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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D208/1/1/2

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 (PTC16)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Chang-ho CHUNG
Judge HUOT Vuthy

Date: 22 January 2015

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PUBLIC (REDACTED VERSION)

DECISION ON [REDACTED] APPEAL AGAINST THE DECISION REJECTING HIS REQUEST FOR INFORMATION CONCERNING THE CO-INVESTIGATING JUDGES' DISAGREEMENT OF 5 APRIL 2013

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of ██████ “Appeal against Decision on Suspect’s Motion Requesting Information on Co-Investigating Judges’ Written Record of Disagreement dated 05 April 2013” filed in English on 17 October 2014 and in Khmer on 29 October 2014 (the “Appellant” and the “Appeal”, respectively).¹

I- INTRODUCTION

a. Procedural Background

1. On 7 September 2009, the then acting International Co-Prosecutor filed the Third Introductory Submission dated 20 November 2008 with the Co-Investigating Judges, thereby opening and formally commencing a judicial investigation into crimes for which the Appellant, together with others, is alleged to be responsible (the “Introductory Submission”).² The International Co-Prosecutor filed Supplementary Submissions on 18 July 2011³ and 24 April 2014.⁴
2. Between 17 April 2014 and 23 April 2014, the International Co-Investigating Judge issued four decisions dismissing various requests filed by the Appellant in which he noted that he and the National Co-Investigating Judge had registered a disagreement on 5 April 2013 (the “Four Decisions” and the “April 2013 Disagreement”, respectively).⁵ These decisions concern a request to annul the investigation in Case 004 based on lack of personal jurisdiction;⁶ three requests for investigative actions pursuant to Internal Rule 55(10);⁷ and

¹ D208/1/1/1.

² 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.

³ Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65.

⁴ Co-Prosecutors’ Supplementary Submissions Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.

⁵ Preliminary Decision on Request for Reconsideration of International Co-Investigating Judge’s Decision to Refuse ██████ Access to the Case File, 17 April 2014, D121/4/5 (“Preliminary Decision on Request for Reconsideration”); Decision on Request for Reconsideration of International Co-Investigating Judge’s Decision on the ██████ Defence Request to Access the Case File and Take Part in Judicial Investigation, 22 April 2014, D121/4/6 (“Decision on Request for Reconsideration”); Decision on ██████ Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 22 April 2014, D185/1 (“Decision on Request for Annulment”); Decision on ██████ Requests for Investigative Action, 23 April 2014, D190 (“Decision on Requests for Investigative Action”).

⁶ Decision on Request for Annulment *dismissing* ██████ Motion Requesting an Annulment of Investigative Action Pursuant to Internal Rule 76, 15 January 2014, D185.

⁷ Decision on Requests for Investigative Action *dismissing* ██████ First Request for Investigative Action pursuant to Internal Rule 55(10), 8 April 2014, D187; ██████ Second Request for Investigative Action pursuant



a request for the International Co-Investigating Judge to reconsider his previous decision to deny the Appellant access to the case file and the right to participate in the judicial investigation.⁸

3. On 19 June 2014, the Appellant filed a motion requesting the Co-Investigating Judges to provide information concerning their April 2013 Disagreement, more specifically information about a. the facts and reasons of the disagreement; b. the scope of disagreement and; c. any responses from the National Co-Investigating Judge, including whether he refused to participate in decision-making regarding filings in Case 004 (the “Motion for Information”).⁹
4. On 19 September 2014, the International Co-Investigating Judge held that the Appellant, as a suspect in Case 004, has a legitimate interest to bring the Motion for Information at this stage of the proceedings and therefore found it admissible under Internal Rule 21.¹⁰ However, he denied the Motion on the merits, on the grounds that a. reference to the April 2013 Disagreement in the Four Decisions does not reflect a lack of cooperation between the Co-Investigating Judges as “a disagreement on a specific issue may apply to future decisions dealing with the same or related issues”;¹¹ b. the Appellant “failed to demonstrate why specific information on the disagreements existing between the [Co-Investigating Judges] is necessary to determine whether the [Appellant’s] right to equal treatment is being respected”¹² and; c. the Co-Investigating Judges’ disagreements are confidential¹³ (the “Impugned Decision”).

b. The Appeal

5. On 26 September 2014, the Appellant filed a notice of appeal against the Impugned Decision and, on 17 October 2014 and 29 October 2014, he filed the Appeal, in English and Khmer, respectively. The Appellant argues that the Appeal is admissible under Internal

to Internal Rule 55(10), 9 April 2014, D188; [REDACTED] Third Request for Investigative Action pursuant to Internal Rule 55(10), 17 April 2014, D189.

