION ON AO AN'S APPLICATION TO SEISE THE PRE-TRIAL CHAMBER WITH A VIEW TO ANNULMENT OF DECISIONS D193/55, D193/57, D193/59, AND D193/61**

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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 7, 16, 21, 26, and 30 October 2015, the International Co-Prosecutor (“ICP”) sought leave from the CIJs to disclose various documents from the Case 004 investigation into the Case 002 trial and appeal proceedings.<sup>1</sup>
3. On 20, 26, and 28 October and 3 November 2015, the Ao An Defence (“Defence”) filed responses to the above disclosure requests.<sup>2</sup> In the first and second responses, the Defence requested that the CIJs either decline disclosure requests, or order the ICP to demonstrate exceptional circumstances warranting the disclosure of each requested document.<sup>3</sup> In the third and fourth responses, the Defence noted that they would not oppose the disclosure of the requested documents provided the order granting disclosure is made jointly by the CIJs.<sup>4</sup>
4. On 4 November 2015, the ICP filed a consolidated reply to the Defence responses.<sup>5</sup>
5. On 6 November 2015, I 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 (“Decision D193/55”).<sup>6</sup>
6. On 10 November 2015, the Defence filed a request before the CIJs seeking clarification as to whether I had taken into account the Defence responses dated

<sup>1</sup> Case File No. 004-D193/45, *International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002*, 7 October 2015; Case File No. 004-D193/46, *International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002*, 16 October 2015; Case File No. 004-D193/48, *International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002*, 21 October 2015; Case File No. 004-D193/50, *International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002*, 26 October 2015; Case File No. 004-D193/52, *International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002*, 30 October 2015.

<sup>2</sup> Case File No. 004-D193/47, *AO An's Response to the International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002*, 19 October 2015; Case File No. 004-D193/49, *AO An's Response to International Co-Prosecutor's Requests D193/46 and D193/48 to Disclose Case 004 Documents into Case 002*, 23 October 2015; Case File No. 004-D193/51, *AO An's Response to International Co-Prosecutor's Urgent Request D193/50 to Disclose Case 004 Documents into Case 002*, 28 October 2015; Case File No. 004-D193/53, *AO An's Response to International Co-Prosecutor's Urgent Request D193/52 to Disclose a Case 004 Document into Case 002*, 3 November 2015.

<sup>3</sup> Case File No. 004-D193/47, *AO An's Response to the International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002*, 19 October 2015, paras 5, 27, 28, 41, 45, 46; Case File No. 004-D193/49, *AO An's Response to International Co-Prosecutor's Requests D193/46 and D193/48 to Disclose Case 004 Documents into Case 002*, 23 October 2015, paras 3, 12, 18, 19, 20.

<sup>4</sup> Case File No. 004-D193/51, *AO An's Response to International Co-Prosecutor's Urgent Request D193/50 to Disclose Case 004 Documents into Case 002*, 28 October 2015, paras 2(b), 3; Case File No. 004-D193/53, *AO An's Response to International Co-Prosecutor's Urgent Request D193/52 to Disclose a Case 004 Document into Case 002*, 3 November 2015, paras 2(b), 3.

<sup>5</sup> Case File No. 004-D193/54, *International Co-Prosecutor's Reply to Ao An's 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.

<sup>6</sup> Case File No. 004-D193/55, *Decision on International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002/01*, 6 November 2015.



26 and 28 October 2015 when issuing Decision D193/55 (“Clarification Request”).<sup>7</sup>

7. On 17 November 2015, I authorised the disclosure of the 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 (“Decision D193/57”).<sup>8</sup>
8. On 1 December 2015, the ICP filed a further request to disclose documents from Case 004 into the Case 002 trial.<sup>9</sup> On 3 December 2015, I authorised the disclosure of the requested documents subject to various restrictions and modalities (“Decision D193/59”).<sup>10</sup>
9. On 4 December 2015, the Defence filed a response to the ICP’s disclosure request dated 1 December 2015, reiterating their request that all orders regarding disclosure be issued jointly by the CIJs.<sup>11</sup> While the response was filed notwithstanding that Decision D193/59 had already been issued, I am cognisant that the Defence may have been unaware of the Decision at that stage given that the Decision, consistently with previous disclosure decisions issued, had not been distributed to the Case 004 Defence teams or Civil Parties.
10. On 17 December 2015, I authorised the disclosure of the documents requested by the ICP in, *inter alia*, his requests dated 7 and 21 October 2015 (“Decision D193/61”).<sup>12</sup>
11. On 18 December 2015, I issued a decision on the Clarification Request in which I confirmed that the arguments set out in the Defence’s various responses had been taken into consideration in issuing Decision D193/55, and that in any event, I was not obliged to expressly address every party’s submissions on a legal issue when making a decision (“Clarification Decision”).<sup>13</sup>
12. On 15 January 2016, the Defence appealed the Clarification Decision to the Pre-Trial Chamber (“PTC”), requesting it to overturn the Decision and to order me to revoke all previous orders and decisions on the disclosure of Case 004 material into Case 002 (“Appeal”).<sup>14</sup>
13. On 31 March 2016, the PTC dismissed the Appeal as inadmissible.<sup>15</sup>

<sup>7</sup> Case File No. 004-D193/56, *Request for Clarification of Decision on International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002/01*, 10 November 2015.

