**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/TC

**Party Filing:** The Defence for IENG Sary

**Filed to:** The Trial Chamber

**Original language**: ENGLISH

**Date of document:** 20 June 2011



**CLASSIFICATION**

**Classification of the document suggested by the filing party:** **PUBLIC**

**Classification by OCIJ or Chamber:** សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

---

# IENG SARY'S REQUEST FOR LEAVE TO REPLY
# &
# REPLY TO THE CO-PROSECUTORS' RESPONSE TO "IENG SARY'S MOTION TO ADD THE OCIJ'S CASEMAP TO THE CASE FILE"

---

Filed by:

**The Co-Lawyers:**
ANG Udom
Michael G. KARNAVAS

Distribution to:

**The Trial Chamber Judges:**
Judge NIL Nonn
Judge THOU Mony
Judge YA Sokhan
Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge YOU Ottara
Reserve Judge Claudia FENZ

**Co-Prosecutors:**
CHEA Leang
Andrew CAYLEY

**All Defence Teams**

**All Civil Parties**

## REQUEST FOR LEAVE TO REPLY

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), respectfully requests leave to reply to the Co-Prosecutors' Response to "IENG Sary's Motion to Add the OCIJ's CaseMap to the Case File" ("Response").[1] The Response's mischaracterizations of the law and arguments made in IENG Sary's Motion to Add the OCIJ's CaseMap to the Case File ("Motion")[2] constitute compelling circumstances warranting a reply which, left unanswered, may misdirect the Trial Chamber towards issuing a Decision based on an incorrect assessment of the applicable law and procedure at the ECCC. This Reply is made necessary because the OCP misapplies the law and mischaracterizes the arguments made in the Motion. The OCP fails to provide either cogent reasoning or relevant legal authority to support its arguments. For the sake of judicial economy and expediency, Mr. IENG Sary's Reply is affixed hereto should the Trial Chamber grant this leave to reply.

## REPLY

1. In paragraph 1, the OCP erroneously states that the Defence's "Request [sic] is based on three grounds." The Motion raised four grounds.[3]
2. In paragraphs 2 to 4, the OCP merely introduces arguments and sets out the background.[4]
3. In paragraph 5, the OCP asserts that the definition of the Case File in the ECCC Internal Rules ("Rules") is "written records (*procés verbaux*) of investigative action" which do "not (and *could* not) include every thing [sic] written by the OCIJ during a investigation, as the Defence contend."[5] This assertion mischaracterizes the Defence's argument. The Defence submitted that "[a]s a *written record of investigative action*, the Case File comprises all relevant documents including records of interview, pleadings, decisions and analysis which are relevant to establishing the truth of the facts alleged in the OCP's Introductory Submission."[6] The Defence submits that not only is the OCIJ CaseMap a

[1] Co-Prosecutors' Response to "IENG Sary's Motion to Add the OCIJ's CaseMap to the Case File," 13 June 2010, E91/1.
[2] IENG Sary's Motion to Add the OCIJ's CaseMap to the Case File, 3 June 2011, E91.
[3] **a.** The Defence is entitled to obtain the OCIJ's CaseMap from the Trial Chamber as it is properly considered part of the Case File; **b.** adding the OCIJ CaseMap to the Case File will facilitate the expeditious conduct of the proceedings; **c.** adding the OCIJ's CaseMap to the Case File will protect Mr. IENG Sary's right to adequate time and facilities for the preparation of his defence; and **d.** if the OCIJ's CaseMap has been provided to the Trial Chamber, this is indicative that the OCIJ's CaseMap is part of the Case File and that the parties are entitled to it.
[4] The Defence notes, however, that the OCIJ did not warn the Defence for showing disregard to the procedural regime applicable to the judicial investigation by requesting the OCIJ's CaseMap. Order issuing warnings under Rule 38 on 25 February 2010, D367.
[5] Emphasis added.
[6] Motion, para. 5.

