

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:** 3 June 2011**CLASSIFICATION****Classification of the document
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IENG SARY'S MOTION TO ADD THE OCIJ'S CASEMAP TO THE CASE FILE

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves, pursuant to Rules 86 and 21 of the ECCC Internal Rules (“Rules”), the Trial Chamber to add the OCIJ’s CaseMap to the Case File. This Motion is made necessary because the parties are entitled to the OCIJ’s CaseMap; it is properly to be considered part of the Case File and the parties have the right to examine and obtain copies of it pursuant to Rule 86. Mr. IENG Sary’s right to be tried expeditiously and his right to adequate facilities for the preparation of his defence require that the OCIJ’s CaseMap be added to the Case File. If the OCIJ’s CaseMap has been provided to the Trial Chamber, this would support the Defence’s position that the parties are entitled to it.

I. INTRODUCTION TO CASEMAP

1. CaseMap is litigation management software that has been developed to help organize complex cases. To use CaseMap’s own terminology, “facts” (i.e. events) are linked with “objects” (i.e. key individuals, documents, places) and “issues” to facilitate intelligent searching based upon these criteria. In other words, CaseMap enables the user to search for and link documents with facts and issues in a case.¹
2. At the ECCC, CaseMap software is used by the OCIJ and (to the best of the Defence’s knowledge) by the Trial Chamber. The Defence understands that the OCIJ used CaseMap to produce *written records of investigative action*, including records of interview, site visits, and factual/legal analysis. The Closing Order ineluctably reflects or is the by-product of the OCIJ’s CaseMap.

II. BACKGROUND

3. On 18 July 2007, the judicial investigation of Mr. IENG Sary was initiated with the filing of the Introductory Submission by the OCP.²
4. On 14 January 2010, the OCIJ notified the parties and their lawyers that they considered that the investigation in Case 002 had concluded.³ At that date, “tens of thousands of pages of documentary evidence [had] been placed on the casefile. More than 800 statements [had] been taken from witnesses, civil parties and charged persons, by the OCIJ judges and investigators. 53 national or international Rogatory Letters [had] been

¹ See <http://www.casesoft.com/casemap/casemap.asp>.

² Introductory Submission, D3, 18 July 2007.

³ Notice of Conclusion of Judicial Investigation, 14 January 2010, D317.

issued. More than 200 decisions [had] been rendered. More than 2000 civil party applications [had] been received ...”⁴

5. On 12 February 2010, the Defence requested the OCIJ to provide it, *inter alia*, with its CaseMap.⁵ The Defence argued:

Access to the casemap and relevant internal workings is necessary in order for the Defence to carry out, *inter alia*, the following activities in protecting Mr. IENG Sary’s fair trial rights:

- To see whether any further Investigative Requests need to be made to the OCIJ;
- To see whether the investigation has been conducted in an impartial manner;
- To see to what extent evidence obtained by torture has been relied upon; and
- For judicial economy and equality of arms.

The earlier the Defence is aware of the case against Mr. IENG Sary, the fairer the proceedings will be.

6. On 25 February 2010, this request was denied and the OCIJ issued a warning to the Defence for making duplicitous filings.⁶
7. On 16 September 2010, the OCIJ filed the Closing Order in Case 002.⁷ There are 1,762 documents from the Case File cited in the Closing Order.⁸ On 13 January 2011, the Pre-

⁴ See ECCC Press Statement, “Conclusion of judicial investigation in Case 002,” available at <http://www.eccc.gov.kh/en/articles/conclusion-judicial-investigation-case-002>.

⁵ Request access to the entire dossier, including all documents in your possession not available to the parties and, if one is prepared, access to the casemap, 12 February 2010, D354.

⁶ See Order issuing warnings under Rule 38, 25 February 2010, D367, paras. 10(b), 14, 15. The OCIJ warned the Defence on three separate grounds: **a.** disregard for the rules for filing of documents; **b.** disregard for the procedural regime applicable to the judicial investigation; **c.** and duplicitous filings and matters already judicially addressed. In the context of this Motion, it bears specific emphasis that the Defence was not warned for showing disregard to the procedural regime applicable to the judicial investigation for requesting the OCIJ’s CaseMaps. In denying a previous request for access to relevant information, the OCIJ had relied upon Rule 70 (A) of the ICTY Rules of Procedure and Evidence: “Notwithstanding the provisions of Rules 66 and 67, 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 these Rules.” Office of the Co-Investigating Judges, Your “Request for Investigative Action” concerning, *inter alia*, the strategy of the Co-Investigating Judges in regard to the Judicial Investigation, D171/5, 11 December 2009, *Id.*, para. 23, fn. 12. *But see* Request access to the entire dossier, including all documents in your possession not available to the parties and, if one is prepared, access to the casemap, 12 February 2010, D354, where the Defence argued: “The ECCC has an inquisitorial system ... The system at the ICTY is adversarial, with the Prosecution and Defence conducting their own separate investigations. The purpose of Rule 70 (A) at the ICTY is to protect each party’s confidentiality when preparing its respective case. Conversely, the investigation at the ECCC – for all parties concerned – is conducted by the OCIJ. There should be no issue of confidentiality. Thus, ICTY Rule 70 (A) is not only inapplicable but also redundant at the ECCC.”