⁸ Preliminary Decision on Request for Reconsideration *and* Decision on Request for Reconsideration *dismissing* [REDACTED] Motion Requesting Reconsideration of International Co-Investigating Judge’s Decision on the [REDACTED] Defence Requests to Access the Case File and Take Party in Judicial Investigation, 18 February 2014, D121/4/4.

⁹ Motion Requesting Information on Co-Investigating Judges’ Written Record of Disagreement Dated 05 April 2013, 19 June 2014, D208.

¹⁰ Decision on Suspect’s Motion Requesting Information on Co-Investigating Judges’ Written Record of Disagreement dated 05 April 2013, 19 September 2014, D208/1, para. 7.

¹¹ *Ibid.*, para. 8.

¹² *Ibid.*, para. 9.

¹³ *Ibid.*, para. 10.



Rule 21 as getting clarification about the disagreement procedure set out in Internal Rule 72 and information about the April 2013 Disagreement, which appears to have a broad scope, is necessary to ensure the Appellant's right to be tried by a tribunal established by law, to an effective defence and to equality before the law.¹⁴ On the merits, the Appellant argues that the International Co-Investigating Judge's interpretation of Internal Rule 72, which would allow registration of a broad disagreement rather than specific disagreements in respect of each separate issue before them, is erroneous as it fails to take into account the Co-Investigating Judges' legal obligation to cooperate and to deliberate on submissions filed by the parties or participants to the proceedings.¹⁵ A disagreement, the Defence argues, cannot be permanently unresolved or kept secret to the suspects because they would otherwise be unable to challenge potential violations of their rights and would lack a remedy under law.¹⁶ The Appellant also submits that any judicial privilege that may protect the April 2013 Disagreement is not absolute and is outweighed by the necessity to protect the Appellant's fair trial rights.¹⁷ Finally, the Appellant argues that the April 2013 Disagreement appears to be significant to the investigation given that it is referenced in five decisions recently issued by the International Co-Investigating Judge, so the requested information is necessary to safeguard his right to prepare a defence¹⁸ and to equal treatment before the law.¹⁹ Consequently, the Appellant asks this Chamber to "a. [a]dmit this appeal; b. [o]verturn the Impugned Decision; c. [c]larify the disagreement process under [Internal Rule] 72 in light of the cooperation requirement under ECCC law; and d. [o]rder the Co-Investigating Judges to provide [him] with the requested information concerning the April 2013 Disagreement."²⁰

6. The Co-Prosecutors, Civil Parties and Civil Party Applicants did not file any response to the Appeal.

II- ADMISSIBILITY

7. The Appellant does not allege that the Appeal is admissible under Internal Rules 73 or 74, which set out the explicit jurisdiction of the Pre-Trial Chamber, but rather argues that the

¹⁴ Appeal, para. 27.

¹⁵ *Ibid.*, paras 29-32.

¹⁶ *Ibid.*, para. 33.

¹⁷ *Ibid.*, paras. 35-38.

¹⁸ *Ibid.*, para. 41.

¹⁹ *Ibid.*, para. 43.

²⁰ *Ibid.*, para. 44.



Pre-Trial Chamber should declare it admissible under Internal Rule 21 in order to safeguard his rights to be tried by a tribunal established by law, to prepare a defence and to equal treatment before the law.²¹ This Rule provides, in its relevant parts:

Rule 21. Fundamental Principles

1. 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.

8. The Pre-Trial Chamber previously held that 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 (the “Agreement”),²² Article 35^{new} of the ECCC Law²³ and Article 14(3) of the International Covenant on Civil and Political Rights,²⁴ 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.²⁵ Where the particular facts and circumstances of a case required, the Pre-Trial Chamber has admitted appeals raising issues of fundamental rights or “serious issue[s] of fairness” under Internal Rule 21.²⁶ This being said, Internal Rule 21 does not provide an automatic avenue for appeals raising arguments based on fair trial rights; for the Pre-Trial

²¹ *Ibid.*, paras 26-27.

