

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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

Party Filing: The Defence for [REDACTED]

Filed to: The Co-Investigating Judges

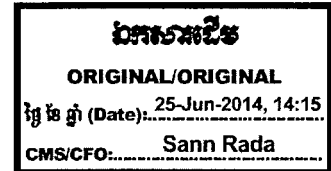
Original language: ENGLISH

Date of document: 24 June 2014

CLASSIFICATION

Classification of the document

suggested by the filing party: **CONFIDENTIAL**



**Classification by OCIJ
or Chamber:**

~~សម្រាប់/Confidential~~ សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

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

Filed by:

The Co-Lawyers:
SO Mosseny
Suzana TOMANOVIĆ

Distribution to:

The Co-Investigating Judges:
Judge YOU Bunleng
Judge Mark HARMON

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

All Defence Teams in Case 004

All Civil Parties in Case 004

██████████ through ██████ Co-Lawyers (“the Defence”), pursuant to Article 31 of the Constitution, Article 12(2) of the Agreement,¹ Article 35 new of the Establishment Law,² Article 14(3)(b) of the International Covenant on Civil and Political Rights (“ICCPR”) and Rule 21(1) of the ECCC Internal Rules (“Rules”), hereby requests the Co-Investigating Judges to Order 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 ██████████ fundamental rights. This Request is made necessary to: **a.** protect ██████████ right to defend himself; **b.** protect ██████████ right to appeal; **c.** in accordance with Rule 21, ensure legal certainty at the ECCC; and **d.** ensure the ECCC’s practice is that of the model court it attests to be.³ The Defence requests to file this Request in English with the Khmer translation to follow because the Interpretation and Translation Unit (“ITU”) cannot timely complete the translation due to other priorities.⁴

I. BACKGROUND

1. On 6 March 2014, the Defence filed to the OCIJ the English version of, ‘██████████ Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation.’⁵ On 24 March 2014, the Defence filed the Khmer translation of this Motion.⁶ On 28 March 2014, the Defence emailed the OCIJ Greffier asking whether this Motion had been placed on the Case File, and if not, why not.⁷ On 28 March 2014, the OCIJ Greffier responded to the email stating, “I well received your filing. Your team

¹ 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 (“Agreement”).

² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”).

³ The Trial Chamber has stated that, while the ECCC lacks the mandate to directly address alleged deficiencies in national mechanisms designed to uphold the independence of the judiciary, “[i]t may, as a model court, nonetheless serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity.” *Case 002*, Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3 (“Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn”), para. 14 (emphasis added).

⁴ See Email from ITU to Defence, “Translation of Motion,” 24 June 2014.

⁵ ██████████ Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation, 6 March 2014, D186 (“Access to the Case File Motion”); Proof of filing, Access to the Case File Motion, English, 6 March 2014.

⁶ Proof of filing, Access to the Case File Motion, Khmer, 24 March 2014.

⁷ Email from the Defence to the OCIJ Greffier, “Submission on the Case File,” 28 March 2014.

will be informed of its status in due course.”⁸ On 18 April 2014, the Defence again emailed the OCIJ Greffier asking whether this Motion had been placed on the Case File, and if not, why not.⁹ The OCIJ Greffier did not respond to the 18 April 2014 email. This Motion was notified to the parties on 23 April 2014.¹⁰

2. On 24 April 2014, the Defence filed to the OCIJ both the English version and Khmer translation of, ‘[REDACTED] Urgent Request for relief based on new information.’¹¹ This Motion was notified to the parties on 28 April 2014.¹²
3. On 29 April 2014, the Defence filed to the OCIJ both the English version and Khmer translation of, ‘[REDACTED] Notice of Appeal Against Decision on [REDACTED] Urgent Request for relief based on new information.’¹³ This Notice of Appeal was notified to the parties on 29 April 2014.¹⁴
4. On 7 May 2014, the Defence filed to the OCIJ the English version of, ‘[REDACTED] Submission on the Reconsideration of the Decision to Grant [REDACTED] Access to the Case File.’¹⁵ On 15 May 2014, the Defence emailed the OCIJ Greffier asking whether this Submission had been placed on the Case File, and if not, why not.¹⁶ On 20 May 2014, the OCIJ Greffier responded to the email stating, “the motion will be placed in the Case File today.”¹⁷ This Submission was notified to the parties on 20 May 2014.¹⁸ On 6 June 2014, the Defence filed the Khmer translation of this Submission.¹⁹

⁸ Email from the OCIJ Greffier to the Defence, “Re: Submission on the Case File,” 28 March 2014.

⁹ Email from the Defence to the OCIJ Greffier, “Re: Submission on the Case File,” 18 April 2014.

¹⁰ Email from Case File Notification Officer to the Defence, “FW: [Filed by Defence (004)] NEW DOCUMENT(S): CASE FILE No. 004 – [REDACTED] Urgent Motion Requesting Access To The Case File And To Take Part In The Judicial Investigation),” 23 April 2014.

¹¹ [REDACTED] Urgent Request for relief based on new information, 24 April 2014, D192 (“Urgent Request for Relief”); Proof of filing, Urgent Request for Relief, English and Khmer, 24 April 2014.

¹² Email from Case File Notification Officer to the Defence, “FW: [Filed by Defence (004)] NEW DOCUMENT(S): CASE FILE No. 004 – [REDACTED] Urgent Request For Relief Based On New Information),” 28 April 2014.

¹³ [REDACTED] Notice of Appeal Against Decision on [REDACTED] Urgent Request for relief based on new information (“Notice of Appeal”), 29 April 2014, D192/1/1; Proof of filing, Notice of Appeal, English and Khmer, 29 April 2014.

¹⁴ Email from Case File Notification Officer to the Defence, “Fw: [Filed by OCIJ] NEW DOCUMENT(S): CASE FILE No. 004 – (Appeal Register of Appeal Against ICIJ’s Decision On [REDACTED] Urgent Request,” 29 April 2014.

¹⁵ [REDACTED] Submission on the Reconsideration of the Decision to Grant [REDACTED] Access to the Case File, 7 May 2014, D186/2 (“Submission on Reconsideration of Access to the Case File”); Proof of filing, Submission on Reconsideration of Access to the Case File, English, 7 May 2014.

¹⁶ Email from the Defence to the OCIJ Greffier, “Submission on the Case File,” 15 May 2014.

¹⁷ Email from the OCIJ Greffier to the Defence, “Re: Submission on the Case File,” 20 May 2014.

5. On 20 May 2014, the Defence filed to the OCIJ the English version of, ‘[REDACTED] Application to the Co-Investigating Judges Requesting them to Seize the Pre-Trial Chamber with a view to Annul the Judicial Investigation.’²⁰ On 26 May 2014, the Defence filed the Khmer translation of this Application.²¹ On 27 May 2014, the Defence emailed the OCIJ Greffier asking whether this Application had been placed on the Case File, and if not, why not.²² On 27 May 2014, the OCIJ Greffier responded to the email stating, “i have received the Request. your Request will be placed in the case file in due course and you and your team will be notified of its placement in the case file.”²³ On 2 June 2014, the Defence again emailed the OCIJ Greffier asking whether this Application had been placed on the Case File, and if not, why not.²⁴ The OCIJ Greffier has not responded to the 2 June 2014 email. This Application is yet to be notified to the parties.
6. On 26 May 2014, the Defence filed to the OCIJ the English version and Khmer translation of, ‘[REDACTED] Notice that [REDACTED] Fully Intends to Exercise [REDACTED] Right to Remain Silent before the Co-Investigating Judges or any member of the Office of the Co-Investigating Judges.’²⁵ This Notice was notified to the parties on 27 May 2014.²⁶
7. On 3 June 2014, the Defence filed to the OCIJ the English version of, ‘[REDACTED] Request for Clarification that [REDACTED] can conduct [REDACTED] own investigation.’²⁷ On 20 June

¹⁸ Email from Case File Notification Officer to the Defence, “Fw: [Filed by Defence (004)] NEW DOCUMENT(S): CASE FILE No. 004 – [REDACTED] Submission on the Reconsideration of the Decision to Grant [REDACTED] Access to the Case File,” 20 May 2014.

