

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

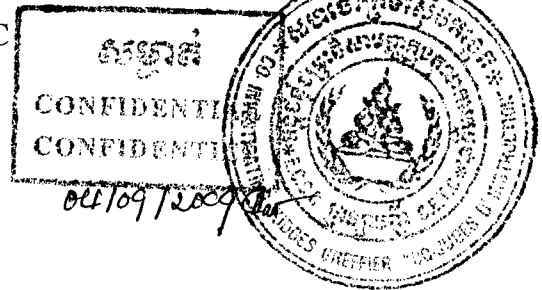
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FIFTEENTH REQUEST FOR INVESTIGATIVE ACTION

ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម	
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I. INTRODUCTION

1. Pursuant to Rule 55(10) of the ECCC Internal Rules (the 'Rules'), counsel for Charged Person Nuon Chea (the 'Defence') submit this request for investigative action to the Office of the Co-Investigating Judges (the 'OCIJ').

II. FACTUAL BACKGROUND

2. In an order dated 28 July 2009 (the 'Torture Order'), the OCIJ publically announced its intention to rely on evidence obtained through torture—possibly for the truth of its contents—in order to substantiate allegations advanced by the Office of the Co-Prosecutors (the 'OCP') against Nuon Chea and the other Charged Persons at the ECCC.¹ Notably, the OCIJ has determined that it is capable of assessing, 'on a case-by-case basis', the forensic value of such inherently unreliable information.² Prior to the announcement of the Torture Order, the Ieng Sary Defence Team specifically requested information related to the OCIJ's definition, identification, use, and intended disclosure of 'evidence obtained by or derived from torture'.³ To date, no reply to the Ieng Sary Request has been placed on the case file; nor have the particular queries contained therein been answered (directly or otherwise) by the Torture Order.⁴ The Torture Order is currently on appeal before the Pre-Trial Chamber.⁵
3. In a previous order dated 19 June 2009 (the 'SMD Order'), the OCIJ publically suggested that—pursuant to the so-called 'principle of sufficiency'—it would 'close

¹ Document No D-130/8, 'Order on the use of statements which were or may have been obtained by torture', 28 July 2009, ERN 00355926–00355933.

² Torture Order, para 28, ERN 00355932 ('However, the reliability of the statements is at issue when it comes to using them for the truth of their contents. The Co-Investigating Judges are fully cognizant of the fact that information obtained by torture is, as a rule, unreliable. However, regardless of the circumstances in which the information within the confessions was obtained, it is not possible at this stage to affirm that no element of truth can ever be found in the confessions. The reliability of the statements cannot be assessed until the end of the investigation, when the case file is deemed complete. At that point, as with all of the evidence in the case file, the reliability of the confessions will be assessed on a case-by-case basis, with the understanding that the Co-Investigating Judges will proceed with utmost caution given the nature of the evidence and the manner in which it was obtained.')

³ Document D-130/7, Letter from Ieng Sary Defence Team to OCIJ, 17 July 2009 (the 'Ieng Sary Request'), ERN 00352184–00352185.

⁴ *N.B.* The Ieng Sary Defence Team recently reiterated the specific queries contained in its request. See Document D-130/7/2, Letter from Ieng Sary Defence Team to OCIJ, 7 August 2009, ERN 00360855–00360856.

⁵ See Document No D-130/9, 'Record of Appeal', 3 August 2009, ERN 00357068–00357071.

[its] judicial investigation *once* [it] has determined that there is sufficient evidence to indict' Nuon Chea and the other Charged Persons.⁶ Furthermore, the OCIJ indicated that its 'duty of impartiality' does not impose a positive obligation to seek out exculpatory materials⁷ and any such search it may undertake—presumably as a discretionary matter—must be subordinated to 'the requirement for trial within a reasonable time'.⁸ The SMD Order is currently on appeal before the Pre-Trial Chamber.⁹

4. For nearly two years, the OCIJ has conducted its judicial investigation without disclosing any information to the parties regarding: the 'procedural law applied by the [OCIJ] and [its] Investigators'; the OCIJ's 'planning and overall strategy'; the 'qualifications and experience of OCIJ Investigators and their Standard Operating Procedures'; or the 'collection and analysis of exculpatory evidence by the OCIJ'.¹⁰ Moreover, the fruits of the OCIJ's investigation—which amounts to several thousand pages of documentation—have been placed on the case file in an apparently random manner. The result is a confusing accumulation of material, the organization of which makes little objective sense.

