

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



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**CO-PROSECUTORS' RESPONSE TO "IENG SARY'S MOTION TO ADD THE OCIJ'S
CASEMAP TO THE CASE FILE"**

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I. INTRODUCTION

1. On 3 June 2011 Ieng Sary through his Defence (the “Defence”) filed a motion requesting that the Office of the Co-Investigating Judge’s (the “OCIJ’s”) CaseMap be placed on the Case 002 Case File (the “Request”).¹ The Request is based on three grounds. First, the Defence contend that CaseMap is a part of the Case File as they believe it falls within the definition of a “written record of investigative action.” Second, the Defence argue access to CaseMap is necessary to protect Ieng Sary’s right to adequate time and facilities to prepare his defence, and third, as the Defence believe that the Trial Chamber has the OCIJ’s Casemap it should also be provided to the Defence. The Co-Prosecutors request the Trial Chamber to dismiss this Request as it lacks a factual and legal basis.
2. First, there is no legal support either from the ECCC, Cambodian or International law for the proposition that investigators internal work product can be considered part of a Case File. To the contrary, investigative work product is almost universally privileged under international and foreign law and there is no evidence the CIJ have waived this privilege. Failing to supply the CIJ investigative work product does not effect Ieng Sary’s fair trial rights as the Defence has been given more than adequate time and facilities to process the evidence in the Case File to which they have been given access. It is neither a right nor feasible for the Defence to trawl through the CIJ’s CaseMap to review the methodology of the investigation.

II. BACKGROUND

3. The Defence has previously requested access to the OCIJ’s CaseMap on 12 February 2010.² This was rejected in the OCIJ’s Order issuing warnings under Rule 38 on 25 February 2010.³ The Defence then requested, on 31 March 2010, that the OCIJ provide an “analytical table linking each material fact to each relevant inculpatory or exculpatory piece of evidence, each element of the crimes charged and each constituent element of the modes of participation as part of the closing order,”⁴ and on 7 June 2010 requested that the OCIJ identify all

¹ Ieng Sary’s Motion to Add the OCIJ’s CaseMap to the Case File, 3 June 2011, E91, ERN 00700055.

² Request for Access to the Entire Dossier, 12 February 2010, D354, ERN 00454214.

³ Order Issuing Warnings under Rule 38, 25 February 2010, D367, ERN 00478513.

⁴ Ieng Sary’s Request for an Analytical Table, 31 March 2010, A372 at ERN 00492598.

exculpatory material on the Case File.⁵ The former request was rejected on 8 April 2010⁶ and the CIJs did not respond to the latter as it had no legal basis.⁷

III. ARGUMENT

A. CaseMap Is Not Part of the Case File and Is Therefore Not Subject to Disclosure

4. The Defence argue that as they are entitled to the Case File pursuant to Rule 86 they are entitled to the CIJ's CaseMap as they claim it forms part of the Case File. This argument is not supported by the definition of what constitutes a Case File under the ECCC Rules. The Rules define Case File as follows "Case File" (dossier) refers to all the written records (procés verbaux) of investigative action undertaken in the course of a Preliminary Investigation or a Judicial Investigation, together with all applications by parties, written decisions and any attachments thereto at all stages of the proceedings, including the record of proceedings before the Chambers."⁸
5. In order to so argue that CaseMap is part of the Case File the Defence claim that this electronic software program is a "written record" or "*procés verbaux*." On any interpretation, this is clearly not the case. The English words "written records of investigative action" are a literal translation of the French "*procés verbaux*", which is a term of art. These words do not (and *could* not) include every thing written by the OCIJ during an investigation, as the Defence contend. Rather, a "written record" or *procés verbal* is a specific legal document which is a "detailed, authenticated written report of a proceeding."⁹ In the ECCC, this document provides a record of the work of the CIJs.¹⁰
6. Cambodian procedural law also uses the term in this sense. Article 242 of the Cambodian Criminal Procedure Code ("CCPC") specifies that there must be a written record established for each interrogation, interview or confrontation. Article 240 sets out the form requirements

⁵ Request for Identification of Exculpatory Evidence, 7 June 2010, A 395, ERN 00531145.

⁶ Response to IENG Sary's Request to Provide the Defence with an Analytical Table of Evidence, 8 April 2010, A372/1, ERN 00495629. The appeal of this decision to the PTC was rejected as being inadmissible: Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Rejection of Ieng Sary's Third Request to Provide the Defence with an Analytical Table of the Evidence with the Closing Order, 8 June 2010, A372/2/7, ERN 00527474.

⁷ Greffiers' Resonse to Ieng Sary's Co-Lawyers Request for Exculpatory Evidence, 11 June 2010, A395/1, ERN 00531151.