¹⁹ Proof of filing, Submission on Reconsideration of Access to the Case File, Khmer, 6 June 2014.

²⁰ [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 (“Application for Annulment”); Proof of filing, Application for Annulment, English, 20 May 2014.

²¹ Proof of filing, Application for Annulment, Khmer, 26 May 2014.

²² Email from the Defence to the OCIJ Greffier, “Motion on the Case File,” 27 May 2014.

²³ Email from the OCIJ Greffier to the Defence, “Re: Motion on the Case File,” 27 May 2014.

²⁴ Email from the Defence to the OCIJ Greffier, “Re: Motion on the Case File,” 2 June 2014.

²⁵ [REDACTED] Notice that [REDACTED] Fully Intends to Exercise [REDACTED] Right to Remain Silent before the Co-Investigating Judges or any member of the Office of the Co-Investigating Judges, 26 May 2014, D195 (“Notice of [REDACTED] right to remain silent”); Proof of filing, Notice of [REDACTED] right to remain silent, English and Khmer, 26 May 2014.

²⁶ Email from Case File Notification Officer to the Defence, “Fw: [Filed by Defence (004)] NEW DOCUMENT(S): CASE FILE No. 004 – [REDACTED] Notice That [REDACTED] Fully Intends To Exercise [REDACTED] Right To Remain Silent Before The Co-Investigating Judges Or Any Member Of The Office Of The Co-Investigating Judges,” 27 May 2014.

²⁷ [REDACTED] Request for Clarification that [REDACTED] can conduct [REDACTED] own investigation, 3 June 2014 (“Request for Clarification”); Proof of filing, Request for Clarification, English, 3 June 2014.

004/07-09-2009-ECCC/OCIJ

2014, the Defence filed the Khmer translation of this Request for Clarification.²⁸ This Request for Clarification is yet to be notified to the parties.

8. On 19 June 2014, the Defence filed to the OCIJ the English version of, “[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.”²⁹ The Request is still being translated by the ITU.³⁰ This Request is yet to be notified to the parties.
9. For the sake of ease, the Annex to this Request sets out the Defence’s filings to the OCIJ outlined *infra*. The Annex sets out the date which each filing was filed in English and Khmer and, where applicable, the date it was placed on the Case File.

II. ADMISSIBILITY

10. The Request is made pursuant to Rule 21. Rule 21 requires that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.” The Pre-Trial Chamber has previously considered that the fundamental principles set out in Rule 21 “requires that Pre-Trial Chamber adopt a broader interpretation of the Charged Person’s right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded.”³¹ Rule 21 is applicable to Suspects and Charged Persons, therefore regardless of the Status of [REDACTED] the Pre-Trial Chamber’s broad interpretation should apply. The Pre-Trial Chamber has admitted appeals which raise issues of fundamental fair trial rights solely on the basis of

²⁸ Proof of filing, Request for Clarification, Khmer, 20 June 2014.

²⁹ [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 (“Request for Understanding should there be a Disagreement”); Proof of filing, Request for Understanding should there be a Disagreement, English, 19 June 2014.

³⁰ Request for Translation, Request for Understanding should there be a Disagreement, 18 June 2014.

³¹ *Case 002*, 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 Stay of Proceedings, 20 September 2010, D390/1/2/4 (“Decision on IENG Sary’s Response”), para. 13. *See also*, *Case 002*, Decision on KHIEU Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 36; *Case 002*, Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49.

Rule 21.³² The Co-Investigating Judges should follow the jurisprudence of the Pre-Trial Chamber and answer the Request in order to ensure that the fair trial rights of [REDACTED] are safeguarded.

III. APPLICABLE LAW

A. Right to Adequate Time and Facilities to Prepare a Defence

11. Article 31 of the Constitution states: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.”

12. Article 12(2) of the Agreement states in pertinent part: “The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.”

13. Article 35 new of the Establishment Law states in pertinent part:

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

- b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
- d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing...

