

**BEFORE THE PRE-TRIAL CHAMBER OF THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**JOINT DEFENCE APPEAL FROM THE OCIJ ORDER ON THE
REQUEST FOR INVESTIGATIVE ACTION TO SEEK EXCULPATORY EVIDENCE
IN THE SMD OF 19 JUNE 2009**

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TABLE OF CONTENTS:

I	INTRODUCTION AND SUMMARY OF ARGUMENTS	3
II	FACTUAL HISTORY	4
III	PRELIMINARY OBSERVATIONS	5
3.1	Admissibility of the Appeal	5
3.2	Request for an Oral Hearing	5
IV	THE LAW	6
V	ARGUMENTS	8
5.1	Appeal Ground 1	8
	Breach of Rule 55(5); ‘Principle of Sufficiency’ Is Wrong Standard	8
5.2	Appeal Ground 2:	9
	The OCIJ Has the Obligation to Investigate the SMD	9
5.3	Appeal Ground 3:	10
	Trial without Undue Delay May Not Be Invoked to Deny Fair Trial	10
5.4	Appeal Ground 4:	12
	Joint Defence Request Was Sufficiently Specific	12
5.5	Appeal Ground 5:	13
	OCIJ Misapplies Common Law Standard	13
VI	RELIEF REQUESTED	14

I INTRODUCTION AND SUMMARY OF ARGUMENTS

1. On 20 April 2009, pursuant to Internal Rule 55(10), the joint defence for Ieng Thirith, Ieng Sary and Nuon Chea filed an ‘Urgent Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive’ (“**Joint Defence Request**”)¹ with the Office of the Co-Investigating Judges (“**OCIJ**”). On 19 June 2009, the OCIJ issued its ‘Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD’ (“**Order**”).²
2. On 3 July 2009, defence for Ieng Thirith, Nuon Chea and Khieu Samphan filed their respective Notices of Appeal.³ Pursuant to Rules 74(3)(b) and 75 of the Internal Rules the defence teams for the four Charged Persons herewith submit their ‘Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009’ (“**Joint Defence Appeal**”). In this Joint Defence Appeal, the defence will argue:
 - A. The OCIJ breached Rule 55(5) by applying the non-existing ‘principle of sufficiency;
 - B. The OCIJ Has the obligation to investigate the SMD;
 - C. The right to a trial without undue delay should not be invoked as an excuse by which to deny the Charged Persons a fair and impartial trial and thorough investigations;
 - D. The OCIJ erred by stating that the Joint Defence Request was an “imprecise request”; and
 - E. The OCIJ applied the wrong standard in assessing whether the Joint Defence Request was sufficiently specified.

¹ Urgent Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 20 April 2009, Document No. D164.

² Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, Document No. D164/2. This Order was received by the parties on 25 June 2009.

³ Khieu Samphan Déclaration d’Appel, 3 July 2009, Document No. D164/5; Ieng Thirith Notice of Appeal, 3 July 2009, Document No. D164/6; Nuon Chea Notice of Appeal, 3 July 2009, Document No. D164/4.

II FACTUAL HISTORY

3. On 20 July 2007, two days after the filing of the Introductory Submission, the Office of the Co-Prosecutors (“OCP”) made available to the parties a collection of documents via a Shared Materials Drive (“SMD”) created in the ‘ECCC ZyIMAGE Search Portal’.⁴ According to the SMD Protocol,⁵ these documents

[have] not yet been analysed for relevance in the case file [...]. However, some of the material could contain relevant exculpatory/inculpatory evidence and their sources are already open (the “Swedish Collection”, DC-Cam and Bophana etc).

4. Extremely voluminous materials have been placed in the SMD so far. In particular, 17,807 documents have been ‘shared’ by the OCP. According to the OCP, these documents may contain relevant information, including:

- information on the structure and organization of the DK government;
- evidence of information flow between various branches of the DK government;
- interviews with victims and potential witnesses;
- statements by / interviews with suspects identified in the Introductory Submission;
- contemporaneous news coverage of the situation in Cambodia from the early 1970s to the 1990s; and
- official publications produced by the government of Democratic Kampuchea.⁶

5. During a meeting between representatives of the OCIJ, the OCP and the Defence Support Section (“DSS”) on 4 February 2009,⁷ it appeared that the OCP had received these documents in the course of their preliminary investigation, and that they did not have time to analyse them before filing their Introductory Submission.

⁴ It is worth noting that this database had so far been used for the sole purpose of allowing the parties to access the official Case File in an electronic format.

⁵ See <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>.

⁶ Information provided on the “ECCC ZyIMAGE Search Portal” at: <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>.

