

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

**FILING DETAILS**

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**INTERNATIONAL CO-PROSECUTOR'S DISCLOSURE TO TRIAL CHAMBER  
REGARDING INTERVIEWS OF CASE 002 WITNESSES IN CASES 003 AND 004 WITH  
STRICTLY CONFIDENTIAL ANNEX A**

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## I. INTRODUCTION

1. By this filing, the International Co-Prosecutor seeks direction from the Trial Chamber regarding interviews that have been conducted of Case 002 witnesses in the judicial investigations in Cases 003 and 004. These witnesses have either been selected for oral testimony by the Trial Chamber, or proposed by the Co-Prosecutors to testify or have their statements admitted as evidence at trial. Under the ECCC Rules and procedural rules established at the international level for similar cases, such statements are required to be disclosed on the basis that they (1) may contain exculpatory material or material that may effect the credibility of a witness' testimony and (2) are prior statements of a witness at trial.
2. **Annex A** lists the 29 witnesses in Case 002 who have provided written statements in Cases 003 and 004. In order to ensure that the Co-Investigating Judges are aware of this issue, the International Co-Prosecutor has included them in the distribution list on the cover page of this filing.

## II. PROCEDURAL BACKGROUND

3. The Co-Prosecutors filed their initial list of proposed trial witnesses in Case 002 on 28 January 2011.<sup>1</sup> The annexes submitted with that filing identified the previous statements of the proposed trial witnesses of which the Co-Prosecutors were aware at that time. On 19 April 2011 the Co-Prosecutors filed their Rule 80 (3) trial document list.<sup>2</sup> Annex 12 of this list contained 1415 statements of witnesses that they intend to put before the Chamber at trial. On 27 June 2011, the Trial Chamber released to the parties a Tentative List of Witnesses for the First Phase of the Trial, which identified 56 witnesses, experts and civil parties.
4. Subsequent to the filing of the OCP Trial Witness List, the Co-Investigating Judges have conducted interviews and placed onto the Case File in Cases 003 and 004 written statements from thirteen witnesses that are on the OCP Trial Witness List in Case 002. Most of these interviews have occurred in the past five months. Specifically, of the 36 written statements that were taken by OCIJ field investigators in Cases 003 and 004 between June and December 2010, only 1 of the 36 interviews involved a witness proposed on the Co-Prosecutors' Case 002 trial witness list.

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<sup>1</sup> Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes, 28 January 2011, E9/4 ("OCP Trial Witness List").

<sup>2</sup> Co-Prosecutors' Rule 80 (3) Trial Document List, 19 April 2011, E9/31 ("OCP Trial Document List").



5. However, in the interviews that have been conducted by the International Co-Investigating Judge since late March 2011, 12 of the 34 witnesses interviewed by Judge Blunk are proposed OCP trial witnesses, four of whom are part of the 56 witnesses tentatively selected by the Trial Chamber for the initial trial phase. The others are trial witnesses that have been proposed by the Co-Prosecutors in relation to the Case 002 crime base. In addition, sixteen further witnesses have been interviewed in Cases 3 or 4 who were proposed by the Co-Prosecutors solely to have their written statements admitted as evidence at trial.

### III. LAW

#### *i. Disclosure of exculpatory material*

6. Disclosure of exculpatory material is required generally by Internal Rules 21(1) and specifically by Rule 53(4). Rule 21 (1)(a) provides that ECCC proceedings shall be ‘fair and adversarial and preserve a balance between the rights of the parties’. Rule 53(4) further requires the Co-Prosecutors to 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 Charged Person or affect the credibility of prosecution evidence. This is in addition to, and persists beyond the initial disclosure of exculpatory material with the Introductory Submission, under Rule 53(2). The International Co-Prosecutor submits that pursuant to the right of the accused to a fair trial, this obligation continues throughout all phases of the ECCC proceedings.
7. Such an approach accords with the jurisprudence of the international criminal tribunals. For example, Rule 77 of the ICC Rules of Procedure and Evidence (RoPE) entitles the defence to inspect any exculpatory material in the Prosecutor’s possession. Similarly, Rule 68(i) of the ICTY RoPE requires the Prosecutor to make available to the defence ‘any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence’. Rule 68(A) of the ICTR RoPE similarly creates this obligation on the Prosecutor.
8. This obligation relates to statements made in other proceedings and continues throughout the whole judicial process. For example, at ICTY, after testifying in the *Blaskić* case, several witnesses also gave evidence in a connected case. The appellant applied for disclosure of their testimony on several grounds, including Rule 68(i). The ICTY Appeals Chamber held that this rule imposes an obligation which continues through the trial and appellate stages, and which encompasses

exculpatory statements made in other proceedings. It was further stated that this obligation also arose from the right of the accused to a fair trial, and the Prosecutor's status as an "organ" of the Tribunal and of international criminal justice'.<sup>3</sup>

*ii. Disclosure of prior witness statements*

9. The issue of disclosure of prior statements of witnesses in proceedings is not explicitly dealt with under the Internal Rules nor Cambodian Criminal Procedure. Consequently, pursuant to Article 33 new, in such instances, where the "existing procedure does not deal with a particular matter" guidance may be sought in procedural rules established at the international level. The ICTY and ICTR Rules 66(A)(ii) oblige the Prosecutor to make available to the defence copies of the statements of all witnesses whom the Prosecutor intends to call at trial, or which are to be admitted in lieu of oral testimony. In *Blaskić* the Appeals Chamber held that the Prosecutor was not obliged to disclose the prior statements of witnesses as the Prosecutor could not 'intend' to call witnesses who had already testified at the appellant's trial. However, they held that, had the witnesses been yet to testify in the case, the Prosecutor would have had to disclose statements made in other proceedings.<sup>4</sup>
10. The obligation to disclose the prior statements of witnesses includes statements of witnesses that were taken by entities other than the prosecution. In the ICTY case of *Milutinović*, the Prosecutor was ordered to disclose statements and interviews of refugees collected by several intergovernmental and nongovernmental organizations.<sup>5</sup> The Trial Chamber held that a witness statement included any 'account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation', irrespective of whether it is obtained by the Prosecutor directly or via other sources.<sup>6</sup> The breadth of this obligation was again said to arise from the Prosecutor's status as an 'organ of international criminal justice', and the right of the accused to a fair trial.<sup>7</sup>

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<sup>3</sup> *Prosecutor v Tihomir Blaškić*, IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (ICTY Appeals Chamber), 26 September 2000, paras. 31-33.

<sup>4</sup> *Ibid.*, paras. 15-16.

<sup>5</sup> *Prosecutor v Milan Milutinović et al.*, IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii) (ICTY Trial Chamber), 29 September 2006, paras. 1, 7.

<sup>6</sup> *Ibid.*, paras. 14, 19.

<sup>7</sup> *Ibid.*, paras. 13, 16.



#### IV. ARGUMENT

11. At this stage, the Co-Prosecutors cannot disclose to other parties in Case 002 the identity of these 26 witnesses or provide copies of their witness statements, because of their confidentiality obligation in the ongoing judicial investigation in Cases 003 and 004. Nonetheless, the International Co-Prosecutor believes they are obligated to notify the Trial Chamber on a ***strictly confidential*** basis the names of such witnesses in **Annex A** and other Case 002 parties more generally of the existence of these written statements. This is so that the Trial Chamber may determine whether such statements should be disclosed in this case.
12. The International Co-Prosecutor submits that disclosure of these written statements is necessary for two reasons. First, to the extent that any of the statements contain exculpatory information in relation to Case 002, disclosure would be required pursuant to the principles underlying Internal Rules 21(1) and 53(4) as those statements may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.”<sup>8</sup> Accordingly, to the extent that any of the Case 003 or 004 statements include exculpatory facts or contain possible inconsistencies with the prior statements of those witnesses, their disclosure is required in Case 002.
13. Second, by virtue of international procedure in similar cases, disclosure of prior statements of witnesses is mandatory. Such practice is a recognition of the fact that it is in the interests of justice that the parties and the Trial Chamber are in possession of statements that contain information relevant to the subject matter of the trial, whether inculpatory or exculpatory. In particular, with respect to those individuals who will appear as trial witnesses in this case, the questioning of such witnesses by the Trial Chamber and parties would be more efficient and more likely to result in the ascertainment of the truth if all known prior statements of such witnesses that are relevant to this case are made available. Similarly, where statements of witnesses who are not called are tendered as evidence other prior statements of those witnesses will assist the Trial Chamber in attaching the relevant weight to that evidence.
14. Moreover, in the International Co-Prosecutor’s review of these new statements of Case 002 witnesses, he has noted a number of inconsistencies or omissions when comparing the written

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<sup>8</sup> Internal Rules 21(1) and 53(4). While the latter rule only applies by its terms to the judicial investigation phase, the Co-Prosecutors have proceeded on the assumption that a similar obligation exists throughout all phases of proceedings before the ECCC.

statements in Cases 003 and 004 to the audio recordings of those interviews, therefore any disclosures directed by the Trial Chamber should also include the audio recordings of these interviews. Because the interviews conducted by the International CIJ are relatively short (most lasting only between 10 and 30 minutes), the review of these new statements and recordings will not be overly time-consuming for the Chamber or parties.

15. In making this request, the International Co-Prosecutor is mindful of the need to preserve the confidentiality of the ongoing judicial investigations in Cases 003 and 004, pursuant to Internal Rules 56(1) and 60(2). Should the Trial Chamber determine that the disclosure of these witness statements is appropriate, confidentiality could be maintained by designating such documents strictly confidential and limiting their disclosure to necessary parties. The Trial Chamber may also order the parties in Case 002 not to disclose the fact that the trial witnesses in question are also witnesses who have provided statements in the Case 003 and 004 investigations.

#### V. CONCLUSION

16. The International Co-Prosecutor thus respectfully seeks direction from the Trial Chamber regarding the disclosure of statements obtained in Cases 003 and 004 of those witnesses in Case 002 who are identified in the strictly confidential **Annex A**.

Respectfully submitted,

Date	Name	Place	Signature
6 October 2011	Andrew CAYLEY International Co-Prosecutor	Phnom Penh 	