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ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Royaume du Cambodge
Nation Religion Roi

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

Case File No: 004/07-09-2009-ECCC-OCIJ

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Before: **The Co-Investigating Judges**
 Date: **04 August 2014**
 Language(s): **Khmer/English [Original in English]**
 Classification: ~~CONFIDENTIAL~~ **សាធារណៈ / Public**

**DECISION ON [REDACTED] REQUEST TO THE
 CO-INVESTIGATING JUDGES TO ORDER THE OCIJ
 GREFFIER TO IMMEDIATELY PLACE THE DEFENCE'S
 FILINGS ON THE CASE FILE**

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Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“ECCC Law”);

Noting the Co Prosecutors’ Third Introductory Submission, filed on 7 September 2009 (“Introductory Submission”);¹

Noting the Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, filed on 18 July 2011;²

Noting the Co-Prosecutor’s Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, filed on 24 April 2014;³

Noting the judicial investigation opened in relation to alleged violations of the **1956 Penal Code**, the **Convention on the Prevention and Punishment of the Crime of Genocide**, the **Geneva Conventions of 1949**, and **Crimes against Humanity**, punishable under Articles 3 (new), 4, 5, 6, 29 and 39 of the ECCC Law; and Articles 209, 210, 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code;

Noting Rules 14(2), 21, 39, 55, 72, 74 and 76 and of the ECCC Internal Rules (“Internal Rules”), and Article 7 of the Practice Direction on Filing Documents before the ECCC (Revision 8);

Considering ██████████ *Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence’s Filings on the Case File* (“Request”);⁴

Noting the Disagreements registered on 22 February and 5 April 2013;

PROCEDURAL HISTORY

1. The Request was filed on 24 June 2014, along with an annex containing a list of relevant filings by the Suspect’s Lawyers.⁵ On 27 June 2014, the OCIJ Greffier placed the Request on the Case File and informed the Co-Lawyers for ██████████ (“Suspect” and “Suspect’s Lawyers”) that “[p]ursuant to instructions from the International Co-Investigating Judge, your request has been placed on the case file and will be responded to as soon as possible.”⁶

¹ Case File No. 004-D1, *Co-Prosecutors’ Third Introductory Submission*, 20 November 2008 (“Third Introductory Submission”); Case File No. 004-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009.

² Case File No. 004-D65, *Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011.

³ Case File No. 004-D191, *Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence*, 24 April 2014.

⁴ Case File No. 004-D202, ██████████ *Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence’s Filings on the Case File*, 24 June 2014.

⁵ Case File No. 004-2014-1 ██████████ *Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence’s Filings on the Case File, Table of Authorities*, 24 June 2014, paras. 8-17.

⁶ Case File No. 004-D202/1, *Greffier’s Response to ██████████ Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence’s Filings on the Case File*, 27 June 2014.



SUBMISSIONS

2. The Suspect's Lawyers request the Co-Investigating Judges to "[o]rder the Office of Co-Investigative Judges' ("OCIJ") Greffier to immediately place the Defence's Filings on the Case File. The OCIJ Greffier has either failed to place, or belatedly placed, the Defence's filings on the Case File. As such, the Defence is either being denied the opportunity to immediately make its record or denied the opportunity to make its record at all which, in turn, violates [REDACTED] fundamental rights"⁷.
3. In support of the Request, the Suspect's Lawyers submit that:
- In accordance with the glossary of the Rules, the Case File needs to contain "the record of proceedings before the Chambers". The Defence is involved in the proceedings. Filings from those involved in the proceedings constitute, *inter alia*, the record of proceedings; these filings must be placed on the Case File;⁸
 - To the Defence's knowledge, the OCIJ Greffier has not placed the Application for Annulment on the Case File, either immediately or at all. The Application for Annulment has not been registered. There is no record of the Application for Annulment on the Case File. The OCIJ Greffier has violated Rule 76(3);⁹
 - No Rule provides the OCIJ Greffier discretion whether or when to place filings on the Case File. There has been no decision from the Co-Investigating Judges stating otherwise. Moreover, the Rules do not permit a Judge to make a Decision or an Order not to place filings on the Case File;¹⁰
 - As exemplified in the Annex, the OCIJ Greffier is acting in an arbitrary manner if or when placing the Defence's filings on the Case File. There is no basis as to why the OCIJ Greffier belatedly placed the Defence's filings on the Case File, if he placed them on the Case File at all. The OCIJ Greffier has not provided an adequate explanation for his arbitrary behavior;¹¹
 - In order to defend [REDACTED] [REDACTED] must be heard. In order to be heard, [REDACTED] must have [REDACTED] filings placed on the Case File. By failing to place the Defence's filings on the Case File immediately, or at all (of which there is a real risk should the OCIJ Greffier continue with his current practice), the OCIJ Greffier is violating [REDACTED] [REDACTED] right to defend [REDACTED]¹²
 - In order for [REDACTED] to exercise his right to appeal in accordance with Rule 74(3) and ECCC jurisprudence, he must be able to make a record which, axiomatically, includes preserving errors of law, fact or abuse of discretion for appellate review.¹³

DISCUSSION

a. Admissibility

⁷ Request, Introduction.