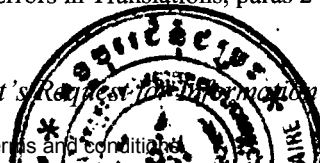
²² Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Kampuchea Democratic, 6 June 2003 (“Agreement”).

²³ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Kampuchea Democratic, with inclusion of amendments as promulgated on 27 October 2004 (“ECCC Law”).

²⁴ *See, e.g.*, Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC64), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, paras 13-18; 27.

²⁵ *See, e.g.*, Case 002 (PTC11), 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 (PTC71), Decision on IENG Sary’s Appeal against Co-Investigating Judges’ Decision Refusing to Accept the Filing of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4 (“Decision on IENG Sary’s Response”), para. 13; Case 002 (PTC14), Decision on Defence Notification of Errors in Translations, 17 December 2010, Doc. No. 2 (“Decision on Errors in Translation”), para. 3; Case 002 (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30 (“Decision on IENG Sary’s Appeal against the Closing Order”), para. 49.

²⁶ *See, e.g.*, Case 002 (PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, 10 August 2010, D264/2/6, paras 13-14; Decision on IENG Sary’s Response, para. 13 and Decision on Errors in Translations, paras 2-6.



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 an irreparable damage to the fairness of the proceedings or the appellant's fair trial rights. The Pre-Trial Chamber has emphasised that Internal Rule 21 does not provide an avenue for the Chamber to resolve hypothetical questions or provide advisory opinions.²⁷

9. At the outset, the Pre-Trial Chamber finds that it has no jurisdiction to entertain the Appellant's request for clarification of the disagreement process under Internal Rule 72. The Appellant challenges the International Co-Investigating Judge's interpretation of Internal Rule 72, which would allow disagreements to cover future decisions dealing with the same or related issues.²⁸ The Appellant alleges that this interpretation is inconsistent with the Co-Investigating Judges' obligation to cooperate and to deliberate on submissions filed by the parties or participants in the proceedings, resulting in the Appellant not being investigated by a tribunal established by law.²⁹ The Pre-Trial Chamber notes that the Appellant does not ask the Pre-Trial Chamber to overturn or annul any specific decision where this procedure had been applied (*e.g.* the Four Decisions), but rather seeks to obtain an advisory opinion from the Pre-Trial Chamber on the legality of the procedure itself. Whereas the International Co-Investigating Judge found it appropriate to explain his understanding of Internal Rule 72 in order to dissipate the Appellant's misgivings about the lack of cooperation with his national counterpart, the Pre-Trial Chamber finds that the Appellant's challenge to this interpretation, formulated in general terms, does not fall within the ambit of Internal Rule 21.
10. As to the Appellant's request for information about the April 2013 Disagreement, the Pre-Trial Chamber recalls that pursuant to Internal Rule 72(1), disagreements between the Co-Investigating Judges are internal to their office, unless they are brought before the Pre-Trial Chamber for resolution. Pursuant to Internal Rule 72(2), the written statement of the facts

²⁷ *See, e.g.*, Case 004/07-09-2009-ECCC/OCIJ ("Case 004") (PTC14), Decision on ██████████ Appeal against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 December 2014, D212/1/2/2, para. 6; Case 004 ("PTC 11") Decision Decision on ██████████ Appeal against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, para. 8; Case 003/07-09-2009-ECCC/OCIJ (PTC10), Decision on ██████████ Appeal against the Co-Investigating Judges' Constructive Denial of Fourteen of ██████████ Submissions to the [Office of the Co-Investigating Judges], 23 April 2014, D87/2/2, para. 26; Case 002 (PTC60), Decision on Ieng Sary's Appeal against OCIJ's Order on Ieng Sary's Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11, para. 11.

²⁸ *See* Appeal, para. 29.

²⁹ *Ibid.*, para. 32.



and reasons for the disagreement shall not be placed on the investigation case file, except where the disagreement is brought before the Pre-Trial Chamber for resolution and relates to a decision against which a party to the proceedings would have the right to appeal. The underpinning consideration for exclusion of written records of disagreement from the case file is that they form part of the deliberations between the Co-Investigating Judges. Pursuant to the rules established at the international level, “[judicial] deliberations are secret”³⁰ and, as such, “internal documents between the Judges who are shielded by the secrecy of deliberations or the confidentiality of correspondence are not intended for automatic disclosure to third parties”.³¹ Provision of information concerning the Co-Investigating Judges’ disagreements is therefore strictly within the purview of their discretion. The Pre-Trial Chamber shall not interfere with the exercise of this discretion unless it is demonstrated that, in the exceptional circumstances of the case, the lack of information about a disagreement impairs the Appellant’s fair trial rights, in which case the Pre-Trial Chamber may consider appropriate remedy.