14. Article 14(3) of the ICCPR states in pertinent part:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing ...

15. Rule 21(1) states in pertinent part:

The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to

³² See, e.g., Cases 002, 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, 10 August 2010, D264/2/6 (“Decision on IENG Thirith Appeal”), paras. 13-14; Decision on IENG Sary's Response, para. 13.

ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.

B. Role of the Greffier

16. Rule 14(2) states: “Each Co-Investigating Judge shall have a Greffier. The Greffiers shall keep a record of the investigation and undertake such other activities as required by the Co-Investigating Judges under these IRs.”
17. Rule 16*bis*, entitled “Greffiers,” states: “In order to exercise their functions within the ECCC as provided in these IRs, ECCC Greffiers shall be accredited by the Ministry of Justice. The Office of the Administration shall forward the list of Greffiers immediately to the Ministry of Justice for accreditation.”
18. Rule 39(6) states:

Documents filed before the ECCC, such as complaints, requests and pleadings, shall be submitted to the Greffier of the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges or the Chambers, as the case may be, in accordance with the applicable laws, these IRs, the applicable Practice Directions and, where appropriate, any decision by the judges.
19. Rule 55(6) states:

The Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC.
20. Rule 76 is entitled “Applications Concerning Procedural Defects.” Rule 76(3) states:

“The Greffier of the Co-Investigating Judges shall register the application immediately. Where the Co-Investigating Judges decide to accept the application, they shall forward the case file to the Chamber.”
21. Article 2.1 of the document entitled “Filing of Documents before the ECCC” states:

“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, or the Chambers, as appropriate (hereinafter the “relevant greffier”), through the Case File Officer.”

22. Article 7.1 of the document entitled “Filing of Documents before the ECCC” states in pertinent part: “All documents shall be filed in Khmer as well as in English or French.”
23. Article 7.2 of the document entitled “Filing of Documents before the ECCC” states: “In exceptional circumstances, the Co-Investigating Judges or a Chamber of the ECCC may authorise a party to file a document in French or in English in the first instance, provided however, that a Khmer translation must be filed before the Chamber at the first opportunity.”
24. Article 128 of the Cambodian Criminal Procedure Code (“CPC”) entitled “Assistance of Court Clerks” states in pertinent part: “An investigating judge shall be assisted by a clerk. In any case, the clerk cannot perform the duties of the investigating judge himself.”
25. Article 129 of the CPC entitled “Roles of Court Clerks” states in pertinent part:
- The case file shall be kept by the clerk. If possible, the clerk shall make copies of each record. The clerk shall certify that the copied records are true copy of the original. The copies shall be kept in a reserve file. The clerk shall assign code number for all records in a chronological order.
26. Article 341 of the CPC entitled “Establishing Hearing Record” states:
- At the hearing, the court clerk shall establish the hearing record for the purpose of giving the Court of Appeal the means to examine the legality of the proceedings and an understanding of the hearing. The court clerk shall make his best efforts to describe the activities of the hearing and make the record as accurate as possible in relation to the questions and answers of the accused, the civil party, the civil defendants, the witnesses and the experts. The hearing record shall be signed by the court clerk and be registered after being verified by the presiding judge within 10 days after the announcement of the judgment. Any court clerk who carelessly handles a hearing record shall be subject to disciplinary action.

IV. REQUEST

A. The OCIJ Greffier has no Discretion when placing Parties’ Filings on the Case File

27. The glossary of the Rules defines the Case File as:

‘Case File’ (*dossier* – សំណុំរឿង) refers to all the written records (*procès verbaux*) of investigative action undertaken in the course of a Preliminary Investigation or a Judicial Investigation, together with all applications by parties, written

decisions and any attachments thereto at all stages of the proceedings, including the record of proceedings before the Chambers.

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.

28. The Rules do not state that only filings from “parties” are to be put on the Case File. The definition of “Case File” in the glossary of the Rules states, “together with all applications by parties,” but the definition also states “the record of proceedings before the Chambers.” Black’s Law Dictionary defines the term “proceeding” as “[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.”³³ Case 004 commenced when the Co-Prosecutors filed their Introductory Submission on 7 September 2009.³⁴ Judgement in Case 004 has yet to be rendered. “All acts and events” would include filings from those involved in Case 004, including [REDACTED] between 7 September 2009 and the date Judgement is rendered. In accordance with the definition of “Case File” in the glossary of the Rules, a record must be made of all these “acts and events,” which include filings from the Defence.

