

D164/4/4

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

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and Nuon Chea

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**JOINT DEFENCE REPLY TO PROSECUTION RESPONSE TO 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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**Civil Party Lawyers and
Unrepresented Civil Parties**

I INTRODUCTION AND PETITION

1. On 25 June 2009, the Office of the Co-Investigating Judges issued its ‘Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD’ (“**Order**”),¹ against which the defence for Ieng Thirith, Nuon Chea and Khieu Samphan filed a joint appeal.²
2. On 20 August 2009, the Pre-Trial Chamber issued its ‘Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25’³ (**PTC Order**), ordering the defence to file a reply pursuant to Article 8.4 of the Practice Direction on the Filing of Documents. The defence herewith files its reply in accordance with the PTC Order and said provision.
3. Given the very limited time allocated to formulating a reply—five days which include a weekend—the defence is unable to go into all the details of the Prosecution Response,⁴ but will respond solely to (i) the issue of what the Office of the Co-Investigating Judges (**OCIJ**) refer to as the ‘principle of sufficiency’ and (ii) the specificity requirement mentioned by the Prosecution Response.

II ARGUMENT

2.1 ‘Principle of Sufficiency’

4. In the paragraphs preceding paragraph 30 of the Prosecution Response, the Prosecutors set out that the OCIJ misunderstand the law by applying a ‘principle

¹ 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.

² Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, 25 June 2009, Document No. D164/4/1 (**Appeal**).

³ Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, 20 August 2009, D164/4/3.

⁴ Co-Prosecutors’ Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary against the Co-Investigating Judges’ Order Denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 10 August 2009, Document No. D164/4/2 (**Prosecution Response**).

of sufficiency'. In paragraph 30, the Prosecutors then state that however, the OCIJ's 'reasoning on the principle of sufficiency should not be read out of context'.

5. The defence objects to this apologetic interpretation by the Prosecutors. The formulation of this 'principle of sufficiency' by the OCIJ goes to the core of its *raison d'être*. The OCIJ is established to conduct investigations into the facts set out in the introductory Submission in an independent and objective manner. Misinterpretation of this task cannot simply be dismissed with an assumption that the OCIJ did not mean to actually formulate the 'principle of sufficiency', and that that concept should be read in context.
6. The fact that the OCIJ even refers to it as a 'principle', suggests the importance it attaches to this concept. A principle is described as 'a comprehensive and fundamental law, doctrine or assumption'.⁵
7. The formulation of this 'principle of sufficiency' thus shows that there is a fundamental misunderstanding on the side of the Co-Investigating Judges of its own role in this Tribunal that needs to be remedied and clarified by the Pre-Trial Chamber in this instance.

2.2 Specificity Requirement

8. The second issue the defence raises in this Reply is what the OCP refers to as the requirement of specificity.⁶ Such requirement is not embedded in Cambodian or French law; the only condition imposed on a request for investigative action is that it is 'conducive to ascertaining the truth'.⁷ Contrary to what the OCP states,⁸ the defence submits that its investigative powers are virtually non-existent before

⁵ Merriam Webster Dictionary, see URL address: <http://www.merriam-webster.com/dictionary/principle>.

⁶ Prosecution Response, paras. 43-50.

⁷ Rule 55(5).

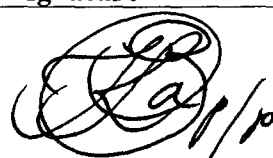
⁸ Prosecution Response, paras. 51-55 (Alleged Application of Common Law Standard).

the ECCC, which is a fundamental difference from the position of the defence before the other international tribunals. This difference should be counterbalanced by the fact that the defence can ask the investigative authorities to do such investigations on its behalf. The jurisprudence referred to by the OCP in support of this specificity requirement is moreover irrelevant, as it relates to requests for disclosure. The underlying Defence Request aims at discovering the truth and as such is conducive to ascertaining the truth. By not allowing the Defence Request, the OCIJ discharged itself of its obligation to investigate potentially exculpatory material in the Case File. Hence, the Order must be quashed.

III CONCLUSION

9. For the reasons set out above and in the Appeal, the defence respectfully requests the Pre-Trial Chamber to quash the OCIJ Order and to order the Office of the Co-Investigating Judges to:

- review all the documents placed in the SMD;
- 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
- to provide a list of exculpatory material contained in the SMD.

Party	Date	Name Lawyers	Place	Signature
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