"written record," but also that it is quite possibly the *most* detailed, authenticated, written record of the judicial investigation that exists.[7]

4. In paragraphs 6 to 8, the OCP asserts that Articles 240 and 242 of the Cambodian Criminal Procedure Code ("CPC") and commentary on French criminal procedure demonstrate "that a 'written record' is envisaged to be a specific type of document, not just any document written by the CIJs or their staff."[8] The OCP's argument prioritizes form over substance and disregards the inherent specificity of the ECCC:[9] it is reasonable to presume that CaseMap was used by the OCIJ for the creation of *written records of investigative action* for each interrogation, interview or confrontation (as envisaged by Article 242 of the CPC). The formal requirements of Article 240 of the CPC should not, in this context, trump the fact that *written records of investigative action* will have been recorded in the OCIJ's CaseMap and are thus properly considered part of the Case File.
5. In paragraph 9, the OCP asserts that there "is a clear distinction between the *products* of a criminal investigation, such as evidence, inculpatory or exculpatory, and an indictment which must be provided to the Defence, and the internal working documents related to that investigation which are protected from disclosure." This assertion misconstrues the nature of the inquisitorial system. It necessitates applying common law principles of privilege and disclosure, predicated on the notion that the Parties are responsible for conducting their respective investigation.
6. In paragraph 10, the OCP asserts that "'reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under'" the Rules of Procedure and Evidence of the ICTY and ICTR.[10] Again, the simple but fundamental distinction is that at the ICTY and the ICTR it is the Parties that are responsible for conducting their own investigations;[11] both conduct unquestionably Party-driven

[7] It is for this reason that Defence noted in the Motion that it is "understandable that the Trial Chamber would build upon or at least utilize a CaseMap developed by the OCIJ as in all likelihood the OCIJ's CaseMap was the raw material, i.e. *the written record of investigative action*, upon which the Closing Order was founded," and that this "would allow for judicial economy of resources and avoid duplication." *Id.*, para. 19.
[8] Response, para. 6.
[9] Rule 21 requires consideration of the "inherent specificity" of the ECCC when interpreting the ECCC's constitutive instruments in a manner that safeguards Mr. IENG Sary's interests and to ensure legal certainty and transparency of proceedings. The ECCC is inherently specific in that it is tasked with trying war crimes cases of massive scale and complexity, while its investigative stage is conducted under the exclusive supervision of the OCIJ. *See* Motion, paras. 12-14.
[10] Emphasis added.
[11] *Cf.* the ECCC, where the investigation is conducted *solely* by the OCIJ. *See* Order issuing warnings under Rule 38 on 25 February 2010, D367. *See also* Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, A110/I, p.2.

proceedings, with each Party having a case.[12] The investigative processes that these Rules protect quite simply do not exist in an inquisitorial system based on French procedure. The OCP cannot have it both ways: it cannot argue that the ECCC has an inquisitorial procedure, yet when convenient rely on Common Law principles that, effectively, run contrary to the Civil Law procedure it insists should apply.

7. In paragraph 11, the OCP asserts that the "'work-product doctrine' or 'litigation privilege' principle of many domestic jurisdictions" supports its contention in paragraph 12 that the "OCIJ's CaseMap is … a 'privileged document or communication.'" The national rules and jurisprudence cited by the OCP all come from Common Law jurisdictions,[13] where the Parties are responsible for conducting their own investigations. The OCIJ enjoys no "work product" litigation privilege; it is not a Party to the litigation.
8. In paragraph 12, the OCP asserts that "the Defence have provided no evidence that the OCIJ CaseMap has been provided to the Trial Chamber and therefore that the OCIJ have waived their privilege over the information." The OCP appears to acknowledge that if the OCIJ's CaseMap has been provided to the Trial Chamber, the OCIJ will have "waived [its] privilege" or "evinced [an] intention that [its] CaseMap should not be regarded as a 'confidential internal document.'" If the Trial Chamber has the OCIJ CaseMap, then the Parties are entitled to it. Suffice to say, the Defence would welcome clarification from the Trial Chamber regarding whether its staff have access to the OCIJ's CaseMap.[14]