⁸ Request, para. 27.

⁹ Request, para. 30.

¹⁰ Request, para. 31.

¹¹ Request, para. 34.

¹² Request, para. 36.

¹³ Request, para. 38.



4. The International Co-Investigating Judge (“International CIJ”) finds that the Suspect has standing to file this request, since it raises relevant concerns about the procedure for suspects filing documents.

b. Filings by parties to the proceedings

5. The International CIJ notes that, as a general principle, the Co-Investigating Judges (“CIJs”) instruct the OCIJ Greffier to place all filings by the parties to the proceedings (and other persons having standing) on the investigation case file without delay. Indeed, prompt placement on the case file ensures transparency and gives notice of the issues raised to the other parties, thus allowing them the opportunity to respond. It should be recalled, however, that the CIJs are only authorized to investigate within the parameters of Introductory and supplementary submissions from the Co-Prosecutors. The CIJs may, thus, refuse to place filings by parties on the case file in exceptional circumstances, where the subject matter of the filing falls outside the factual and procedural parameters of the judicial investigation.¹⁴ Implementation of this principle is, of course, subject to essentially administrative requirements such as the need for a determination by the Co-Investigating Judges (“CIJs”) of the appropriate case file partition and confidentiality level for each filing. The OCIJ Greffier does not exercise any discretion in this process. He follows instructions received from the CIJs.¹⁵

c. Filings by suspects

6. It flows from this principle that there is no obligation to make a “record of proceedings”¹⁶ for filings by persons lacking standing before the ECCC. In his decision on the Suspect’s request for access to Case File 004 and for permission to take part in the judicial investigation, issued on 17 July 2014 (“Case File Access Decision”),¹⁷ the International CIJ reiterated that the Internal Rules clearly distinguish between a suspect and a charged person and grant the latter a broader set of rights.¹⁸ Indeed, not being parties to the proceedings, suspects do not have the right to access the confidential record of the investigation, nor do they have standing to submit applications for annulment pursuant to Internal Rule 76,¹⁹ or to file investigative requests.²⁰ Accordingly, the right of suspects to “be heard”²¹ at

¹⁴ See the CIJs’ rejection of the attempted filing of a copy of a defence team complaint before the Phnom Penh municipal Court: Case File No. 002-D124/1, *Order Refusing to Place a Document on the Case File*, 14 January 2009; and rejecting a request to ascertaining the truth “about this Tribunal”: Case File No. 002-D158/5, [Public] *Order on Request for Investigative Action*, 3 April 2009, paras-8-11; and Case File No. 002-D158/5/4/14, [Public] *Decision on the Appeal of Ieng Thirith Against the Co-Investigating Judges’ Order on Nuon Chea’s Eleventh Request for Investigative Action*, 25 August 2009, paras 24-31.

¹⁵ Request, para. 31.

¹⁶ Request, para. 27.

¹⁷ Case File No. 004-D186/3, *Decision on the [REDACTED] Defence Urgent Motion to Access the Case File and Take Part in the Judicial Investigation*, 17 July 2014.

¹⁸ Case File Access Decision, para. 26; Case File No. 004-D121/4, Public [REDACTED] *Decision on the Defence requests to access the Case File and take part in the Judicial Investigation*, 31 July 2013, para. 36.

¹⁹ Case File Access Decision, paras 24 and 32.

²⁰ Case File No. 004-D190, *Decision on [suspect’s] Requests for Investigation*, 23 April 2014, paras 4-5.

²¹ Request, para. 36.



this stage of the proceedings only extends to the rights enjoyed by a suspect, as set forth in Internal Rule 21.

