

002/19: 0164

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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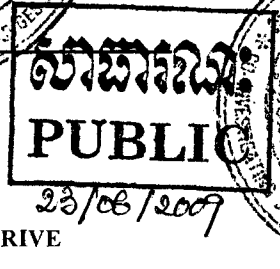
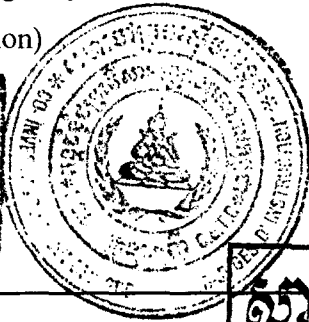
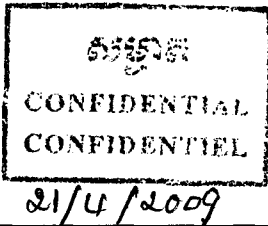
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URGENT

JOINT DEFENCE REQUEST FOR INVESTIGATIVE ACTION

TO SEEK EXCULPATORY EVIDENCE IN THE SHARED MATERIALS DRIVE

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I INTRODUCTION

1. Pursuant to Internal Rule 55(10), the defence for Ieng Thirith, Ieng Sary and Nuon Chea submit this application to the Co-Investigating Judges (“OCIJ”) requesting the following investigative action to be undertaken. It may be reasonably concluded from the nature of the documents made available by the Office of the Co-Prosecutors (“OCP”) through the “Shared Materials Drive” (“SMD”) that they include exculpatory evidence. It is for this reason that the material has been disclosed by way of the SMD. The defence therefore requests the Co-Investigating Judges, in accordance with their duties, to analyse the said documents in order to identify potential exculpatory evidence.

II RELEVANT FACTS

2. In 2007, the OCIJ and the OCP made available to the parties a collection of documents via a SMD created in the ‘ECCC ZyIMAGE Search Portal’.¹ According to the SMD Protocol,² those 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).

3. 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;

¹ 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.

² See <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>

- 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.³
4. During a meeting between representatives of the OCIJ, the OCP and the Defence Support Section (“DSS”) on 4 February 2009,⁴ it appeared that the OCP had received those documents in the course of their preliminary investigation, and that they did not have time to analyse them before filing their Introductory Submission. 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 those 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 those documents, they could not exclude the possibility of such presence. It is precisely for this reason that they ‘disclosed’ those materials.

III RELEVANT LAW

3.1 The Conduct of the Investigation

5. The ECCC Internal Rules (the ‘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 [...].



³ Information provided on the “ECCC ZyIMAGE Search Portal” at: <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>.

⁴ The DSS representative drafted a report of this meeting.

Contrary to the Co-Prosecutors, who only have to gather enough evidence in the course of their preliminary investigation to determine whether crimes within the jurisdiction of the ECCC have been committed,⁵ the OCIJ have the duty to ascertain the truth, and to ensure that all reasonable exculpatory leads have been explored.⁶

6. 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....

7. 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. [...].

8. In a letter to the Co-Lawyers of Mr. NUON,⁷ 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 authorises 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.

⁵ See Rule 50(1).

⁶ 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^o 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.'

⁷ Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, Document No. A110/II.

9. 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’⁸ (“**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.”⁹ The Pre-Trial Chamber continues to state that “the process of ascertaining the truth necessarily involves the collection of information.”¹⁰
10. 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.”¹¹

3.2 The Case File

11. A fundamental feature of the investigation in the procedural system prevailing in the ECCC is that the pre-trial investigation is written. Accordingly, Rule 55(6) states:

The Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. [...]

In addition to the written record of the investigation, all filings by the parties, including all evidentiary materials submitted, are placed in the Case File. Being accessible to the parties, the Case File is the only channel of disclosure.

12. As to the preliminary investigation stage, although the Rules do not contain any equivalent provision to the above mentioned Rule, Rule 53(2) concerning Introductory Submissions provides the following guidance:



⁸ Document No. A190/II/9 of 20 February 2009.

⁹ PTC Translation Decision, para. 19.

¹⁰ PTC Translation Decision, para. 20.

¹¹ PTC Translation Decision, para. 23.

The 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.

It is thus clear that the Co-Prosecutors also have to maintain a written record of their preliminary investigation in a Case File. The Introductory Submission, together with this written record and evidentiary materials, are then placed in the Case File kept by the OCIJ.

13. At the judicial investigation stage, the Co-Prosecutors have the obligation to disclose actual exculpatory evidence in their possession, as set out in Rule 53(4):

The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.

As stated above, such disclosure has to be placed in the Case File. There is no other provision in the Rules concerning disclosure of evidence or other materials by the Co-Prosecutors, including outside the Case File.

IV ARGUMENTS

4.1 The SMD Wrongly Shifts the Burden of the Investigation on the Defence

14. The SMD was created outside the scope of the applicable law. Indeed, the Rules do not provide for any disclosure channel other than the Case File. The SMD does not fall under Rule 53(4) as this only applies to exculpatory evidence of which the Co-Prosecutors have actual knowledge. In any case, such disclosure would have to be placed in the Case File. In other words, both the OCP and the OCIJ have not acted pursuant to any legal provision or procedure, and the SMD cannot in any way be considered as the adequate or proper fulfillment of its legal duty of disclosure.