---

[12] *See* Transcript of Hearing: Trial Management Meeting, Closed Session, 5 April 2011, p. 114. The Deputy International Co-Prosecutor observed in relation to the obligation to provide Rule 80 document lists: "As Your Honours know, and as the Ieng Sary defence knows, a civil law case is not bifurcated, it's not split between the prosecution case and the defence case. So the idea of providing a document list before the case begins is quite consistent with international practice, taking into account we're operating in a civil law environment and not a common law environment, like the Rwanda and Yugoslav tribunal." *Cf.* The Defence's positon on applicable modalities of trial procedure at the ECCC. IENG Sary's Motion for the Trial Chamber to Conduct the Trial in Case 002 by Following a Proposed Revised Procedure & Request for an Expedited Stay on the Order to File Materials in Preparation for Trial, 28 January 2011, E9/3, in which the Defence argued that by adopting certain adversarial modalities of procedure in the Rules, the ECCC "appears to have intended a departure from certain aspects of inquisitorial criminal procedure and introduced elements of adversarial procedure similar to those adopted at the International Criminal Court ("ICC") and the *ad hoc* international criminal tribunals."

[13] *I.e.*, United States, England and Wales, Canada and South Africa.

[14] *See* Letters from the IENG Sary Defence Team to Tony Kranh and Knut Rosandhaug dated 3 March 2011 and 9 May 2011. The Defence wrote to the Office of Administration on these dates "to request information on all members of staff who are currently working in Chambers at the ECCC. Specifically, [the Defence] asked to know: **a.** the names of the staff members; **b.** the Chamber in which they are currently employed; **c.** the position they currently hold; and **d.** whether they have held a position in any other section at the ECCC (the 'Requested Information'). [The Defence] made this request for the sake of transparency and to avoid any potential conflict of interest, which may call into question the integrity and impartiality of the proceedings." The Defence has not received a response to these letters from the Office of Administration. Since 9 May 2011, the Defence has come to understand that since becoming seized with Case 002 the Trial Chamber is developing a CaseMap. This is due to the Defence's understanding that the Trial Chamber may have retained the services of staff previously dedicated to or who have assisted with the development of the OCIJ's CaseMap.

9. In paragraph 13, the OCP asserts that "[r]eleasing the OCIJ internal work documents now would not give an accurate picture of the total work of the OCIJ (this can be found in the Closing Order)…." The Closing Order does not reflect the total work of the OCIJ.[15]
10. In paragraph 14, the OCP asserts that "rules against disclosing investigative work product in criminal proceedings are relied upon not only by the OCIJ but by national and international investigators and prosecutors the world over." This assertion is notable for its absence of supporting authority. The OCP's assertion that for the Trial Chamber to allow the Motion would "set a precedent … undermin[ing] investigators' capacity to be frank in their observations and pursue various case theories" misconceives the function of the investigating judge. The OCIJ in carrying out its investigation – objectively in order to ascertain the truth - should not have a particular agenda or case theory.[16]
11. In paragraph 15, the OCP asserts that to "the extent that CaseMap may be illustrative of the case against the Accused, this information is already contained within the Closing Order, the Final Submission and the Co-Prosecutors' Rule 80 Document List." The Defence is interested in exculpatory material, as well as the basis for any inculpatory material. Exculpatory material cannot be expected to be derived from the OCP Final Submission and its Rule 80 Document List. By asserting that "the Trial Chamber's determination of the guilt or innocence of the Accused is only limited to the facts contained in the Indictment and the evidence put before the Trial Chamber," the OCP fails to acknowledge that the evidence adduced will be derived from, *inter alia*, all the documents which form part of the Case File,[17] which will have been analyzed by the OCIJ and recorded in its CaseMap. The OCP's suggestion that the parties' "access to OCIJ working documents will mean that the evidence on the Case File may be tainted by the weight that the OCIJ has given to it, and not evaluated afresh" must be balanced against the benefits deriving from close scrutiny of the weight that the OCIJ gave to the *entirety* of the material placed on the Case File. This scrutiny is particularly warranted at a time when even members of the OCIJ's staff, as well as civil society, are raising the issue of the OCIJ's dysfunctionality and lack of integrity.[18]

