

**BEFORE THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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**INTERNATIONAL CO-PROSECUTOR'S FIRST CASE FILE 003 INVESTIGATIVE
REQUEST TO ADMIT ADDITIONAL DOCUMENTS AND OBSERVATIONS ON
THE STATUS OF THE INVESTIGATION**

Filed by:

International Co-Prosecutor
Andrew CAYLEY

Distribution to:

**Office of the
Co-Investigating Judges**
Judge YOU Bunleng
Judge Siegfried BLUNK

Copy to:

National Co-Prosecutor
CHEA Leang

APPLICATION TO ADMIT THE VALIDITY OF THE INVESTIGATIVE REQUEST

1. On 7 June 2011, the Co-Investigating Judges issued their Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case File 003 (the “Decision”),¹ by which they rejected as invalid four requests filed by the International Co-Prosecutor alone: three Investigative Requests including this instant Request² and one Request for the extension of the deadline for submission of Case 003 Civil Party Applications.³ The International Co-Prosecutor, pursuant to Internal Rule 39 (4) and Articles 8 and 9 of the Practice Direction on Filing of Documents before the ECCC, re-files this Investigative Request and requests that the Co-Investigating Judges recognize its validity as an action being executed after the expiration of a time limit on such terms as they see fit.
2. The basis for the re-filing of this Request, after the expiration of the time limit prescribed in Rule 66 (1), is that the Co-Investigating Judges have clarified in the Decision their interpretation of the Internal Rules with regards to the formalities deemed necessary for one Co-Prosecutor to file such requests alone. This Investigative Request was rejected on the basis of two procedural technicalities and was not considered on its merits. The Co-Investigating Judges have found that in order for a Co-Prosecutor to act alone there must be a formal delegation of power under Rule 13(3) or a disagreement that has been registered pursuant to Rule 71(1) of the Internal Rules.⁴ While the International Co-Prosecutor is appealing the Co-Investigating Judges interpretation of the Internal Rules in respect of the registration of disagreements the Co-Prosecutors have now recorded the exact nature of their disagreement in respect of this Investigative Request in a signed document, dated today, and placed in a register of disagreements kept by the Greffier of the Co-Prosecutors.
3. As one of the formalities, deemed necessary by the Decision, has now been met, and without prejudice to the appeal to be filed by the International Co-Prosecutor in respect

¹ OCIJ Decision on Time Extension Request and Investigative Requests by the International Co-prosecutor regarding Case 003, D20/3, 7 June 2011 (“Decision”)

² International Co-Prosecutor’s First Case File 003 Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation, 18 May 2011, D17; International Co-Prosecutor’s Second Request for Further Investigative Action Regarding Sou Met and Related Crime Sites, 18 May 2011, D18; International Co-Prosecutor’s Third Investigative Request Regarding Meas Mut and Related Crime Sites, 18 May 2011, D19.

³ International Co-Prosecutor’s Request for an Extension of Time for the Filing of Civil Party Applications in Case 3, 10 May 2011, D15.

⁴ Decision, para. 5.

of this issue, the International Co-Prosecutor respectfully requests the Co-Investigative Judges to admit this Investigative Request as valid and now examine its substance on the merits. Exercising discretion in this way will ensure that administrative legal technicalities do not impede the fairness, legal certainty and transparency of the proceedings pursuant to Rule 21 (1) and the International Co-Prosecutor's fundamental right to request further investigative action at the conclusion of an investigation pursuant to Rule 66 (1).

INTRODUCTION

4. Pursuant to Internal Rule 66 (1), the International Co-Prosecutor hereby submits to the Co-Investigating Judges (CIJ) the following Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation (the "Request") relating to the suspects and crime sites identified in the Second Introductory Submission filed on 7 September 2009.⁵
5. This Request is accompanied by two additional investigative requests (Additional Requests), each outlining specific investigative actions required to be completed in relation to one of the suspects and the related crime sites / criminal events. This Request also contains observations by the International Co-Prosecutor on the status of the investigation as a whole, and which are not restated in the Additional Requests for the sake of brevity.

STATUS OF THE JUDICIAL INVESTIGATION

6. The International Co-Prosecutor submits that the investigation conducted by the Co-Investigating Judges thus far cannot be considered complete, due to a series of factors, including: extremely limited field investigations conducted by the Office of the Co-Investigating Judges (OCIJ) following which numerous avenues of investigation remain unexplored; the late placement of evidence on the Case File, which has made it impossible for the Co-Prosecutors to effectively participate in the investigation; and the fact that the suspects have not been informed that they are under investigation or offered an opportunity to give evidence despite the fact that they are directly implicated by both documentary and testimonial evidence.