III. RELEVANT LAW

5. The Defence adopts by reference the submissions contained in its previously filed requests for investigative action.
6. Moreover, pursuant to the ECCC Agreement and Law, Nuon Chea has the right 'to have adequate time and facilities for the preparation of his [...] defence'.¹¹ The European Court of Human Rights, an institution on whose jurisprudence the OCIJ has

⁶ Document No D-164/2, 'Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD', 19 June 2009, para 6, ERN 00343273 (emphasis added).

⁷ SMD Order, para 15, ERN 00343277.

⁸ SMD Order, para 10, ERN 00343274.

⁹ See Document Nos D-164-3-1, Public 'Ieng Sary's Appeal against the Co-Investigating Judges' Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive', 24 July 2009, ERN 00354919–00354925; D-164-3-1, Public 'Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009', 24 July 2009, ERN 00351611–00351624.

¹⁰ Document No D-171, 'Ieng Sary's Third Request for Investigative Action', 21 May 2009, para 7, ERN 00330822.

¹¹ Agreement, Article 13(1); Law, Article 35*new*.

relied in the past, has given an expansive interpretation to the concept of ‘adequate time and facilities’:

The Court recalls that Article 6 § 3 (b) guarantees the accused ‘adequate time and facilities for the preparation of his defence’ and therefore implies that the substantive defence activity on his behalf may comprise everything which is ‘necessary’ to prepare the main trial. The accused must have the opportunity *to organise his defence in an appropriate way* and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings. *Furthermore, the facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings.* The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.¹²

The obvious import of this analysis is that ‘the results of investigations carried out throughout the proceedings’ should be disclosed in a manner which ensures ‘practical and effective’ defence rights rather than merely ‘theoretical or illusory’ ones.¹³

IV. REQUEST

7. As ‘the circumstances of [this] particular case’—in particular, the SMD Order and the Torture Order—make plain, the OCIJ intends to (i) indict Nuon Chea and the other Charged Persons (ii) on the basis of, among other things, evidence obtained by torture. Of this there can be little doubt. Moreover, the OCIJ’s seemingly haphazard approach to the investigation and byzantine filing system have made it unnecessarily difficult for the Defence to organize itself in ‘an appropriate way’. Accordingly, in order to ensure the provision of adequate time and facilities to effectively ‘influence the outcome of the proceedings’, the Defence hereby requests the OCIJ to:
 - a. identify, with precision, any and all torture-tainted evidence it intends to rely upon (including material contained in the SMD)—for the truth of its contents or otherwise—in substantiating the OCP’s allegations against Nuon Chea;

¹² *Galstyan v Armenia*, ECHR App No 26986/03, ‘Judgment’, 15 November 2007, para 84 (citations omitted) (emphasis added).

¹³ *See, e.g., Artico v Italy*, ECHR App No 6694/74, ‘Judgment’, 13 May 1980, para 33 (‘[T]his is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.’)

- b. identify, with precision, any and all torture-tainted evidence (including material contained in the SMD) which was considered for the above-stated purpose but ultimately rejected; and
- c. in each case, clearly articulate the precise methodology employed in determining the torture-tainted evidence's forensic value.

Additionally, the Defence hereby joins and adopts the Ieng Sary Request and urges the OCIJ to grant the relief requested therein as soon as possible.

CO-LAWYERS FOR NUON CHEA



SON Arun



Michiel PESTMAN & Victor KOPPE