7. As a consequence of the limited rights of suspects during the judicial investigation, the placement of a suspect's submissions on the substantive ("D") partition of the Case File, and responses thereto, is subject to prior determination of his status in the investigation. In the case in hand, it was only on 17 July 2014 that the International CIJ confirmed that the Suspect is not currently a charged person in Case 004, and thus not a party to the proceedings.²²
8. Once the CIJs have determined that a suspect is not a charged person, decisions whether to place his or her filings on the Case File must be made on a case by case basis, depending on whether suspects have standing to file the type of submission in question.²³ For example, in a decision on investigative requests filed by another suspect in Case 004 ("Investigative Requests Decision"),²⁴ the International Co-Investigating Judge determined that "[u]nless there is a change in the Suspect's status, the International CIJ will not entertain, nor place on the Case File, further requests filed on behalf of the Suspect for the exercise of rights reserved by the Internal Rules to charged persons."²⁵
9. In addition, a number of the filings in question were requested to be filed in English only, with a Khmer translation to follow. Such requests require judicial consideration whether exceptional circumstances, such as the urgency of responding to the request, justify departure from the requirement that all documents be filed before the ECCC in Khmer as well as in English or French.²⁶
10. For all these reasons, the period of time will clearly vary between the date a suspect files a submission and a determination by the CIJs concerning placement on the case file. The OCIJ Greffier has no influence over this process, nor does he exercise any discretion therein.
11. Accordingly, the Suspect's Lawyers' accusation of arbitrary behavior by the OCIJ Greffier²⁷ is unfounded. Moreover, such variations in the timing of determinations on placement on the case file do not infringe the Suspect's fundamental rights since they are the necessary consequence of the need to determine whether any particular filing raises issues related to the rights attaching to his status.²⁸

d. Preserving the record

12. Nevertheless, solely in order to preserve the record should a suspect be found to have standing in a particular case or should his or her status change at a later stage, the International CIJ has decided that it is opportune to place all submissions by suspects on the administrative ("A") partition of the Case File. This practice has already been established; for example, when the International CIJ instructed the OCIJ Greffier not to place further requests by another suspect in Case 004 on the substantive portion of

²² Case File Access Decision, para. 28.

²³ Request, para. 31.

²⁴ Case File No. 004-D190, *Decision on [suspect's] Requests for Investigation*, 23 April 2014.

²⁵ Investigative Requests Decision, para. 6.

²⁶ Practice Direction on Filing Documents before the ECCC (Revision 8), Arts 7.1 and 7.2.

²⁷ Request, para. 34.

²⁸ Request, para. 38.



Case File 004, the request was annexed to the Greffier's administrative notification.²⁹

13. In the case in hand, the International CIJ notes that, since the Suspect's status was determined in the Case File Access Decision, most of the filings listed in the annex to the Request have been placed on the substantive partition of the case file and/or responded to.³⁰
14. As regards the Suspect's outstanding application for annulment pursuant to Internal Rule 76,³¹ a judicial determination has already been made in the Case File Access Decision that suspects do not have standing to submit such applications.³² Accordingly, that application shall be placed on the administrative ("A") partition of the Case File pending any change in the suspect's status.


FOR THE FOREGOING REASONS, I, MARK B. HARMON, HEREBY:

15. Instruct the OCIJ Greffier to:

- place the application referred to in paragraph 14 above on the administrative ("A") partition of the Case File, as well as all future submissions by suspects in Case 004, in order to preserve the record pending a case by case decision on standing;
- provide the Suspect's Lawyers with copies of the confidential case law referred to herein, redacted as necessary, solely for the purposes of this decision; and

16. Reject the remainder of the Request.

Dated 04 August 2014, Phnom Penh



Judge Mark B. Harmon
 លោកជំទាវម៉ាក ហាម៉ុង
 International Co-Investigating Judge
 Co-juge d'instruction international

²⁹ Case File No. 004-A117, *Notification Concerning [suspect's] Fourth Request for Investigative Action Pursuant to Internal Rule 55(10)*, 23 May 2014; and annexes 004-A117/1 and following; this procedure is also being followed in Case 003: Case File No. 003-D108/1, *Decision on [suspect's] Request to Place All Submissions on the Case File*, 28 July 2014.

³⁰ - Case File No. 004-D203, [REDACTED] *Request for Clarification that [REDACTED] Can Conduct His Own Investigations*, 3 June 2014; and Case File No. 004-D203/1, *Decision Regarding [REDACTED] Request for Clarification that He Can Conduct His Own Investigations*, 21 July 2014;

- Case File No. 004-D205, [REDACTED] *Request to the Co-Investigating Judges to provide their understanding of the law should there be a Disagreement between the Co-Investigating Judges when issuing the Closing Order*, 19 June 2014; and Case File No. 004-D205/1, *Decision On the [REDACTED] Request for Clarification Regarding Closing Orders Should There be a Disagreement Between the Co-Investigating Judges*, 01 August 2014;

- in addition, the Case File Access Decision responded to filings 004-D186 and 004-D186/2.

³¹ [REDACTED] *Application to the Co-Investigating Judges Requesting them to Seize the Pre-Trial Chamber with a view to Annul the Judicial Investigation*, 20 May 2014; referred to in the Request at para. 30.

³² Case File Access Decision, paras 19 and 32.