⁵ Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

7. The International Co-Prosecutor recalls that in civil law systems, as reflected in Rule 55(2), it is mandatory for investigating judges to investigate the facts set out in an introductory submission. From the few interviews conducted since the expiration of the first and only Rogatory Letter issued in this case, it appears that the CIJ have: (i) restricted their very limited inquiries to a consideration of the positions held by the two suspects;⁶ and (ii) consequently ceased any substantive investigations into the allegations relating to the crime base (including the nature of the crimes and their temporal and geographic scope, as well as the numbers of victims). The allegations relating to the common criminal plan and the authorities responsible for the crimes equally remain incomplete. In light of the issuance of the Notice of Conclusion of Judicial Investigation prior to the completion of a full investigation, the International Co-Prosecutor can only assume that the CIJ may have formed a view on whether the two suspects fall into the category of senior leaders of Democratic Kampuchea (DK) or persons most responsible for the crimes committed from 17 April 1975 to 6 January 1979.
8. The International Co-Prosecutor submits that, whatever preliminary view the CIJ may have formed on this issue, a full investigation of the allegations in the Second Introductory Submission is compulsory. The closure of the judicial investigation at this stage would amount to a breach of Internal Rule 55(2) and any finding on the issue of jurisdiction would be clearly premature. In the absence of a full investigation, the CIJ will not have collected all the evidence necessary to rule on the issue of personal jurisdiction. A transfer of Case File 002 documents and a handful of interviews fall far short of the sort of investigation that would be required for the CIJ to rule on whether or not the suspects are senior leaders of DK or persons most responsible for the crimes.
9. In Case 002, the Pre-Trial Chamber held that the Closing Order represents an order confirming the jurisdiction of the Court.⁷ This meant that, although the individuals named in the first Introductory Submission could well have been found to fall outside the Court's personal jurisdiction at the time of the issuance of the Closing Order, this did not absolve the CIJ of their obligation to carry out a full investigation of the crime

⁶ Rogatory Letter, 9 June 2010, D2; Rogatory Letter Completion Report, 10 February 2011, D2/1; Witness Records of Interview of CHHOUK Rin, 24 March 2011, D6; KAING Guek Eav *alias* Duch, 27 April 2011, D12; SAM Bung Leng, 21 March 2011, D8.

⁷ Case 002: Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/3/15, at pages 30-33.

base allegations and of the suspects' individual responsibility. It was only at the end of a full investigation that the Co-Prosecutors were in a position to analyse the evidence gathered (including that relating to the roles of the Charged Persons) and make detailed submissions in relation to the issuance of the Closing Order.

10. Matters that must be fully investigated before the CIJ can make final rulings include the crime base allegations and the role of the identified suspects, as well as any other individuals against whom there is clear and consistent evidence of criminal responsibility. The International Co-Prosecutor notes that the CIJ may charge such additional individuals and are not bound by the Co-Prosecutors' identification of suspects.⁸ Therefore, a full and proper investigation cannot be dispensed with by a determination that one or more of the named suspects may not fall within the Court's jurisdiction. To argue otherwise would make it possible for any case to be dismissed without a proper judicial investigation on the basis of a premature finding that suspects named by the Co-Prosecutors do not fall within the Court's jurisdiction.
11. In any event, as argued in the Additional Requests, it is the International Co-Prosecutor's view that, on the basis of the evidence available thus far, SOU Met and MEAS Mut can be classified as senior leaders of DK and persons most responsible for the crimes. Any decision that these suspects are not within the Court's jurisdiction would be contrary to the conclusions reached by the CIJ and Trial Chamber in Case 001, and the CIJ in Case 002.⁹
12. The preceding submissions are made on a preliminary basis and without the benefit of a notice of the issues under consideration by the CIJ. In Case 002, prior to ruling on the applicability of the mode of liability of Joint Criminal Enterprise, the CIJ invited the parties to make submissions on the issue.¹⁰ If the CIJ propose to dismiss the three investigative requests now being filed by the International Co-Prosecutor and end their investigation on the basis of a jurisdictional finding, the International Co-Prosecutor must be given notice of the issues under consideration and an opportunity to file

⁸ Internal Rule 55(4).

⁹ Case 001: Closing Order, 8 August 2008, D99 at page 33, Judgment, 26 July 2009, E188, at pages 4-9; Case 002: Closing Order, 15 September 2010, at page 330.