⁷ The DSS representative drafted a report of this meeting.

6. Because the OCP did not want to be accused of concealing exculpatory elements, and because they considered that those documents could be relevant to the case, they decided to make them available to the judges and the parties through a channel other than the Case File. The OCP made clear that although they are not aware of the presence of any specific exculpatory evidence among these documents, they could not exclude the possibility of such presence. It is precisely for this reason that they 'disclosed' these materials. Given the description of that material in paragraph 4 above, it appears to be directly related to the charges brought against the Charged Persons. In the circumstances, it may properly be inferred that the thousands of documents contained in the SMD include exculpatory material.

III PRELIMINARY OBSERVATIONS

3.1 Admissibility of the Appeal

7. Rule 74(3)(b) of the Internal Rules provides that the Charged Person may appeal against orders of the OCIJ "refusing requests for investigative action allowed under these IRs". The Joint Defence Request falls into this category, and the Charged Persons thus have a right to appeal from it to the Pre-Trial Chamber. The appeal is thus admissible.

3.2 Request for an Oral Hearing

8. The scope of the OCIJ's investigations is an issue that lies at the heart of the proceedings of the ECCC. It is thus of the utmost importance that this issue be fully discussed and resolved at the PTC stage. The defence submits a hearing should be scheduled in order to allow all relevant parties to shed light on this issue.
9. Given the applicable deadlines, the defence submit that the hearing should be scheduled in beginning of September 2009.



IV THE LAW

10. Rule 21 of the Internal Rules provides for the Charged Persons' fair trial rights where it states, insofar relevant:

- (1)(a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;
[...]
(4) Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.

11. Pursuant to Rule 55(10), the parties have the possibility to submit requests for investigative actions:

At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation [...].

12. The Internal Rules clearly outline the respective obligations and rights of the Co-Investigating Judges and the parties in the conduct of the judicial investigation. The duties of the OCIJ are set out in Rule 55(5):

In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory [...].

Contrary to the OCP, who only have to gather sufficient evidence in the course of their preliminary investigation to determine whether crimes within the jurisdiction of the ECCC have been committed,⁸ the OCIJ have the duty to ascertain the truth, and to ensure that all reasonable exculpatory leads have been explored.⁹

⁸ See Rule 50(1).

⁹ See the description of the duties of the investigating judge in the French criminal procedure in Duverger, *Manuel des juges d'instruction*, I, 3^e éd., 1862, p. 425, quoted in Chambon, Guéry, *Droit et pratique de l'instruction préparatoire*, 6^e éd., 2007, p. 119, n° 31.12 : 'Dégagé de toute préoccupation autre que celle de parvenir à la manifestation de la vérité, soucieux de ne pas compromettre ni la vindicte publique ni le sort des prévenus, il relèvera avec une sollicitude égale les armes de l'accusation et les instruments de la défense ; en un mot, faisant ses premiers devoirs de l'impartialité et de l'amour de la justice, il instruira toujours à charge et à décharge.'

13. Rule 58(6) of the Internal Rules furthermore adds:

At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. [...].

14. In a letter to the Co-Lawyers of Mr. Nuon,¹⁰ the Co-Investigating Judges provided the following interpretation of the conduct of the investigation under the Rules:

Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. Of course, the parties have the right, under Rule 55(10) and 58(6), to request the Co-Investigating Judges to undertake investigative action; The capacity of the parties is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action.

15. The Internal Rules do not define an ‘investigative request’, however, in the ‘Decision on Ieng Sary’s Appeal against the OCIJ’s Order on Translation Rights and Obligations of the Parties’¹¹ (“**PTC Translation Decision**”) the Pre-Trial Chamber provided a definition. It referred to Rule 55(8) of the Internal Rules, which provides that the OCIJ, in its judicial investigations “may take any investigative action conducive to ascertaining the truth.”¹² The Pre-Trial Chamber continues to state that “the process of ascertaining the truth necessarily involves the collection of information.”¹³

16. The Pre-Trial Chamber concludes that “requests for investigative actions should be interpreted as being requests for action to be performed by the Co-Investigating Judges [...] with the purpose of collecting information conducive to ascertaining the truth.”¹⁴

¹⁰ Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, Document No. A110/II.

¹¹ Document No. A190/II/9 of 20 February 2009.

¹² PTC Translation Decision, para. 19.

¹³ PTC Translation Decision, para. 20.

¹⁴ PTC Translation Decision, para. 23.



17. Rule 53(2) specifies that

The [Introductory Submission] shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory.