15. The SMD was made available to the parties in the case, using the same electronic support as the Case File, by the OCP which is motivated by a concern to ensure that it does not conceal documents in its possession from other parties. The defence cannot

ignore the existence of the SMD, which may have been created 'so as not to unduly burden the case file',¹² but in the event imposes a considerable and unfair burden upon the defence which cannot be met. The defence must ensure that the case of the Charged Person is not compromised by a failure to use exculpatory material which is available.

16. The defence is already overwhelmed by the massive disclosure of non-translated evidentiary materials accompanying the Introductory Submission, with no certainty as to which of those documents will be relied on by the Prosecution at trial. It is now invited to go through an even more voluminous collection of documents to ensure that no exculpatory evidence has been missed by the OCP or the OCIJ. The creation of the SMD has had the effect of wrongly shifting the burden of the investigation for exculpatory evidence onto the defence and away from the parties who are legally obliged to carry out the investigation.

4.2 The Co-Investigating Judges Have the Duty to Review the SMD

17. The OCP asserts that the documents 'shared' may be relevant to the case, and might include materials of evidentiary value. The detailed indications given as to the kind of documents of which the collections might be comprised suggest that those documents could indeed be relevant. Moreover, the OCP's insistence on the potential exculpatory nature of some of those documents cannot be ignored and should be investigated in order to ascertain the truth.

18. As indicated by the Pre-Trial Chamber, "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."¹³



¹² See the SMD Protocol.

¹³ PTC Translation Decision, para. 23.

19. Based on this information, the defence respectfully submits that it is the duty of the Co-Investigating Judges to look into the SMD in search of exculpatory evidence. The judicial investigation does not simply consist in gathering enough evidence to send the Charged Person to trial. In its aim to ascertain the truth, the Co-Investigating Judges have the explicit duty to look for exculpatory evidence. This is the only way to remedy the patent inequality of arms governing the ECCC procedural system at the investigation stage, as well as the unfairness of the situation created by the SMD.

4.3 The Documents in the SMD Cannot Be Considered as 'Available' to the Defence

20. Further, the defence submits that given the overwhelming volume of the SMD, and the lack of resources available to defence teams, it is not possible to consider that the documents placed in the SMD are currently 'available' to the defence in any meaningful way.¹⁴ In other words, the defence submits that it must be in a position to avail itself of any such exculpatory materials as may be contained in the SMD, and which have not been placed in the Case File, at trial or at the appeals stage. To ensure the fairness of the trial process the Defence should be assisted in obtaining and utilising exculpatory material. By use of the SMD the OCP and the OCIJ have sought to evade their statutory responsibilities to search for exculpatory material which might assist the Charged Persons. Such responsibility cannot be in any way diluted or extinguished. It is no answer to make the SMD available to the defence in circumstances where it is physically impossible in terms of the available resources for the defence to undertake a review of the material contained therein.



¹⁴ The Defence refers to Rule 87(4) which provides that requests for admission of new evidence must satisfy the Trial Chamber that it was 'not available before the opening of the trial', and to Rule 108(7) which states that the parties may submit a request to the Appeals Chamber for additional evidence provided it was 'unavailable at trial'.

V URGENCY OF THE REQUEST

21. The defence qualifies the underlying request as 'urgent' for the following reason.
22. Were the OCIJ to reject the request, it would cost the defence time and resources to analyse these thousands of extra documents. It would require reallocation of time and resources to be able to do so, as well as additional resources, more than currently available to the defence. Were the OCIJ to decide on this matter only at the end of the investigative stage, which it is allowed to do so by law, the defence would either be forced to go through all the SMD documents or to risk going to trial without having them analysed and thus risk missing exculpatory material. Given the potential importance of said documents to each of the defence teams, this should be given priority.
23. It is for this reason that the defence files this request on an urgent basis. Given the absence of any time limits for the proceedings before the Co-Investigating Judges, the defence proposes that the OCIJ issue filing directions to the parties, including deadlines for the OCP and Civil Parties to respond and that the OCIJ decides on this matter at its earliest convenience.
24. Given that the request is straightforward, does not refer to any complicated legal issue, the defence respectfully submits that this request could be decided within a relatively short period of time. The defence respectfully submits the Office of the Co-Investigating Judges decide upon this request at their earliest convenience and in any case within a period of thirty days after the filing of the OCP Response. Failure to do so will urge the defence to interpret the non-decision by the OCIJ as a constructive dismissal of the request.



VI REQUEST

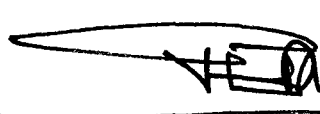

25. For the reasons stated above, the defence respectfully requests the Co-Investigating Judges to:

- (i) Review all the documents placed in the Shared Materials Drive by the OCP or the OCIJ;
- (ii) 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;
- (iii) Provide a list of exculpatory material contained in the SMD;
- (iv) To issue to the parties filing instructions so that this request may be dealt with within a reasonable period of time, so as to allow the defence to properly organise the preparation of its case and to avoid undue delay in the proceedings.

26. Further, the defence reserves the right to rely on any exculpatory material contained in the SMD, and which has not been placed in the Case File, at trial or at the appeals stage.

Signed in Phnom Penh this 20th day of April 2009,

Co-lawyers for Ieng Thinh



 PHAT Pouv Seang
 Diana ELLIS, QC

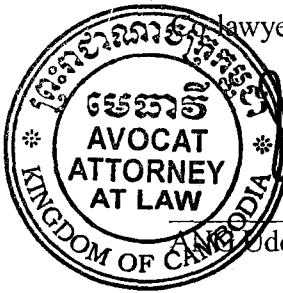


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