¹⁰ Case 002, Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 16 September 2008, D97/III.

detailed submissions thereon. As the Pre-Trial Chamber has ruled, jurisdictional issues are fundamental.¹¹

13. Turning to the status of the investigation, a review of the file reveals that, over a period of almost 20 months (from 7 September 2009 to 29 April 2011),¹² the CIJ conducted a total of 20 witness interviews with 17 witnesses with respect to 10 crime sites / criminal events and two suspects. Those interviews comprise:
- (a) Five interviews relating to Division 801 security centres (808, 809, 810), a Division 801 work site (Kalai), and a Sector Security Centre for civilians (Au Cheng), which does not appear to have been connected to Division 801;¹³
 - (b) 10 interviews with seven witnesses relating to Division 164 (DK Navy), the capture of foreign vessels, Wat Enta Nhien Security Centre and Stung Hav Rock Quarry and related sites;¹⁴
 - (c) Three interviews relating to Division 502 (DK Air Force), including a single interview relating to Division 502 Security Centre S-22;¹⁵ and
 - (d) Two interviews relating to the roles of Suspects SOU Met and MEAS Mut in the RAK and the CPK authority structure.¹⁶
14. By comparison, in Case 002, the OCIJ conducted over 800 interviews with respect to 27 crimes sites / criminal events and four Charged Persons. While in Case 002 numerous statements were taken for each site, in Case 003, the number of witness interviews is usually one or two per site. One set of criminal allegations, namely the crimes allegedly committed by troops commanded by Division 164 in Vietnam, does not appear to have been the subject of any interviews.

¹¹ Case 002: Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/3/15, at page 32.

¹² Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

¹³ Written Records of Interview of HEAN Rum, 24 August 2010, D2/5, OUM Keo, 28 September 2010, D2/11, MAO Phat, 29 September 2001, D2/12, SAY Tay, 25 September 2010, D2/13, MEANG Buolin, 26 September 2010, D2/14.

¹⁴ Witness Records of Interview of PAUCH Koy, 28 July 2010, D2/4, NHOUNG Chrong, 24 August 2010, D2/6, PEN Sarin, 26 August 2010, D2/7, SAY Born, 6, 7 and 9 September 2010 (D2/8, D2/9, D2/10), TOUCH Soeuli, 10 and 11 November 2010 (D2/15, D2/16), IN Saroeun, 12 November 2010, D2/17, and SAM Bung Leng, 21 March 2011, D8.

¹⁵ Witness Records of Interview of OU Leang, 13 July 2010, D2/2, NOP Hat alias KY Hat alias NOP Hon, 20 July 2010, D2/3 and Sreng Thi, 1 December 2010, D2/18.

¹⁶ Witness Records of Interview of CHHOUK Rin, 24 March 2011, D6 and KAING Guek Eav *alias* Duch, 27 April 2011, D12.

15. The CIJ have placed on the Case File Site Identification Reports relating to: (1) Security Centre 809 and Kalai work site;¹⁷ (2) Au Cheng Sector 5 Prison;¹⁸ (3) Security Centre S-22;¹⁹ (4) Wat Enta Nhien Security Centre²⁰ and (5) Stung Hav Rock Quarry and related sites.²¹ In preparing the first three Reports the OCIJ relied on information provided by one witness per site; the second two Reports were prepared with the help of two witnesses per site.
16. The only additional investigative activity of which the International Co-Prosecutor is aware of is the transfer by the OCIJ of 1,287 Case 002 documents to Case File 003,²² and the placement on Case File 003 of three lists of S-21 prisoners from Divisions 502, 164 and 801, compiled by the OCIJ.²³ While some of the evidence transferred from Case File 002 sheds light on the events overlapping with the allegations in Case 003, it does not substitute a thorough investigation in this case, especially in relation to the additional sites, and the responsibility of the suspects for the alleged crimes in this case.

OVERVIEW OF PENDING INVESTIGATIVE ACTIONS

17. The totality of the products of the investigation, namely the Rogatory Letter Completion Report,²⁴ written records of witness interviews, site identification reports and notes on placement of documents on Case File 003 were provided to the Co-Prosecutors in March and April 2011, shortly before the issuance of the Notice of Conclusion of Judicial Investigation on 29 April 2011. The single Rogatory Letter issued in this case was de-classified on 10 May 2011, and thus made available to the Co-Prosecutors only after the closure of the investigation. Further, given that the eight reports on the transfer of documents from Case File 002 have not been filed, the methodology employed by OCIJ in selecting the documents remains unexplained.²⁵ The International Co-Prosecutor has therefore not been in a position to effectively

¹⁷ Site Identification Report, 4 November 2010, D2/19.

¹⁸ Site Identification Report, 4 November 2010, D2/20. This site identification report lacks relevance as it concerns civilians and a site apparently not connected to Division 801.

¹⁹ Site Identification Report, 9 December 2010, D2/21.

²⁰ Site Identification Report, 29 December 2010, D2/22.

²¹ Site Identification Report, 30 December 2010, D2/23.