V ARGUMENTS

5.1 Appeal Ground 1

Breach of Rule 55(5); ‘Principle of Sufficiency’ Is Wrong Standard

18. In paragraph 6 of the Order, the OCIJ states that

The logic underpinning a [*sic*] criminal investigation is that the principle of sufficiency of evidence outweighs that of exhaustiveness: an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person.

19. The defence is not aware of the existence of any such ‘principle of sufficiency’ in common or civil law, and the OCIJ indeed fails to mention any source for this principle. The defence submits that this is a non-existent principle, and moreover that application thereof would result in the denial of a fair trial.

20. The OCIJ holds that an investigating judge may close a judicial investigation once he has determined there is sufficient evidence to indict a Charged Person. This does not adequately reflect the OCIJ’s legal obligation to be impartial and thus to also actively search for exculpatory material. Merely finding “sufficient evidence to indict a Charged Person” negates the OCIJ’s impartiality and breaches Rule 55(5) of the Internal Rules, which provides that the OCIJ “shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory”.

21. The OCIJ’s approach that it merely needs to find sufficient evidence to indict a Charged Person is in violation of Rule 55(5), and on this basis the Order should be squashed.



5.2 Appeal Ground 2:

The OCIJ Has the Obligation to Investigate the SMD

22. The defence submits the SMD documents fall under Rule 53(2) of the Rules which specifies that the following material may be sent to the OCIJ alongside the Introductory Submission and the Case File:

[A]ny other material of evidentiary value in the possession of the Co-Prosecutors, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory.

23. As explained above, the OCP received this material shortly before the Introductory Submission was filed, and it did not have the time to analyse them and include them in the charging document. Hence, it sent this information to the OCIJ who, through application of Rule 53(1) and (2), was seized of this other evidentiary material. The SMD Protocol specifies moreover that “some of the material could contain relevant exculpatory / inculpatory evidence”.¹⁵

24. The defence submits that the OCIJ’s exclusive jurisdiction over the judicial investigation prevents it from shifting obligations on to the defence; when the OCP sent these documents to the OCIJ as other evidentiary material, the burden shifted to the OCIJ, and not the defence. As indicated in the Order, when the OCP filed the Introductory Submission, the OCIJ was seized with the investigations, which terminated the OCP authority to investigate the same facts.¹⁶ Through Rule 53(2) the burden shifted from the OCP to the OCIJ.

25. Submitting documents to the OCIJ through the SMD is the only way the OCP can at this stage in the proceedings inform the OCIJ and other parties of documents it has not analysed. It cannot request that they are put on the Case File for they have not been analysed and verified.

¹⁵ See <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>, p. 1.

¹⁶ Order, para. 14.

26. Were it true, as the OCIJ seems to suggest, that the SMD documents can be equated to “all manner of documentary sources throughout the world”,¹⁷ the legitimate question to be raised is why the OCP would have put them on the SMD in the first place. The OCP is no longer allowed to investigate the facts of the Introductory Submission, and the OCP is not under an obligation to analyse those documents, but now the OCIJ is.
27. As such, this material needs to be analysed to verify whether it should form part of the Case File, on which the OCIJ bases its investigations. Particularly now that the OCP has specified that this material may contain exculpatory material, the OCIJ is under an obligation to investigate such evidentiary material with which it was seized.
28. By refusing to investigate the SMD, the OCIJ is in breach of its legal obligation to investigate the facts set out in the Introductory Submission, the Case File and its accompanying documents. For this reason, the Order should be quashed, and the OCIJ should be directed to investigate the material placed on the SMD.

5.3 Appeal Ground 3:

Trial without Undue Delay May Not Be Invoked to Deny Fair Trial

29. In paragraph 10 of the Order, the OCIJ sets out that the Charged Persons have the right to be tried within reasonable time and without undue delay. The defence agrees that this is a fundamental right of the Charged Persons, not only laid down in international human rights instruments, but even in the Internal Rules.¹⁸
30. The OCIJ argues that it must refrain from doing further investigations “beyond a certain length of time in order to avoid the infringing of the fairness of the trial”.¹⁹ The defence submits the right to be tried without undue delay cannot be understood to rank higher than the overall right to a fair and impartial trial.

¹⁷ Order, para. 15.

¹⁸ Rule 21(4) Internal Rules.

¹⁹ Order, para. 10.

31. In the case of *Neumeister v. Germany* the European Court of Human Rights (“ECHR”) ruled that a speedy trial does not absolve the judges from taking every measure possible to clarify the truth or falsehood of the charges. Delay in proceedings should not be leveled against a defendant who requests the investigative authorities to impartially and independently investigate the materials made available by the prosecuting authorities. The ECHR held:

It should moreover be pointed out that a concern for speed cannot dispense those judges who in the system of criminal procedure in force on the continent of Europe are responsible for the investigation or the conduct of the trial from taking every measure likely to throw light on the truth or falsehood of the charges [...].²⁰

32. The OCIJ formulation of the ‘principle of sufficiency’,²¹ i.e. “an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person”,²² combined with the allegation that it cannot continue investigations beyond a certain length of time, infringes the Charged Persons’ right to a fair and impartial trial.

33. The right to be tried without undue delay cannot be used against the Charged Persons by denying their overall right to a fair and impartial trial and a thorough investigation. Rule 21 of the Rules guarantees both rights and Rule 55(5) directs the OCIJ to conduct impartial investigations. The fact that the proceedings against the Charged Persons may already be subject to delay cannot be held against them in any way.

34. The defence submits that the OCIJ is under an obligation to investigate the documents contained in the SMD, and the OCIJ cannot relieve itself of such obligation by relying on the Charged Person’s right to be tried without delay. By doing so, the OCIJ infringes its obligation under Rules 21 and 55(5), as a result of which the Order must be squashed.

²⁰ *Neumeister v. Austria*, ECHR, Judgment, Application no 1936/63, 27 June 1968, p. 38, para. 21.

²¹ See Appeal Ground 1 above.

²² Order, para. 6.

5.4 Appeal Ground 4:

Joint Defence Request Was Sufficiently Specific

35. In paragraphs 9, and 11 through 13 of the Order, the OCIJ holds that the defence insufficiently specified its Joint Defence Request. The OCIJ held that

[I]t must provide sufficiently precise information to show the Judges why they believe such a request is 'reasonable'. Yet they have failed to do so in this case.²³

36. The OCIJ mistakenly applies the specificity criterion to the defence. Instead, the OCIJ should have requested the OCP to specify why it wanted to add those thousands of documents to the SMD on 20 July 2007. The defence presumes the OCP had reasons to add these documents to the SMD. The OCP burdened the OCIJ and all parties by adding more than 17,000 documents to the SMD, and the defence presumes the OCP would not do this lightly.

37. Failure by the OCIJ to request the OCP to specify why it wanted to include those documents in the SMD in July 2007 cannot lead to the OCIJ at this stage requesting the defence to specify the nature of a request relating to those documents.

38. By actively allowing those documents to be included into the SMD, the OCIJ acknowledged their importance, and implicitly allowed those documents to fall under its obligation to investigate. This puts the documents in the SMD in a different category from those many materials and documents which may touch upon matters relevant to the issues to be determined but which are not within the provenance of the ECCC and therefore cannot be considered.

39. The defence therefore submits that the Joint Defence Request was thus sufficiently specific and was to uncover relevant information for ascertaining the truth of the allegations set out in the Introductory Submission. The Order needs to be quashed on this point, and the Joint Appeal allowed.



²³ Order, para. 11.

**5.5 Appeal Ground 5:
OCIJ Misapplies Common Law Standard**

40. A separate appeal ground arises in respect of the specificity argument raised by the OCIJ. In paragraph 12 of the Order the OCIJ states:

[D]ifferences in systems apart, it bears noting that within international criminal tribunals, the Defence has the prima facie obligation to provide supporting material in order to be sufficiently specific as to the nature of its request.²⁴

The defence submits that this is more a common law than a civil law principle, and indeed does the OCIJ only provide common law sources for such statement.²⁵

41. In a dominantly civil system, such as the ECCC, and unlike the common law systems at the ICTY and ICTR, the investigations are conducted by the investigating judges; the defence is excluded from such process. The OCP by putting the documents on the SMD has indicated that, whilst not in a position to analyse the documents itself, it considered them of sufficient importance to make them available to the OCIJ and the other parties.

42. For this reason, the OCIJ applied the wrong standard to its analysis of the Joint Defence Request, as a result of which it made an error of law by finding that the Joint Defence Request was insufficiently specific. Consequently, the Order should be squashed, and the OCIJ ordered to investigate the SMD materials.

²⁴ Order, para. 12.

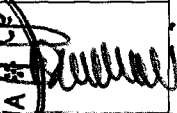

²⁵ Namely, decisions from the common law dominated systems at the ICTY and ICTR.



VI RELIEF REQUESTED

43. On the basis of the aforementioned reasons, the defence respectfully requests the Pre-Trial Chamber to:

- Squash the Order by the OCIJ;
- Order the OCIJ to review all the documents placed in the SMD;
- Order the OCIJ to produce a sufficiently detailed report of their analysis to enable the defence to ensure that all necessary investigative actions have been undertaken to identify potential exculpatory evidence; and
- Order the OCIJ to provide a list of exculpatory material contained in the SMD.

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