29. Rule 55(6) states that during the investigative phase of proceedings, the Case File is kept by the OCIJ Greffier. The OCIJ Greffier is responsible for placing filings on the Case File. The glossary of the Rules states that the Case File covers “all stages of the proceedings.” For all stages of the proceedings to be recorded, the Case File must be up to date; the entire record of proceedings must immediately be placed on the Case File. Rule 55(6) states that “the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file.” This part of Rule 55(6) will

³³ BLACK’S LAW DICTIONARY 1324 (West Publishing Co., 9th ed. 2009) (emphasis added).

³⁴ The Defence does not have access to the Introductory Submission. The Introductory Submission can be found online, *available at*:

http://img.scoop.co.nz/media/pdfs/1106/CambodiaThird_Introductory_Submission.redacted.pdf. The citation to the Introductory Submission can be found at: Consideration of the Pre-Trial Chamber on ... Appeal against the Decision Denying [REDACTED] Request to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014, D121/4/1/4 (“Pre-Trial Chamber Access to Case File Decision”), n.2, which states: “Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.”

be redundant if the Case File is not kept up to date. The Case File will only be kept up to date – and therefore complete – if all filings are immediately placed on it.

30. Rule 76 specifically concerns applications for procedural defects. The Defence filed an application for annulment due to a procedural defect on 20 May 2014.³⁵ Rule 76(3) states, *inter alia*, “The Greffier of the Co-Investigating Judges shall register the application immediately;”³⁶ no discretion is afforded to the OCIJ Greffier. Black’s Law Dictionary defines the term “register” as “to make a record of.”³⁷ 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).
31. Rule 39(6) states that documents filed before the ECCC shall be submitted to the relevant Greffier in accordance with the Rules and, “where appropriate, any decision by the judges.” As stated *supra*, the Rules are clear that filings must immediately be placed on the Case File. 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.
32. Article 341 of the CPC states in pertinent part that “the court clerk shall establish the hearing record.” Although Article 341 is applicable during trial, the same principles apply to maintain a record during the investigation phase. Under Article 128 of the CPC, “An investigating judge shall be assisted by a clerk.” This is similar to the role played by the Greffier at the ECCC. Logically, the “hearing record” in the CPC is the same as “record of proceedings” in the Rules. Applying these principles to the investigative phase at the ECCC, the Greffier at the ECCC must maintain a complete and up-to-date Case File. The Defence’s filings, *inter alia*, must immediately be placed on the Case File.

³⁵ Application for Annulment.

³⁶ Emphasis added.

³⁷ BLACK’S LAW DICTIONARY 1396 (West Publishing Co., 9th ed. 2009).

33. Rule 16*bis* states that ECCC Greffiers “shall be accredited by the Ministry of Justice.” Should the current practice of the OCIJ Greffier not to place, or belatedly place, the Defence’s filings on the Case File continue, the Defence will be left with no option other than to request the Ministry of Justice to commence disciplinary proceedings against the OCIJ Greffier.³⁸

B. The actions of the OCIJ Greffier are arbitrary

34. As stated *supra*, the OCIJ Greffier’s actions are not in accordance with the Rules. 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. Emails from the OCIJ Greffier stating, “I well received your filing. Your team will be informed of its status in due course,”³⁹ and “i have received the Request. your Request will be placed in the case file in due course and you and your team will be notified of its placement in the case file,”⁴⁰ or not responding to emails at all, are not adequate explanations as to why he is acting in an arbitrary manner in violation of the Rules.