²² Note on Placement of Documents on Case File 003, 5 April 2011, D4 (and list attached D4.1); Note on Placement of Documents on Case File 003, 25 April 2011, D10 (and list attached D10.1).

²³ Note on Placement of Documents on Case File 003, 25 April 2011, D9 (and lists attached D9.1, D9.2, D9.3).

²⁴ Rogatory Letter Completion Report, 10 February 2011, D2/1.

²⁵ The production of these reports is referred to in the Rogatory Letter Completion Report, *Ibid*, at page 1.

monitor the investigation and file relevant investigative requests prior to the filing of the Notice of Conclusion.

18. Yet, even upon a preliminary review of the Case File conducted in the short time available, it is clear that significant additional activity must be conducted before the investigation can be considered concluded. This is confirmed by the OCIJ investigators' reports. Two site reports by one of the OCIJ investigators are qualified as "preliminary" and stress the fact that the investigation is incomplete and that further investigative action must be undertaken.²⁶ For example, in the report relating to the Stung Hav Quarry, the investigator states:

"With regard to the present site identification report, *the investigation is not completed yet*. Not all possible and necessary investigative action could be done by the time this report was written and before expiration of the rogatory letter. [...] Not all available witnesses including three new witnesses identified by the OCIJ could be interviewed prior to the expiration date of the rogatory order. Thus this report contains limited information regarding establishment, functioning and security of the sites, *this report must be updated when further investigative activities lead to more information* [emphasis added]."²⁷

Further, the Rogatory Letter Completion Report states that "some witnesses identified by the investigators were not interviewed because resources were refocused on the reviewing of documents."²⁸

19. The Site Identification Report relating to S-22 does not show that any investigation was made to identify (apart from the sole witness SRENG Thi) survivors, S-22 guards or Division 502 cadres who could provide further information.
20. Equally, investigation into the role of the two suspects is clearly incomplete, as indicated in more detail in the Additional Requests. No attempt appears to have been made by the CIJ to interview the suspects. Further, the suspects have not been notified that they are the subjects of a judicial investigation. Subrule 21(1)(d) states that any person "suspected" has "the right to be informed of any charges brought against him/her, to be defended by a lawyer of his or her choice." Pursuant to Subrule 57(1), suspects are to be informed of these rights at their initial appearance before the CIJ.
21. Another aspect of the investigation that remains pending is adequate follow up on the basis of an analysis of the documents transferred from Case File 002. It is apparent that

²⁶ Site Identification Report, 29 December 2010, D2/22; Site Identification Report, 30 December 2010, D2/23.

²⁷ Site Identification Report, 30 December 2010, D2/23, at page 3.

²⁸ Rogatory Letter Completion Report, 10 February 2011, D2/1, at page 1.

the CIJ did not intend to re-interview Case 002 witnesses (with the exception of KAING Guek Eav *alias* Duch and CHHOUK Rin) on the basis of their prior statements and in light of the specific allegations made in Case File 003. An analysis of Case 002 statements, and appropriate follow up interviews are clearly necessary. In addition, documents which have been transferred from Case File 002 should be shown to those witnesses who may be in a position to authenticate them.

22. Finally, departing from their practice in Case 002, the CIJ have not publically announced the crime sites and events under investigation, which has made it difficult for prospective Civil Parties to apply, and limited the evidence that could be collected. The Co-Investigating Judges will be aware that, in Case File 002, important evidence in relation to a number of crime sites was provided by Civil Parties.

SPECIFIC ACTION REQUESTED – TRANSFERS AND FILING OF NEW DOCUMENTS

23. Given the large number of sites and factual allegations which are the subject of this investigation, the Co-Prosecutor will request detailed actions in relation to the suspects and crime sites in the Additional Requests. This request deals primarily with documents to be added to Case File 003. On the basis of the review of the Case File conducted in the short time available, the International Co-Prosecutor has identified a number of additional Case File 002 documents, which are probative and relevant to the allegations in this case. He has also undertaken a fresh review of the documents held by the Office of the Co-Prosecutors and identified further relevant documents which were not attached to the Second Introductory Submission. The latter category includes S-21 Confessions, S-21 Prisoner Lists, documents containing information on RAK divisions, and interviews with the suspects. Finally, a limited number of additional documents were located from public sources in the preparation of these requests.
24. For the reasons set out above, the International Co-Prosecutor therefore requests that:
 - (a) Case File 002 documents listed in Annex 1 be transferred to Case File 003;

- (b) New documents listed in Annex 2 be placed on Case File 003; and
- (c) Eight reports on the documentary reviews referred to in the Rogatory Letter Completion Report be placed on the Case File.

Respectfully submitted,

Date	Name	Place	Signature
10 June 2011	Andrew CAYLEY International Co-Prosecutor	Phnom Penh	 