---

[15] *See* Motion, para. 17. "The Closing Order cites 1,762 of the 70,000 plus documents which have been added to the Case File. Only through adding the OCIJ's CaseMap to the Case File will the parties be able to understand how the OCIJ evaluated the *entire* Case File, including its consideration of the inculpatory or exculpatory nature of the approximately 68,000 documents added to the Case File which are not cited in the Closing Order."
[16] Rule 55(5).
[17] IENG Sary's Initial List of Documents Already on the Case File & Notice Notice Concerning his Forthcoming Initial List of New Documents to be Put Before the Trial Chamber at Trial, 1 April 2011, E9/22.
[18] *See, e.g.*, Statement by former OCIJ Investigator Stephen Heder, *quoted in* James O'Toole, *Outgoing Consultant Blasts Tribunal Judges*, PHNOM PENH POST, 14 June 2011: "'In view of the judges' decision to close

12. In paragraph 16, the OCP asserts that the "Defence argue that the burden of reviewing each document on the Case File *ab initio* is too great." This is a gross distortion of the Defence's submission, which emphasized the enhanced focus and time saving which will derive from adding the OCIJ's Case Map to the Case File.[19] The OCP's assertion that the "Case File has been given to the Defence in an electronic format through the Zylab document management system" conflates applicable procedural Rules.[20]
13. In paragraph 17, the OCP asserts that the Defence has been "provided with over 1,000 documents supporting the Introductory Submission in a CaseMap file form as a matter of courtesy." There are currently over 70,000 documents on the Case File. It is not unreasonable to presume that disclosure of the OCIJ's CaseMap cataloguing the circa 69,000 documents not included on the CaseMaps shared by the OCP would enhance the fairness and expeditiousness of the proceedings.
14. In paragraph 18, the OCP asserts that the Trial Chamber has already ruled on this issue, noting that the Defence, "having had access to the case file since the start of the judicial investigation, cannot claim a lack of sufficient time and facilities for the preparation of their Defence."[21] Having access to the Case File – in its present form – does not mean that the Defence has access to the OCIJ's CaseMap. It is because the Defence submits that the CaseMap is inherently part of the investigative process that it properly must be considered as part and parcel of the Case File.
15. In paragraph 19, the OCP concludes by reaffirming submissions made elsewhere in the Response. To avoid repetition, this paragraph need not be dealt with separately.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS
Co-Lawyers for Mr. IENG Sary
Signed in Phnom Penh, Kingdom of Cambodia on this **20th** day of **June, 2011**

---

the investigation into Case File 003 effectively without investigating it, which I, like others, believe was unreasonable; in view of the UN staff's evidently growing lack of confidence in your leadership, which I share; and in view of the toxic atmosphere of mutual mistrust generated by your management of what is now a professionally dysfunctional office, I have concluded that no good use can or will be made of my consultancy services.'" *See also* James O'Toole, *NGOs Concerned about KRT*, PHNOM PENH POST, 20 May 2011. "More than 30 local NGOs have joined to criticise the Khmer Rouge tribunal's handling of its controversial third and fourth cases, expressing concern that 'the impartiality, integrity, and the independence of ECCC judges are being tainted.'"

[19] *See* Motion, paras. 16-17.

[20] Rule 10(4) requires electronic storage of Case File documents, i.e. it provides a mandate for Zylab. Rule 86, on the other hand, is the Rule upon which the Motion was grounded.

[21] Response, n. 30.