11. The Pre-Trial Chamber finds that the Appellant has not demonstrated that the Co-Investigating Judges’ refusal to provide him with the requested information about the April 2013 Disagreement impairs his right to be tried by a tribunal established by law. It is clear that each of the Four Decisions has been issued by the International Co-Investigating Judge alone and that the National Co-Investigating Judge, who is also in receipt of the Appellant’s motions, has elected not to respond to those, at least not at this stage. In this respect, the International Co-Investigating Judge has noted in each of his decisions that a written record of disagreement had been previously registered and explained in the Impugned Decision that there is no lack of cooperation, contrary to the Appellant’s assertion, given that “[d]isagreement on a specific issue may apply to future decisions dealing with the same or related issue”.³² The National Co-Investigating Judge has not opposed this process nor expressed any diverging view. The Agreement, ECCC Law and

³⁰ *Prosecutor v. Šešelj*, IT-03-67-T, Decision to Unseal the Report of the Presiding Judge to the President of the Tribunal or Alternatively the Judge Designated by Him Regarding the Motion For Disqualification of Judge Harhoff, Presiding Judge of Trial Chamber III, 4 September 2013, p. 3. See also *Prosecutor v. Prlić et al.*, IT-04-74-T, Order by the Chamber’s Presiding Judge Concerning the Prlić Defence Request Seeking Disclosure of Correspondence, Trial Chamber III, 5 October 2010 (“Prlić Decision on Disclosure Request”), p. 2. See also, e.g., ICC Code of Judicial Ethics, ICC-BD/02-01-05, art. 6 (“Judges shall respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations”); ICC Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13, Rule 5(1)(a) (providing for the solemn undertaking of a judge: “I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations.”); Internal Rule 96 (which provides that the Trial Chamber shall deliberate “*in camera*”).

³¹ *Prlić Decision on Disclosure Request*, p. 2.

³² Impugned Decision, para. 8.



Internal Rules provide that one Co-Investigating Judge can validly act alone if the requirements of the disagreement procedure have been complied with.³³ In the present case, there was no need to ensure that the 30-day settlement period had elapsed before the International Co-Investigating Judge could issue the Four Decisions, given that none of them fall within the ambit of paragraphs (a) to (c) of Internal Rule 72(3).³⁴ Prior to issuing the Four Decisions, the International Co-Investigating Judge was only required to inform his national counterpart of the proposed course of action, for him to be allowed to state his views and, possibly, bring the disagreement for resolution before the Pre-Trial Chamber. In this respect, the Pre-Trial Chamber notes that the ECCC legal framework gives a broad discretion to the Co-Investigating Judges as to how they handle their disagreements and communicate with each other. Putting disagreements on record is helpful to show that the procedure set forth in Internal Rule 72 has been followed, but it is not mandatory.³⁵ Absent any indication to the contrary, it is presumed that the Co-Investigating Judges, in light of their judicial and ethical duties, ensure that they act in compliance with the requirements set forth in Article 5(4) of the Agreement, 23^{new} of the ECCC Law and Internal Rule 72. There is no indication in the present case disclosing a lack of compliance with these legal requirements by the International Co-Investigating Judge in issuing the Four Decisions so the Appellant's argument that he is not being investigated by a tribunal established by law is unfounded.

12. Finally, the Pre-Trial Chamber finds no merit in the Appellant's arguments that denying the requested information violates his rights to equality before the law and to prepare a defence. As recalled above, disagreements between the Co-Investigating Judges are confidential, not only to the Appellant, but as a rule. There is therefore no difference of treatment with other suspects in the same case who, similarly, do not have access to disagreements, nor any automatic right of access that would stem from a right to prepare a defence. The Appellant speculates about the content of the April 2013 Disagreement but

³³ Article 5(4) of the Agreement; Article 23^{new} (2) of the ECCC Law; Internal Rule 72(2) and (3). *See also, e.g.* Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, para. 16 and 27; Decision on IENG Sary's Appeal against the Closing Order, paras 274-276; Case 004, Decision on ██████████'s Urgent Request to Stay the Execution of ██████████ Summons to an Initial Appearance, 15 August 2014, A122/6.1/3, para. 14.