⁸ ECCC Rules Glossary

⁹ *Black's Law Dictionary's Law Dictionary* (8th ed, 2004), 1243.

¹⁰ ECCC Internal Rules, Rules 25, 28, 50, 55, 57, 58, 59, 61, 62, 63. See also, relating to other organs of the court, Rules 13, 71, 72, 76.

of “Written Records,”¹¹ demonstrating that a “written record” is envisaged to be a specific type of document, not just any document written by the CIJs or their staff - let alone a computer document storage and analysis system such as CaseMap.

7. This interpretation is confirmed by the French-language understanding of *procès-verbal* as an instrument proving that the actions undertaken to be done by the investigating judge have indeed occurred. Pradel enumerates the acts done by a judge that must be proven by the existence of a *procès-verbal*: presence of the judge on the crime scene, hearing of civil party or witnesses, expertise order, confrontations and reconstructions.¹² Vandermeersch confirms that there are only specific elements of an investigation which must be related in a *procès-verbal*.¹³
8. Clearly CaseMap cannot be construed to be a written record of investigation or *procès-verbal* under any law ECCC, National or French Law. As it is not a document but a data base software computer system it does not fulfil the form requirements within Cambodian and foreign law nor can it be construed as the type of document foreseen by the definition.

B. CaseMap Is Confidential Work Product and Is Therefore Not Subject to Disclosure

9. Aside from the fact that computer data bases like CaseMap are clearly excluded from the definition of the Case File, international and national jurisprudence further support the position that investigative work product like CaseMap is not disclosable to the Parties. 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.
10. The Rules of Procedure and Evidence of the International Criminal Tribunal of the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) require that all evidence to be used at trial and all exculpatory evidence - be disclosed,¹⁴ but *specifically state* 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

¹¹ Written records must include: the name of the investigating judge; the name of the court clerk; the number and date of the case file; the date of the introductory submission, the type of offence alleged in the introductory submission; and the dates of establishment of the written records.

¹² Jean Pradel, *Manuel de Procédure Pénale* (13th ed, 2006/2007), §684.

¹³ Henri-D Bosley and Damien Vandermeersch, *Droit de la Procédure Pénale* (2nd ed, 2001), 306. See also Michel Franchimont, Anne Jacobs and Adrien Masset, *Manuel de procédure pénale* (2nd ed, 2006), 247–250.

¹⁴ ICTY/ICTR Rules of Procedure and Evidence (“RPE”), Rules 66–70.

disclosure or notification under those Rules.”¹⁵ This includes interview notes,¹⁶ “notes of the investigators”,¹⁷ reflections on witnesses’ place within the trial,¹⁸ the “development of potential avenues of investigation,”¹⁹ “internal assessment on ... work processes,” “techniques of investigation” and “the conclusions and the recommendations made by the investigators.”²⁰

11. This is borne out of the “work-product doctrine” or “litigation privilege” principle of many domestic jurisdictions, which excludes from disclosure “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.”²¹ The rules protecting investigative working documents are “based upon the need for a protected area to facilitate investigation and preparation of a case for trial.”²² The notes made by police during their investigation are specifically included within the scope of this rule.²³
12. The OCIJ’s CaseMap is therefore a “privileged document or communication.”²⁴ The Defence have provided no evidence that the OCIJ CaseMap has been provided to the Trial Chamber and therefore there is no evidence that the OCIJ have waived their privilege over the information. On the contrary, the OCIJ have evinced no intention that their CaseMap should not be regarded as a “confidential internal document.”²⁵

C. Disclosing CaseMap Would Have a Negative Effect upon the Administration of Justice

¹⁵ ICTY RPE Rule 70; replicated in ICTR RPE Rule 70; SCSL RPE Rule 70; ICC RPE Rule 81(1): “Restrictions on disclosure: 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”.

¹⁶ *The Prosecutor v Eliézer Niyitegeka*, Case No ICTR-96-14-T, Judgment (16 May 2003), para 41.

¹⁷ *The Prosecutor v. Blaskic*, “Decision on the Production of Discovery Materials”, Case No IT-95-14-PT, 27 January 1997, para 40.

¹⁸ *The Prosecutor v Ildephonse Nizeyimana*, Case No ICTR-00-55C-PT, Decision on Urgent Defence Motions for Disclosure of Prior Statements (31 January 2011), para 6.

¹⁹ *The Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06, Annex 2 to: Decision issuing corrected and redacted versions of “Decision on the “Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information” of 5 December 2008”, 2 June 2009, Document No ICC-01/04-01/06-1924-Anx2, para 31.

²⁰ *The Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06, Prosecution Submissions on Disclosure pursuant to Trial Chamber’s I Order of 5 November 2010, 17 November 2010, Document No ICC-01/04-01/06-2625-Red, para 21.

²¹ US Federal Rules of Civil Procedure, Rule 26(b)(3); see also *Anderson v Bank of British Columbia* (1875–76) LR 2 Ch D 644, 656 (James LJ), 658 (Mellish LJ).

²² *Minister of Justice v Blank* [2006] 2 SCR 319, paras 27–28 (Canada).

²³ *S v Mavela* 1990 (1) SACR 582 (A), 590-591 (Eksteen JA).

²⁴ Cf Ieng Sary’s Motion to Add the OCIJ’s CaseMap to the Case File, 3 June 2011, E91 at ERN 00700062 para 20.

²⁵ Cf Ieng Sary’s Motion to Add the OCIJ’s CaseMap to the Case File, 3 June 2011, E91 at ERN 00700062 para 20.

13. The Defence request to review the investigative approach of the OCIJ²⁶ is entirely inappropriate, and would make a “most unsatisfactory travesty” of criminal investigation.²⁷ Releasing 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), would abuse the confidentiality of the OCIJ, would distort the Trial Chamber’s evaluation of the evidence and would have a significant inhibiting effect upon other investigations.
14. Case preparation “must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were being prepared.”²⁸ The 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. These rules are based in the principle that “each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations.”²⁹ To set a precedent undermining this principle equally undermines investigators’ capacity to be frank in their observations and pursue various case theories.
15. 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. Moreover, the ECCC Rules ensure that the Trial Chamber’s determination as to 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. To allow the parties, and thus judicial organs, 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.

D. The Confidentiality of the OCIJ CaseMap Does Not Infringe Ieng Sary’s Fair Trial Rights

16. The Defence argue that the burden of reviewing each document on the Case File *ab initio* is too great, and the release of the OCIJ’s work will save the Defence time and enable them to understand the case. This is simply not true. The Defence have had over 3 and a half years

²⁶ Ieng Sary’s Motion to Add the OCIJ’s CaseMap to the Case File, 3 June 2011, E91, ERN 00700055 paras 2, 14, 15, 16, 17.

²⁷ *Susan Hosiery Ltd v Minister of National Revenue* [1969] 2 Ex CR 27, [9] (Jackett P).

²⁸ *Susan Hosiery Ltd v Minister of National Revenue* [1969] 2 Ex CR 27, [8] (Jackett P).

²⁹ *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at [52].

to review the documents and evaluate them on an ongoing basis. They have not only been given adequate time before the trial commences but they have had sophisticated electronic facilities available to them to evaluate the evidence both individually and in the context of all of the evidence. The Case File has been given to the Defence in an electronic format through the Zylab document management system. Other possibly relevant materials have been provided to them on Zylab in the Shared Materials Drive to assist them in the preparation of their case.

17. As access to the Case File and the Shared Materials Drive has been in an electronic searchable form the Defence have had every opportunity to prepare the case in a multiplicity of ways to be able to analyze the evidence effectively. They also have been provided with their own CaseMap program to assist them in this process. In addition, they have been provided with the over 1,000 documents supporting the Introductory Submission in a CaseMap file form as a matter of courtesy. This file contains over 1,000 entries with each document being linked and described with relevant criteria to give the Defence a head start to preparing their case.
18. All of these facilities have been provided to them over three and a half years ago shortly after the Accused was arrested. Moreover, the Trial Chamber has already ruled on the issue stating “having had access to the case file since the start of the judicial investigation, [*the Defence*] cannot claim a lack of sufficient time and facilities for, the preparation of their defence.”³⁰
19. An Accused’s right to adequate time and facilities to prepare his Defence is a fundamental right that must be respected. However it is a matter of choice whether the Accused and his Defence use that time and those facilities. The Trial Chamber cannot force them to do so.³¹ Similarly, it is not an obligation for the OCIJ, Trial Chamber or any other Party for that matter to actually prepare Ieng Sary’s defence by providing them with all of their confidential work product whether it be in a CaseMap form, their computer hard drives, meeting minutes or any other internal work documentation. The untenable position of

³⁰ See Trial Chamber Disposition of Request for Extension of Deadlines (E9/7 and E9/4/9), 28 February 2011, E9/7/1, ERN 00648637; Trial Chamber Decision on Requests for Extension of Time to File Lists of Documents and Exhibits, 29 March 2011, E9/16/4, ERN 00657167, 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”.


³¹ See, eg, *Prosecutor v Slobodan Milosevic*, Case No IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para 19.

Defence can be contrasted with other Parties to the case who have been able to analyze the case on their own without assistance from the CIJ's document analysis system, CaseMap.

IV. RELIEF REQUESTED

20. In view of the above reasoning, it is respectfully requested that the Defence Motion be dismissed.

Respectfully submitted,

Date	Name	Place	Signature
13 June 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
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