35. Article 7.2 of the document entitled “Filing of Documents before the ECCC” states that documents must be filed in Khmer and English (or French) unless the Co-Investigating Judges authorize a party to file a document in English or in French in the first instance with the Khmer translation to follow. On four (out of seven) occasions, where the OCIJ Greffier has received filings in both languages, he either has not placed, or belatedly placed, the Defence’s filings on the Case File.⁴¹ The OCIJ Greffier does not appear to be failing to place, or belatedly placing, filings on the Case File due to non-compliance

³⁸ Sub-Decree No. 47 of the Ministry of Justice is titled: “Sub-Decree on Organization and Functioning of the Ministry of Justice” (“Sub-Decree No. 47”). Sub-Decree No. 47 was signed by Prime Minister Hun Sen on 11 May 2007. Article 25 of Sub-Decree No. 47 specifies that it will come into effect from the date of signature (as opposed to the King’s signature or promulgation). Article 3 of Sub-Decree No. 47 provides that, “The Ministry of Justice shall [*inter alia*] be responsible for: Ensur[ing] the functioning of all levels of court and prosecution offices; Inspect[ing] cases where there are complaints from any individuals or legal persons about courts or prosecutors.” As the Ministry of Justice is responsible for all levels of court, this would include the ECCC. As such, the Defence can raise a complaint against the OCIJ Greffier under Article 3 of Sub-Decree No. 47.

³⁹ Email from the OCIJ Greffier to the Defence, “Re: Submission on the Case File,” 28 March 2014.

⁴⁰ Email from the OCIJ Greffier to the Defence, “Re: Motion on the Case File,” 27 May 2014.

⁴¹ Access to the Case File Motion, introduction; Submission on Reconsideration of Access to the Case File, introduction; Application for Annulment, introduction; Request for Clarification; introduction.

with the language of the filings. Indeed, on one occasion, the OCIJ Greffier has placed a Defence filing on the Case File where the filing was submitted solely in English.⁴²

C. The OCIJ Greffier is violating [REDACTED] right to defend [REDACTED]

36. In accordance with the Constitution,⁴³ Agreement,⁴⁴ Establishment Law,⁴⁵ and ICCPR,⁴⁶ [REDACTED] has the right to defend himself. In order to defend himself, [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] right to defend himself. The European Court of Human Rights, a court from which the ECCC can take guidance, has held that:⁴⁷

[I]n view of the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly 'heard', that is to say, properly examined by the tribunal.

[REDACTED] cannot practically and effectively be heard without first having [REDACTED] filings placed on the Case File; only then can they be examined by the ECCC and [REDACTED] be "truly heard."

37. By failing to place the Defence's filings on the Case File, not only is the OCIJ Greffier violating [REDACTED] right to defend himself by violating [REDACTED] right to be heard, but also the right of the Co-Prosecutors and Civil Parties to be heard in matters which affect their interests. Defence filings not placed on the Case File are inaccessible to the other parties to the proceedings. The other parties cannot respond to them. Should the Defence's filings affect their interests, their right to be heard is being violated. In Case 002, the Supreme Court Chamber held that, "The need to respect the right to be heard in criminal proceedings [...] is dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal

⁴² Submission on Reconsideration of Access to the Case File.

⁴³ Constitution, Art. 31.

⁴⁴ Agreement, Art. 12(2).

⁴⁵ Establishment Law, Art. 35 new.

⁴⁶ ICCPR, Art. 14(3)(d).

⁴⁷ *Ajdarić v. Croatia*, Application No. 20883/09, Judgement, 13 December 2011, para. 33.

standards.”⁴⁸ Indeed, the International Co-Investigating Judge is aware of such a right as exemplified in his “Notification in relation to ██████ Urgent Motion to Access the Case File and take part in the Judicial Investigation,” where he “notifie[d] the Suspect’s Defence and the Parties to Case 004 that he intends to reconsider the Notification of Suspect’s Rights and the subsequent attempted oral notification, and invites them to submit any observations they may have on this matter.”⁴⁹

D. The OCIJ Greffier is violating ██████ right to appeal

38. The International Judges of the Pre-Trial Chamber have held that appeals by Suspects (as well as Charged Persons) under Rule 74(3) (which provides grounds of appeal against Orders and Decisions from the Co-Investigating Judges) are permissible where the issue deprives the Suspect from fair and adversarial proceedings.⁵⁰ Further, the Pre-Trial Chamber has admitted appeals which raise issues of fundamental fair trial rights solely on the basis of Rule 21.⁵¹ In order for ██████ to exercise ██████ right to appeal in accordance with Rule 74(3) and ECCC jurisprudence, ██████ must be able to make a record which, axiomatically, includes preserving errors of law, fact or abuse of discretion for appellate review. The record needs to show against what ██████ is appealing. ██████ cannot appeal if there is no record. By failing to place the Defence’s filings on the Case File immediately, or at all, the OCIJ Greffier is denying ██████ the opportunity to make ██████ record which, in turn, is denying ██████ right to appeal.