³⁴ In this regards, the Pre-Trial Chamber notes that it has dismissed the Appellant's appeals against both the Decision on Request for Annulment and the Decision on Requests for Investigative Actions. *See* Decision on ██████████ Appeal against International Co-Investigating Judge's Decision Denying Requests for Investigative Actions, 30 September 2014, D190/1/2; Decision on ██████████ Appeal against International Co-Investigating Judge's Decision Denying Motion for Annulment, 13 October 2014, D185/1/1/2. The Appellant has not appealed the Decision on Request for Reconsideration but the same reasoning would apply.

³⁵ *See* Art. 5(4) and 7(1) of the Agreement; Art. 23^{new}(3) of the ECCC Law and Internal Rule 72(1).



does not articulate how lack of access to the requested information concretely impairs his right to adequate time and facilities to prepare a defence at this stage of the proceedings.³⁶ In this respect, the Pre-Trial Chamber notes that the Appellant is named in the Introductory Submission but has not been formally charged. The Four Decisions reject five requests filed by him on the basis that, as a suspect, he is not entitled to exercise the rights reserved to charged persons under the Internal Rules.³⁷ The Appellant has not demonstrated that providing him access to privileged information about the disagreement on these decisions is necessary, at this stage, to defend himself against the crimes alleged in the Introductory Submission.

13. The Pre-Trial Chamber therefore finds the Appeal inadmissible under Internal Rule 21.

III- DISPOSITION

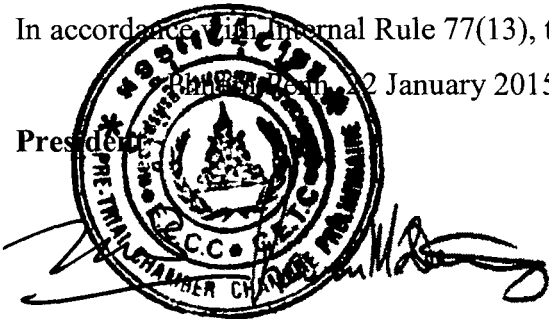
THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY: ^{ca}

DISMISSES the Appeal as inadmissible;

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

Done at The Hague, 22 January 2015

President



Pre-Trial Chamber

PRAK Kimsan **Rowan DOWNING**

NEY Thol

Chang-ho CHUNG

HUOT Vuthy

³⁶ See Appeal, para. 41.

³⁷ See Preliminary Decision on Request for Reconsideration, para. 14, 16 (“The International CIJ notes that, in reconsidering the Suspect’s Rights Notifications, the core issue was whether or not the Suspect was a Charged Person or should otherwise have been considered subject to criminal charges. [...] However, in order to ensure full respect for the principles of legal certainty and procedural fairness, the International CIJ considers it appropriate to specifically invite the Suspect’s Defence to indicate whether the submissions contained in the Reconsideration Motion cover all of the substantive arguments it would have made had it been given an opportunity to be heard at the appropriate time or whether it intends to make further submissions in support of its request for reconsideration of the Case File Decision.”); Decision on Request for Reconsideration, para. 25 (“[T]he International Judge reiterates that, should the Subject be charged in compliance with the Internal Rules, he will be afforded adequate time and facilities to prepare his defence. At this stage, however, the Suspect is not a party, is not detained, has no case to answer, and therefore no injustice or prejudice flows from the Suspect’s inability to access the case file.”); Decision on Request for Annulment, para. 33 (“The International CIJ finds the Motion inadmissible pursuant to Internal Rule 76 since [redacted] is not a party to the proceedings and finds that Internal Rule 21(1) does not provide [redacted] with an alternative avenue to file the Motion.”); Decision on Requests for Investigative Action, para. 5 (“The Suspect is not a charged person and, as such, he is not entitled to file requests for investigative action. His status as a suspect has already been the subject of findings in the *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, issued on 31 July 2013, which was not overturned on appeal, and in the *Decision on Request for Reconsideration of International Co-Investigating Judge’s Decision on the [redacted] Defence Requests to Access the Case File and Take Part in Judicial Investigation*, issued on 22 April 2014. The International CIJ considers that the Suspect’s status is now clear and need not be further discussed.”).