⁷ Closing Order, 15 September 2010, D427.

⁸ *Id.*

Trial Chamber issued its Decision on IENG Sary's Appeal against the Closing Order.⁹ On 14 January 2011, the Trial Chamber became seized with Case 002.¹⁰ As of 31 March 2011, 70,819 documents were on the Case File in Case 002.

8. 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.

III. LAW

9. Rule 86 states: "At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and obtain copies of the case file, under supervision of the Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC."

IV. ARGUMENT

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

10. The Defence submits that the OCIJ's CaseMap constitutes a *written record of investigative action* and must, according to the definition of the "Case File" in the Internal Rules, be regarded as part and parcel of it. As the parties are entitled to obtain copies of the Case File,¹¹ they are entitled to obtain the OCIJ's CaseMap.
11. The "Case File," English for "*dossier*," is defined in the glossary to the Rules as referring to "all the written records (*procès 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." As 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. These written records would naturally include the OCIJ's CaseMap.

⁹ Decision on IENG Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26.

¹⁰ Order to File Materials in Preparation for Trial, 17 January 2011, E9.

¹¹ Rule 86(1).

B. Adding the OCIJ's CaseMap to the Case File will protect Mr. IENG Sary's fair trial rights to be tried expeditiously and to adequate time and facilities for the preparation of his defence

1. The Trial Chamber may consider the inherent specificity of the ECCC when interpreting Mr. IENG Sary's fair trial rights

12. 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.
13. The judicial investigation (thus, the Case File) was of unique scale. According to former International Co-Investigating Judge Marcel Lemonde, Case 002 is one of the most complex criminal trials since Nuremberg.¹² With over 70,000 documents added to the Case File, it would appear – particularly in light of the limited resources available – that it would not have been technically feasible, still less efficient, for the OCIJ to have created a traditional dossier, which classically would denote a file (literally, a dossier) containing hard copies of the documents and analysis collated during the criminal investigation. The OCIJ used Zylab, an electronic database, to store documents which had been added to the Case File and to fulfill its obligation to make the copies of the Case File available for the parties’ inspection.¹³ Thus, it is not presumptuous to assume that the OCIJ used CaseMap to record how documents on the Case File were linked to “facts,” “objects” and “issues” (as defined above) it considered relevant to the case. Because the OCIJ’s CaseMap constituted a critical tool creating a *written record of investigative action*, it should be placed on the Case File and made available to all the parties.
14. The ECCC is unique among war crimes tribunals in that the investigative stage is conducted under the exclusive supervision of Co-Investigating Judges. The parties were prohibited from conducting their own investigations.¹⁴ The OCIJ is designed to function impartially and independently,¹⁵ its task being to “take any investigative action conducive

¹² See Julia Wallace, *Four Senior Leaders Indicted, Will Be Tried*, CAMBODIA DAILY, 17 September 2010.

¹³ Rule 55(6). See also Rule 55(11), pursuant to which the parties are conferred a right to consult the original Case File.

¹⁴ Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/I, p. 2. See also Order issuing warnings under Rule 38, 25 February 2010, D367.

¹⁵ Establishment Law, Art. 25; Agreement, Art. 5. See also Rule 14(1).

to ascertaining the truth.”¹⁶ Unlike at the *ad hoc* tribunals and ICC, where the parties are responsible for conducting their respective investigations, at the ECCC the OCIJ is responsible for keeping a Case File, including a *written record of the investigation*.¹⁷ The OCIJ, in carrying out its investigation, did not and should have a particular agenda but rather should have conducted the investigation in an objective manner. Thus, the OCIJ would not contain a particular theory in its CaseMap that would reveal tactics or strategy designed to benefit a preselected party or parties. Yet if the OCIJ’s CaseMap *were* to contain such information, then it is respectfully submitted that the parties would be entitled to such data, since it would impact directly upon the *substantive* fair trial rights of the Accused through exposing weaknesses in the integrity of the Case File.¹⁸

2. Adding the OCIJ CaseMap to the Case File will facilitate the expeditious conduct of the proceedings

15. The OCIJ’s CaseMap must be added to the Case File in order to facilitate the expeditious conduct of the proceedings.¹⁹ Adding the OCIJ’s CaseMap to the Case File will allow the parties to examine how the OCIJ connected documents, individuals and events to specific issues arising in the case. If privy to this information, the parties will be able to focus on those specific documents, individuals and events when preparing questions for witnesses. This will facilitate, *inter alia*, focused questioning relevant to the issue being considered. Considering the inherent specificity of the ECCC, adding the OCIJ’s CaseMap to the Case File will significantly contribute to the expeditious conduct of the proceedings.

3. 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

16. The OCIJ’s CaseMap must be added to the Case File in order to protect Mr. IENG Sary’s right to adequate time and facilities for the preparation of his defence.²⁰ An incalculably large number of working hours will be saved through adding the OCIJ’s CaseMap to the

¹⁶ Rule 55(6).

¹⁷ *Id.*

¹⁸ See Article 252 of the Cambodian Criminal Procedure Code, which states that “rules and procedures which intend to guarantee the rights of the defense have a substantial nature.” See also Rule 76(7): “Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”

¹⁹ Establishment Law, Art. 33 new.

²⁰ See Agreement, Article 13(1); Establishment Law, Article 35 new; ICCPR, Article 14(3); UDHR, Article 11(1).

Case File, which will allow the parties to see the complete *written record of investigative action*, including how the OCIJ connected documents, facts and issues in the case.

17. Adding the OCIJ's CaseMap to the Case File will allow the parties to analyze the OCIJ's evaluation of the entire Case File systematically prior to and during trial. 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. It will be a critical tool to help ensure that the integrity of the investigation is maintained by helping ensure that all the material product of the two and a half year investigation in Case 002 is adduced at trial. In the inquisitorial context of the ECCC, where the judge's task is to search for the objective material truth, adding the OCIJ's CaseMap to the Case File will enhance the capability of the Defence to focus its questioning in the manner most conducive to assisting the Trial Chamber with this task. Considering the inherent specificity of the ECCC, adding the OCIJ's CaseMap to the Case File is necessary to protect Mr. IENG Sary's right to adequate time and facilities for the preparation of his defence.

C. 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

18. The Defence understands that former members of the OCIJ's technical staff may have transferred to the Trial Chamber to help develop the Trial Chamber's CaseMap. The Defence presumes that any such personnel have been retained in technical, as opposed to analytical (i.e. substantive legal and/or factual), roles and consequently that there has been no violation of applicable rules of professional conduct and other regulations which guard against conflicts of interest and breaches of confidentiality.²¹ If any transfer of personnel engaged in an analytical capacity were to occur between organs (or sections) of the ECCC (for example between the OCIJ and the Defence Support Section) this would obviously give rise to serious concerns regarding potential breaches of these rules. Whether engaged in an analytical or technical capacity, it is naturally to be expected that

²¹ See Cambodian Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia ("Cambodian Code of Ethics for Lawyers"), Art. 61; International Bar Association Code of Ethics, Rule 13. Rule 56(1); Practice Direction on Classification and Management of Case-related Information, Art.8; Undertaking signed by ECCC staff granted access to the Case File and Zyimage; Cambodian Code of Ethics for Lawyers, Art. 7; Cambodian Law on the Bar, Art. 58; International Bar Association Code of Ethics, Rule 14.

an individual who transfers between organs (or sections) of the ECCC would take with them institutional knowledge and memory accrued in his or her previous role; it is virtually inconceivable that such an individual would be able to compartmentalize this knowledge and memory and not apply it in his or her new position.

19. If the Trial Chamber is relying on any such institutional knowledge, or if the OCIJ's CaseMap has otherwise been provided to the Trial Chamber,²² this supports the Defence's position that the OCIJ's CaseMap should be considered part of the Case File.²³ 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. This would allow for judicial economy of resources and avoid duplication. The Trial Chamber would also benefit from the institutional knowledge gained by the technical staff and would be well placed to avoid any errors that the OCIJ may have made in developing its CaseMap. However, the OCIJ (as an independent judicial organ) cannot circumvent procedure designed to maintain the integrity of the Case File by providing *written records of investigative action*, for example its CaseMap, to the Trial Chamber without first ensuring that those records have been added to the Case File and notified to the parties.
20. Any concern that the OCIJ CaseMap is a confidential internal document that should not be added to the Case File would also be shown to be misplaced by the OCIJ's willingness to share its CaseMap with the Trial Chamber. The OCIJ's CaseMap is not a privileged document or communication. If the Trial Chamber did in fact receive the OCIJ's CaseMap, then consistent with the inquisitorial procedure in place, it should be added to the Case File and provided to the parties. No *written records of investigative action* should transfer from the OCIJ to the Trial Chamber without being disclosed to the parties. Simply put, if the Trial Chamber is entitled to the OCIJ's CaseMap, then so are the parties.²⁴


²² See *supra* para. 8.

²³ See *supra* Section IV.A.

²⁴ For the avoidance of doubt, the issue of whether the Defence is entitled to the OCIJ CaseMap at the trial stage is not settled. This is a matter of first impression. Although the OCIJ rejected the Defence's request for access to its CaseMap during the investigative stage and was warned for making duplicitous filings (as to which, see *supra* n.6), the circumstances have now changed. The Trial Chamber is now seized and is faced with the question of whether the parties are entitled to obtain the OCIJ's CaseMap at the trial stage for the first time.

WHEREFORE, for all the reasons stated herein, the Defence respectfully moves the Trial Chamber to place the OCIJ's CaseMap on the Case File.

Respectfully submitted,


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Signed in Phnom Penh, Kingdom of Cambodia on this **3rd** day of **June, 2011**