

Summary of IENG Sary's Response to Co-Prosecutors' Request to Place Additional Evidentiary Material on the Case File, 23 March 2010

Introduction

The Defence submitted a response to the Co-Prosecutor's Request to admit 849 documents and a database containing data on 3,983 S-21 confessions prepared by Dr. David Chandler. The Defence opposes this Request as it is prejudicial and violates the principle of equality of arms.

The Request: describes the material the OCP seeks to be added to the Case File and explains the relevance of each document in three Annexes. It states that as a whole, this material is relevant and has probative value in proving: 1) the commission of crimes; 2) the jurisdictional elements of the crimes and their contextual setting; and 3) the Charged Persons' authority, as well as participation in, responsibility for, and awareness of the crimes. It explains that the OCP does not believe the material contained in the database violates Article 15 of the Convention Against Torture, as the fields do not rely on any substantive content in the confessions which may have been obtained under torture. The OCP does not provide any explanation as to why it did not submit this material to the OCIJ at an earlier stage.

The Defence notes that the Annexes to the Request do not list the date each document was obtained by the OCP. It can be reasonably inferred that the OCP received some of the listed documents prior to submitting the Introductory Submission since some of the documents have smaller ERN numbers than those of the Introductory Submission, indicating that they were scanned earlier in time. Conversely, it can be reasonably inferred that some of the documents were obtained after the date the OCIJ became seized with the investigation, since some of the documents have ERN numbers which indicate that these documents were scanned very recently.

Summary of Arguments

The Defence submits that the Request must be denied, as the OCP: 1) has been in possession of much of the requested material for several years; 2) knew of the material's relevance throughout this period; 3) had a duty to provide all "material of evidentiary value" along with the Introductory Submission; and 4) failure to provide this material until this late date is prejudicial to the Defence. Furthermore, it appears that the OCP may have obtained some of this material through impermissible investigation, which is prejudicial to the Defence as it violates the equality of arms.

The OCP had a duty to provide all relevant material in its possession to the OCIJ at the time it submitted the Introductory Submission. Rule 53(2) requires that when the OCP submits an Introductory Submission, it "shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors..." The OCP violated Rule 53(2) by failing to submit this material to the OCIJ along with the Introductory Submission. This is prejudicial to the Defence and violates the equality of arms as the Defence is unable to make any use of the material for the purposes of filing

related investigative requests and cannot conduct its own investigations following the Request. Rule 21 requires the ECCC to “preserve a balance between the rights of the parties.” Therefore, the Request must be denied.

If the OCIJ does admit the Request, despite the prejudice it would cause to the Defence, each document must be individually examined for relevance. Some documents do not even purport to be relevant to Case 002, and were perhaps included in the Annexes inadvertently. Other documents do not deal with the time period at issue, while others do not appear relevant to the charges at issue.

Essence of Submission

The Request must be rejected as the OCP has been in possession of much of the requested material for several years, knowing of its relevance, yet the OCP violated its duty pursuant to Rule 53(2) to provide this material along with the Introductory Submission. Instead, it waited until the Defence would be able to make no use of the material for the purpose of filing investigative requests. This is prejudicial to the Defence. It further appears that the OCP may have acquired some of the material through impermissible investigations, which would violate the equality of arms. If the OCIJ simply accepts the OCP’s entire Request without examining each document, it will essentially be abdicating its role as the sole authority over the judicial investigation. This would endorse the OCP’s conducting of its own investigation and would violate the principle of the equality of arms.