

002/19-09-2007-ECCC-OCIJ (CP24)

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

**Filing**

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**DEFENCE REPLY TO THE CO-PROSECUTORS' RESPONSE TO  
MR KHIEU SAMPHAN'S APPEAL AGAINST THE ORDER ON THE REQUEST FOR  
INVESTIGATIVE ACTION TO SEEK EXCULPATORY EVIDENCE IN THE SMD**

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**Before:**

**The Pre-Trial Chamber**

Judge PRAK Kimsan  
Judge NEY Thol  
Judge HUOT Vuthy  
Judge Katinka LAHUIS  
Judge Rowan DOWNING

**The Co-Prosecutors**

CHEA Leang  
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**Lawyers for the Civil Parties and  
Unrepresented Civil Parties**

**MAY IT PLEASE THE PRE-TRIAL CHAMBER****I- Procedural Background**

1. By order dated 19 June 2009,<sup>1</sup> the Co-Investigating Judges rejected the “Urgent Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive”.<sup>2</sup> On 3 July 2009, the Defence appealed the Order, filing its Appeal Brief on 24 July 2009.<sup>3</sup> The Co-Prosecutors filed their response on 10 August 2009.<sup>4</sup>

2. The Defence hereby replies to the Co-Prosecutors as directed by the Pre-Trial Chamber.<sup>5</sup> The Defence refers to the factual and legal elements set out in the Defence Request<sup>6</sup> and in its Appeal Brief<sup>7</sup> and replies on the following points:

- 1) The specificity requirement attaching to requests for investigative action has no basis. In particular, the international criminal case law cited in support of this requirement is irrelevant.
- 2) The Co-Investigating Judges’ application of the “principle of sufficiency”, which the Co-Prosecutors themselves acknowledge is erroneous is a violation of the duty to seek exculpatory evidence.

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<sup>1</sup> Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2.

<sup>2</sup> Urgent Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 20 April 2009, D164-1 (*Defence Request*).

<sup>3</sup> 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, D164/4/1 (*Appeal Brief*).

<sup>4</sup> 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, D164/4/2 (*Co-Prosecutors' Response*).

<sup>5</sup> Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC 24 and PTC 25, 20 October 2009, D164/4/9.

<sup>6</sup> *Defence Request, op. cit.*, paras. 2 to 13.

<sup>7</sup> *Appeal Brief, op. cit.*, paras. 3 to 6, and 10 to 17.

## II- Argument in reply

### 1) The specificity requirement attaching to requests for investigative action has no basis

3. The Co-Prosecutors have great difficulty finding a legal basis for the principle articulated by the Co-Investigating Judges, according to which requests for investigative action must be sufficiently precise. And for good reason, this requirement does not exist in Cambodian law; neither does it exist in French law. The only requirement to be satisfied by a request for investigative action is that it must be “conducive to ascertaining the truth”.

4. Like the Co-Investigating Judges, the Co-Prosecutors felt they could find support for this requirement in the case law of international criminal tribunals.<sup>8</sup> However, in the case law cited, the purpose of the defence motions was to obtain disclosure of exculpatory evidence that had not been disclosed by the prosecution. In other words, the aim was to denounce the prosecution’s violation of its legal obligations. Such a charge obviously needed to be substantiated. That is not the purpose of the Defence Request: it accuses no one.

5. The Defence points out that its request is not equivalent to a motion for disclosure, which is peculiar to the procedural system of the international criminal tribunals, where the defence does not have access to the prosecution’s investigation file. The procedural context is therefore very different from that of a request for investigative action.

6. Contrary to what the Co-Prosecutors assert,<sup>9</sup> the Defence maintains that it has practically

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<sup>8</sup> Co-Prosecutors’ Response, *op. cit.*, para. 47.

<sup>9</sup> Co-Prosecutors’ Response, *op. cit.*, paras. 51 to 55.

no investigative power within the ECCC procedural system, which is a fundamental point of distinction from the procedure applicable before the international criminal tribunals. The upshot of this powerlessness is the access granted to the judicial investigation file and the ability to request investigative action, which is precisely what the Defence Request seeks.

7. Here, however, the Defence Request is conducive to ascertaining the truth in that its aim is to ensure that the investigating judges discharge their obligation to seek exculpatory evidence, and to repair the injustice resulting from the arbitrary exclusion from the judicial investigation of documents that are in fact described as relevant and potentially exculpatory.

**2) The “principle of sufficiency” has no basis and is a violation of the Co-Investigating Judges’ duty to seek exculpatory evidence**

8. As the Co-Prosecutors themselves acknowledge, the “principle of sufficiency” to which reference is made by the Co-Investigating Judges in the impugned Order is baseless.<sup>10</sup> The effect of this patently flawed principle is to nullify the investigating judge’s duty to seek exculpatory evidence. The purpose of this fundamental mission is not only to not arbitrarily exclude exculpatory evidence discovered by chance, but also to actively seek it out. As M. FAUSTIN-HÉLIE explains “[TRANSLATION] *that is the most sensitive aspect of the mission of the investigating judge; he or she must find in himself or herself (...) the abnegation required to verify allegations however implausible, but that might nevertheless be true. (...) he or she has but one task: to conscientiously and impartially ascertain the truth; to thoroughly verify all facts, regardless of the party alleging them*”.<sup>11</sup> Recalling the principle of diligence that attaches to the search for the

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<sup>10</sup> Co-Prosecutors’ Response, *op. cit.*, paras. 26 to 28.

<sup>11</sup> M. FAUSTIN-HÉLIE, *Traité de l’instruction criminelle*, Vol. II, Brussels: Bruylant-Christophe et Compagnie, 1865, p. 255, para. 2144.

truth which governs judicial investigations, he goes on to add: “[TRANSLATION] *while doubts may persist as a result of the early bungling steps in a judicial investigation, either because of the true nature of the acts, or because of the alleged culpability of the charged person, the judicial investigation can only be closed when all means of dissipating such doubts have been exhausted*”.<sup>12</sup> “[TRANSLATION] *Conducting an investigation impartially, whether the evidence is inculpatory or exculpatory, [in effect,] entails going deep into the circumstances of the offence, investigating in every nook and cranny of the matters to be discussed during the proceedings; it entails investigating any and all obscure aspects of the case, all the probabilities it raises; it means overcoming one’s resentment for the long hours of research, and the tiredness arising from unproductive investigations (...)*”.<sup>13</sup>

9. The Defence is not opposed to comparing what is comparable, nor to referring to international criminal case law when it is relevant. In particular, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) has articulated the duties imposed on investigative authorities which may be transposed to the Co-Investigating Judges. Noting that “*one of the purposes of the Prosecution’s investigative function is “to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused”*”, it concluded that “*the Prosecution must actively review the material in its possession*”.<sup>14</sup> That’s exactly what the Defence is asking the Co-Investigating Judges to do, not on account of a duty to

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<sup>12</sup> *Ibid*, p. 256, para. 2146.

<sup>13</sup> *Ibid*, p. 257, para. 2147.

<sup>14</sup> ICTR, *The Prosecutor v. Karemera et al., Decision on the Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations*, 30 June 2006, paras. 9 and 10 (footnote omitted). At footnotes 31 and 33, the Appeals Chamber castigates the attitude of the Prosecutor who claimed that exhaustiveness was impossible and that it resulted in delays. Clearly, the Co-Investigating Judges’ argument opposing exhaustiveness to the right to be tried within a reasonable time, in addition to being unacceptable as a matter of principle, is untenable.

disclose exculpatory material, but, a fortiori, on the basis of their duty to seek exculpatory evidence.

10. In a procedural system in which the defence has no investigative powers, the only means of overcoming such a disadvantage, notably in comparison with adversarial procedural systems, is that the Co-Investigating Judges must put themselves in the shoes of a lawyer for the defence, and methodically seek out exculpatory evidence. That in fact is the purpose of the Defence Request. If the Chamber were to side with the Co-Investigating Judges, one could rightly conclude that the procedural system before the ECCC disfavours the rights of the Defence by comparison with the procedural system of the other international criminal tribunals in that it violates the fundamental principle of equality of arms. As M. FAUSTIN-HÉLIE has asked: “[TRANSLATION] *Does this mean that the charged person himself or herself has to seek evidence to exonerate himself or herself, that he or she should conduct a judicial investigation, on his or her own, in order to discover those of the facts neglected by the investigating judge? Does he or she have the means?*” He concluded that unless it can be considered that the investigating judge has to be diligent in seeking exculpatory evidence, the criminal investigation, “[TRANSLATION] *by disarming the right of the Defence, would be dealing the most deplorable blow to the criminal law principle that the parties must be on a level playing field in order to more reliably attain a complete ascertainment of the truth*”.<sup>15</sup>

11. In this regard, the Defence recalls that another purpose of its request is to avoid being blamed for not having explored all the documentary materials available in the shared materials drive, which would mean shifting the obligation to seek exculpatory evidence onto the Defence.

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<sup>15</sup> M. FAUSTIN-HÉLIE, *Traité de l’instruction criminelle*, *op. cit.*, p. 257, para. 2148.

In fact, the Defence considers that the shared materials drive is certainly not a mechanism for making the documents therein available to the Defence. From a procedural standpoint, while the shared materials drive may not be akin to the collections of evidence already analysed by the prosecutors of international tribunals, the similarity of their format and structure is such that one cannot but benefit from the international criminal case law rendered in this regard on one point: one cannot consider “*that the EDS [the ICTR Prosecutor’s Electronic Disclosure Suite] makes documents reasonably accessible as a general matter, nor that the Defence can be assumed to know about all materials included in it.*”<sup>16</sup>

**FOR THESE REASONS,**

12. The Co-Lawyers for the Defence invite the Pre-Trial Chamber to:

- QUASH the Co-Investigating Judges’ Order for lack of legal basis and breach of the duty to seek exculpatory evidence;
- ORDER the Co-Investigating Judges to review all the documents placed in the shared materials drive;
- ORDER the Co-Investigating Judges 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 all exculpatory evidence;

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<sup>16</sup> ICTR, *The Prosecutor v. Karemera et al., Decision on the Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, op. cit.*, para. 15.

- ORDER the Co-Investigating Judges to provide a list of exculpatory material contained in the SMD.

**WITHOUT PREJUDICE,  
AND JUSTICE WILL BE DONE**

	SA Sovan	Phnom Penh	
	Jacques VERGÈS	Paris	
Date	Name	Place	Signature