<sup>8</sup> Case File No. 004-D193/57, *Decision on the International Co-Prosecutor’s Disclosure Request D193/52*, 17 November 2015.

<sup>9</sup> Case File No. 004-D193/58, *International Co-Prosecutor’s Urgent Request to Disclose Case 004 Documents into Case 002*, 1 December 2015.

<sup>10</sup> Case File No. 004-D193/59, *Decision on the International Co-Prosecutor’s Urgent Disclosure Request D193/58*, 2 December 2015.

<sup>11</sup> Case File No. 004-D193/60, *AO An’s Response to International Co-Prosecutor’s Urgent Request D193/58 to Disclose a Case 004 Document into Case 002*, 4 December 2015, para. 2.

<sup>12</sup> Case File No. 004-D193/61, *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.

<sup>13</sup> Case File No. 004-D284, *Order on Ao An’s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 18 December 2015, para. 23.

<sup>14</sup> Case File No. 004-D284/1/2, *Appeal Against Order on Ao An’s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 15 January 2016, para. 78.

<sup>15</sup> Case File No. 004-D284/1/4, *Decision on Appeal Against Order on Ao An’s Responses D193/47, D193/49, D193/51, D193/56 and D193/60*, 31 March 2016.



14. On 22 January 2016, the Defence filed an application before the CIJs to seize the PTC with a view to annulment of Decisions D193/55, D193/57, D193/59, and D193/61 (“Application”).<sup>16</sup>

## II. SUBMISSIONS

15. The Defence submit that Decisions D193/55, D193/57, D193/59, and D193/61 (together, “Disclosure Decisions”), are procedurally defective pursuant to Internal Rule 48 in two respects. Firstly, that the Defence were not notified of the Disclosure Decisions contrary to the requirement in Internal Rule 46.<sup>17</sup> Secondly, the Disclosure Decisions did not acknowledge Ao An’s relevant filings or address the arguments contained therein.<sup>18</sup> The Defence surmise this from the lack of reference to their disclosure responses in the “Procedural History” or “Submissions” sections of the Disclosure Decisions.<sup>19</sup> The Defence submit that this violates Ao An’s rights to reasoned decisions and to make written submissions pursuant to Internal Rules 56(2) and 92.<sup>20</sup>
16. The Defence submit that these defects infringe Ao An’s fundamental rights in Internal Rule 21, in particular his rights to appeal, to reasoned decisions, to equality before the Court, to equality of arms, and to effective participation.<sup>21</sup> The Defence submit that these cumulative infringements amount to a violation of Ao An’s right to the integrity of the investigation, the preservation of which is the primary responsibility of the CIJs.<sup>22</sup>
17. The Defence request, pursuant to Internal Rule 76(2), that the CIJs seize the Pre-Trial Chamber with a view to annulment of the Disclosure Decisions.<sup>23</sup>

## III. DISCUSSION

18. Upon being seised with an application submitted pursuant to Internal Rule 76(2), the CIJs need be satisfied that the applications are supported by reasoned arguments asserting that (i) there have been procedural defects, and (ii) that such defects infringe the rights of the party making the application.<sup>24</sup> This test requires a determination that the applicant makes an “arguable case”, but does not allow examination of the merits of the application.<sup>25</sup>
19. The Pre-Trial Chamber has recently further specified the CIJs’ role in the assessment of Internal Rule 76(2) applications, stating that they only need to be satisfied that, “*the arguments advanced in the applications could be sustained before the Pre-Trial Chamber, by setting out the alleged procedural defects and*

<sup>16</sup> Case File No. 004-D292, *Application to Seize the Pre-Trial Chamber with a View to Annulment of Decisions D193/55, D193/57, D193/59 and D193/61*, 22 January 2016.

<sup>17</sup> Application, paras 2, 39, 43.

<sup>18</sup> Application, paras 2, 39.

<sup>19</sup> Application, para. 44.

<sup>20</sup> Application, paras 45-46.

<sup>21</sup> Application, paras 3, 39, 51, 52, 55, 57.

<sup>22</sup> Application, para. 60.

<sup>23</sup> Application, paras 4, 63, 65.

<sup>24</sup> Case File No. 002-D263/2/6, *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, para. 18; Case File No. 003-D134/1/10, [REDACTED] *Decision on Appeal Against Co-Investigating Judge Harmon’s Decision on Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action*, 23 December 2015, para. 19.