39. Article 341 of the CPC states that “[a]t the hearing, the court clerk shall establish the hearing record for the purpose of giving the Court of Appeal the means to examine the legality of the proceedings and an understanding of the hearing.” Article 341 sets out in Cambodian criminal procedure the reasoning why a complete and up-to-date record

⁴⁸ Case 002, Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, para. 42. *See also, Prosecutor v. Jelisić*, IT-95-10-A, Judgment, 5 July 2001, para. 27, which states in pertinent part: “the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.”

⁴⁹ Notification In relation to ██████ Urgent Motion to Access the Case File and take part in the Judicial Investigation, 22 April 2014, D186/1, para. 7.

⁵⁰ Pre-Trial Chamber Access to Case File Decision, Opinion of Judges Chang-Ho Chung and Rowan Downing, paras. 1-6.

⁵¹ *See, e.g.*, Decision on IENG Thirith Appeal, paras. 13-14; Decision on IENG Sary’s Response, para. 13.

needs to be maintained, namely for the purposes of giving an appellate court the means to examine the legality of the proceedings and an understanding of the hearing.

E. The OCIJ Greffier actions violate the principle of Legal Certainty

40. Rule 21 provides that legal certainty must be followed at the ECCC in order to protect the fundamental rights of Suspects.⁵² In a civil law system, legal certainty is defined in terms of a maximum predictability of officials' behavior.⁵³ The behavior of the OCIJ Greffier is not predictable. He is not predictable as to when – if at all – he will place [REDACTED] filings on the Case File. The OCIJ Greffier, in violation of the Rules, is controlling the access of information from the Defence to the Case File. In short – of his own volition – the OCIJ Greffier is arbitrarily wielding power which he does not possess. The European Court of Human Rights has held that legal certainty is “one of the fundamental aspects of the rule of law.”⁵⁴ As such, by not placing, or belatedly placing, the Defence's filings on the Case File, the OCIJ Greffier is not only in contravention of Rule 21, but also in violation of a fundamental aspect of the rule of law.

F. The OCIJ Greffier actions are not those to be found at a “model court”

41. According to the Trial Chamber, the ECCC is a model court for Cambodia.⁵⁵ The ECCC website used to also set out the policy that the ECCC is to act as a model court for Cambodia.⁵⁶ However, for reasons unknown to the Defence, this policy has been

⁵² “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement” (emphasis added).

⁵³ “In continental systems, legal certainty is defined in terms of a maximum predictability of officials' behavior.” ERIK CLAES ET AL., *FACING THE LIMITS OF THE LAW* 92 (Springer Publishing Co. 2009).

⁵⁴ *Şahin v. Turkey*, App. No. 13279/05 Eur. Ct. H.R. Gr. Ch., (2011), para. 56.

⁵⁵ The Trial Chamber has stated that, while the ECCC lacks the mandate to directly address alleged deficiencies in national mechanisms designed to uphold the independence of the judiciary, “[i]t may, as a *model court*, nonetheless serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity.” Decision on IENG Sary's Application to Disqualify Judge Nil Nonn, para. 14 (emphasis added).

⁵⁶ The ECCC was established with international assistance to ensure that the judicial proceedings would meet international standards of justice. According to a former page on the ECCC website: “The government of Cambodia insisted that, *for the sake of the Cambodian people*, the trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel. *Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice.* An agreement with the UN was ultimately reached in June 2003 detailing how the international community will assist and participate in the Extraordinary Chambers. This special new court was created by the government and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. *It will provide a new role model for court operations in Cambodia.*” This was available at:

