

no/n: 1 360

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC-OCIJ Party Filing: Defence for Ieng Thirith
Filed to: Office of the Co-Investigating Judges Original language: English
Date of Document: 12 February 2010

CLASSIFICATION

Classification of the document
suggested by the filing party: Public
Classification by Chamber:
Classification Status:
Review of Interim Classification:
Records Officer Name:
Signature:

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 15 / 02 / 2010
ម៉ោង (Time/Heure) : 14 : 03
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: Uch ARUN

**DEFENCE COMPLAINT OF AND REQUEST FOR REASONS FOR
LATE DISCLOSURE OF ROGATORY LETTER D231**

Filed by:

Defence for Ieng Thirith:
PHAT Pouv Seang
Diana ELLIS, QC

Distribution to:

Co-Investigating Judges:
YOU Bun Leng
Marcel Lemonde

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

Defence for other charged persons

**Civil Party Lawyers and
Unrepresented Civil Parties**

ឯកសារច្បាប់ដ៏ត្រឹមត្រូវតាមច្បាប់ដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ ការបញ្ជាក់ (Certified Date/Date de certification): 18 / 02 / 2010
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: Ratanak

I INTRODUCTION AND PETITION

1. The defence wishes to complain of the failure of the Office of the Co-Investigating Judges (OCIJ) to make timely disclosure of evidence which is central and of critical significance to the defence of Madame Ieng Thirith (Charged Person). In the circumstances, the defence respectfully requests the OCIJ to inform the defence of its reasons for the delay in adding the Rogatory Letter to the Case File which is a breach of the Charged Person's right to a fair and expeditious trial and to know the allegations she faces.

II SUMMARY OF RELEVANT FACTS

2. On 26 February 2009 the Co-Investigating Judges delegated a Rogatory Letter to several of the OCIJ's investigators.¹ The Letter specifies that the 'Rogatory Letter Completion Report (including any annexes) shall be submitted to us within four months of the date of this Rogatory Letter'.²
3. On 25 June 2009, after interviewing 25 witnesses and within the time limit described in the Rogatory Letter, the Completion Report was submitted to the Co-Investigating Judges.³ The Completion Report states:

On 25 June 2009, the missions designated in the Rogatory Letter were all completed, and no further investigations are required. The Report of the Execution of Rogatory Letter was done on 25 June 2009.
Accordingly, we wish to confirm that the Rogatory Letter referenced above has been completed. We wish to propose that each document attached to this report be placed in the Case File Number 002/19-09-2007-ECCC-OCIJ.⁴
4. On 11 November 2009 the OCIJ filed this Rogatory Letter, including annexes, with CMS. On 12 November 2009, the defence was notified of this Rogatory Letter.

¹ Rogatory Letter, 26 February 2009, Document No. D231.

² Rogatory Letter D231, p. 2.

³ Rogatory Letter Completion Report, 25 June 2009, Document No. D231/1.

⁴ Rogatory Letter Completion Report, p. 10-11.

III RELEVANT LEGAL STANDARD

5. The defence submits that there exists a general rule of international law that requires the prosecuting or investigative authority to disclose inculpatory and exculpatory evidence as soon as possible to the defence.
6. The Pre-Trial Chamber of the ECCC has previously decided on the importance of the OCIJ deciding on matters of importance to the defence. In the case against co-accused Nuon Chea, the Pre-Trial Chamber held:
 23. The Pre-Trial Chamber considers that with the passage of time, the failure of the Co-Investigating Judges to decide on [a] Request makes it impossible for the Charged Person to obtain the benefit which he sought. [...] The Pre-Trial Chamber notes that in the case of Boodhoo and others v. Attorney General of Trinidad and Tobago, the Privy Council found that “delay in producing a judgement would be capable of depriving an individual of his right to the protection of the law” in circumstances where “the parties were unable to obtain from the decision the benefit which they should”.
 24. The Pre-Trial Chamber finds that the failure of the Co-Investigating Judges to rule on the Request as soon as possible, in circumstances where a delay in making a decision deprives the Charged Person of the possibility of obtaining the benefit he seeks, amounts to a constructive refusal of the application [...].⁵
7. Whilst the underlying issue of that appeal was the failure of the OCIJ to timely address a request filed by the defence for co-accused Ieng Sary, the underlying complaint can be interpreted in analogy to this consideration by the Pre-Trial Chamber. Failure to disclose information available to the OCIJ and crucial for the determination of the defence for the Charged Person should be disclosed to the defence as soon as possible. The consequences of this failure similarly ‘deprives the Charged Person of the possibility of obtaining the benefit [s]he seeks’.
8. Whilst disclosure obligations at the other tribunals are different from the civil law system prevalent at the ECCC, an analogy can certainly be drawn between the

⁵ PTC, Decision on Ieng Sary’s Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, Document No. A189/I/8, paras. 23-24.

applicable rules insofar as the underlying importance of timely disclosure of inculpatory and exculpatory information to the defence is concerned.

III COMPLAINT

9. The OCIJ waited four and a half months before it disclosed Rogatory Letter D231 to the defence and other parties. This cannot be considered 'as soon as possible'. Further, no information available on the Case File provides clarification as to why the OCIJ took so long to add this specific information to the Case File. Obviously, the witness statements in this Rogatory Letter contain information that is, to say the least, crucial in the assessment of the charges against the Charged Person and the determination of the case against her. Prior knowledge of this information would have been of great assistance to the defence in the investigating stage of the proceedings. Further, prior knowledge of this information would have assisted greatly in ascertaining the truth about the Charged Person's role during the Democratic Kampuchea. The OCIJ's failure to disclose this information at an earlier stage has thus harmed the Charged Person's interests and fair trial rights guaranteed by both ECCC law and international human rights provisions.
10. By failing to disclose information to the Charged Person and her defence for over four months at a crucial stage of the investigations, and by only disclosing it at the very end of the investigations, the OCIJ have placed the defence in a disadvantageous position that has affected her right to a fair trial as guaranteed by Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), and Internal Rule 21(1)(a).
11. Since November 2009, the defence has been involved in the further extension of the Charged Person's provisional detention, several appeals against orders by the OCIJ and research for and drafting of several investigating requests. All these actions have been subject to strict deadlines. The defence submits that the OCIJ

acted unfairly against the Charged Person by waiting to disclose Rogatory Letter D231 until November 2009, the most hectic stage of the investigations.

IV CONCLUSION

12. The defence herewith complains of the OCIJ's conduct in failing to disclose crucial information to the defence at an earlier stage of the investigations. By only disclosing this Rogatory Letter to the defence in November 2009 the OCIJ has failed to act in accordance with its implied obligation to disclose inculpatory and exculpatory evidence as soon as possible to the defence, especially since disclosure finally only took place at the last stage of the investigations. Such failure has resulted in a breach of the Charged Person's right to a fair trial as guaranteed by Internal Rule 21 and Article 14(1) ICCPR.

13. The defence requests that the OCIJ without delay disclose the reasons for the delay in adding this specific Rogatory Letter to the Case File.

Party	Date	Name Lawyers	Place
Co-Lawyers for Ieng Thirith	12 February 2010	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh