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



*the ensuing prejudice, if any, to the charged person.”*<sup>26</sup> I will assess the Application in line with this further guidance.

**A. First alleged procedural defect – failure to notify and distribute Disclosure Decisions to the Defence**

20. The Defence identify the CIJ’s failure to distribute and notify them of Disclosure Decisions as a procedural defect on the basis that it contravenes Internal Rule 46. The Defence argue that the defect infringed their ability to exercise Ao An’s right of appeal by precluding them from filing notices of appeal within the timeframe permitted in the applicable rules.<sup>27</sup> The lack of notice infringed Ao An’s right to equality of arms in circumstances where the ICP had notice of the decisions and thus could exercise all his procedural rights, whereas Ao An could not.<sup>28</sup>
21. I am satisfied that the Defence make reasoned arguments in support of the alleged defect and the ensuing harm. However, the factual assumptions underlying the existence of the defect are sound in respect of all but one of the Disclosure Decisions: contrary to the Defence’s contention, Ao An’s Co-Lawyers Mom Luch, Richard Rogers and Göran Sluiter were in fact notified of Decision D193/55 on 6 November 2015 along with all other Case 004 parties, as shown in the email in Annex A to this Decision. The claim that Decision D193/55 was defective on the grounds of a failure to notify and distribute that decision to the Defence is therefore unsustainable.
22. As a general comment on the matter of the notification and distribution of disclosure decisions, I confirm, as previously stated on 12 May 2016,<sup>29</sup> that going forward all disclosure decisions will be notified and distributed to all parties in Case 004, and not solely to the Co-Prosecutors and the relevant Chamber as had previously been the practice.

**B. Second alleged procedural defect – failure to acknowledge the Defence’s disclosure responses**

23. The second procedural defect identified by the Defence is the failure to acknowledge the Defence’s arguments in response to the ICP’s disclosure requests when issuing the Disclosure Decisions. This defect allegedly infringed Ao An’s right to a reasoned decision, which consequently affected his right to appeal, and rendered redundant his right to make written submissions under Internal Rules 56(2) and 92.<sup>30</sup> Finally, the Defence assert that cumulatively, these defects violated the integrity of the investigation.<sup>31</sup>
24. In the Clarification Decision, I stated that I had taken into account the arguments raised by the Defence in their disclosure responses when issuing Decision D193/55, and that I was not obliged to expressly address all parties’ submissions

<sup>26</sup> Case File No. 003-D134/1/10, [REDACTED] *Decision on Appeal Against Co-Investigating Judge Harmon’s Decision on Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action*, 23 December 2015, para. 20.

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

<sup>28</sup> Application, para. 55.

<sup>29</sup> Case File No. 004-D193/74, *Decision on Yim Tith’s Urgent Request for a Stay of Execution of Decision D193/69*, 12 May 2016, para. 15.

<sup>30</sup> Application, paras 46, 50, 52.

<sup>31</sup> Application, para. 60.



on legal issues when rendering decisions.<sup>32</sup> I also set out my views in response to the various arguments raised by the Defence in their disclosure responses. The Defence appealed the Clarification Decision, but only insofar as it concerned my views in response to their disclosure arguments; the Appeal did not concern the question of whether the Disclosure Decisions were reasoned decisions that took into account the Defence's disclosure arguments. The PTC found the Appeal inadmissible,<sup>33</sup> and therefore did not pronounce on its merits. While the PTC found no merit in Ao An's argument that Articles 83 and 121 of the Cambodian Code of Criminal Procedure give him an inherent right to integrity in the conduct of the investigation, to a confidential investigation, or to the protection of his reputation,<sup>34</sup> it did not, nor was it asked to, consider whether the other rights set out above in paragraph 23 were infringed in any way by the Disclosure Decisions.

25. In the circumstances, I am satisfied that the Defence make an arguable case as to the second alleged procedural defect in respect of all the Disclosure Decisions (i.e. Decisions D193/55, D193/57, D193/59, and D193/61).

**FOR THE FOREGOING REASONS, I:**

26. **GRANT** the Application;
27. **INSTRUCT** the OCIJ Greffier to forward Case File 004 to the Pre-Trial Chamber pursuant to Internal Rule 76(3).



Dated 19 August 2016, Phnom Penh

Judge Michael Bohlander

សមាជិកក្រុមស៊ើបអង្កេតអន្តរជាតិ

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

<sup>32</sup> Clarification Decision, para. 23.

<sup>33</sup> Case File No. 004-D284/1/4, *Decision on Appeal Against Order on Ao An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 31 March 2016.

<sup>34</sup> Case File No. 004-D284/1/4, *Decision on Appeal Against Order on AO An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 31 March 2016, para. 23.