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ក្រុមការណ៍ការពារក្តី អៀង សារី

ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់  
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IENG SARY DEFENCE TEAM  
EQUIPE DE DEFENSE DE IENG SARY

ថ្ងៃ ខែ ឆ្នាំ ថ្ងៃការបញ្ជាក់ (Certified Date /Date de certification):

11 / 02 / 2010 ANG Udom and Michael G. KARNAVAS

មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé  
du dossier: SAN N RADA

Co-Lawyers for IENG Sary  
10 February 2010

ឯកសារដើម

ORIGINAL DOCUMENT/DOCUMENT ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):

10 / FEB / 2010

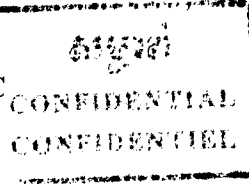
ម៉ោង (Time/Heure) : 09:00

មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé  
du dossier: P. Jay

To: Judge YOU Bunleng  
Judge Marcel LEMONDE  
Co-Investigating Judges

Re: Request to OCIJ as to whether, and to what extent, the Defence can conduct investigations

PUBLIC



11/02/2010

Your Honors:

Pursuant to your judicial functions we request that you clarify whether, and to what extent, the Defence of IENG Sary ("the Defence") can conduct investigations relevant to Case 002. This request for clarification is due to your letter to the NUON Chea Defence, dated 10 January 2008, where you stated that "Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties."<sup>1</sup> Further, you intimated in this letter that any intention of the NUON Chea Defence to locate potential defence witnesses may be in breach of both Cambodian law<sup>2</sup> and under the rules of the ECCC.<sup>3</sup>

The Defence wishes to conduct additional investigations, *inter alia*, due to its loss of confidence in the OCIJ to conduct an impartial and independent investigation. This lack of confidence in the OCIJ is due, in part, for the following reasons:

- The bias concerning investigators and legal officers within the OCIJ;<sup>4</sup> a matter which was not adjudicated upon as it was declared inadmissible.<sup>5</sup>
- The bias of Co-Investigating Judge Lemonde brought to light by the former Chief of the Intelligence and Analysis Unit of the OCIJ, Mr. Wayne Bastin.<sup>6</sup>

<sup>1</sup> Case of NUON Chea, 002/19-09-2007-ECCC-OCIJ, Office of the Co-Investigating Judges, Response to your letter dated 20 December 2007 concerning the conduct of our judicial investigation, A110/I, 10 January 2008.

<sup>2</sup> Article 51, Cambodian Law relating to the judiciary and criminal law and procedure applicable in the transitional period, 10 September 1992.

<sup>3</sup> Specifically referred to by the OCIJ were Internal Rules 35 and 38.

<sup>4</sup> Case of IENG Sary, 002/08-07-2009-ECCC-PTC, IENG Sary's Application for the Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges, 8 July 2009, 1, ERN: 00348412-00348440.

<sup>5</sup> Case of IENG Sary, 002/08-07-2009-ECCC-PTC, Decision on the Charged Person's Application for the Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, 3, ERN: 00378097-00378103.

<sup>6</sup> Case of IENG Sary, 002/09-10-2009-ECCC-PTC (01), Ieng Sary's Application to Disqualify Co-Investigating Judge Lemonde and Request for a Public Hearing, 9 October 2009, 1, ERN: 00386956-00386968. Case of IENG Sary, 002/11-12-2009-ECCC-PTC07, IENG Sary's Second Rule 34 Application to Disqualify Judge Marcel LEMONDE and Joinder to the IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing, 11 December 2009, 1, ERN: 00414160-00414179.

- The lack of co-operation of Co-Investigating Judge Lemonde to work with Co-Investigating Judge You Bunleng, in violation of the Agreement and Establishment Law.<sup>7</sup>
- Co-Investigating Judge Lemonde violating the confidentiality of the investigation.<sup>8</sup>
- Co-Investigating Judge Lemonde threatening witness safety.<sup>9</sup>
- The insistence of the OCIJ to accept evidence obtained by torture.<sup>10</sup>
- The refusal to explain the OCIJ's specific investigation methodology, including the collection and analysis of any exculpatory evidence.<sup>11</sup>
- Failing to be transparent over the qualifications and experience of your investigators.<sup>12</sup>
- The OCIJ's open suggestion of following the principle of "sufficiency".<sup>13</sup>
- The OCIJ's indication that their duty of impartiality does not impose a positive obligation to seek out exculpatory materials.<sup>14</sup>
- The OCIJ's treatment of Investigative Requests has not been competently actioned. For example the OCIJ's demand that Norodom Sihanouk present himself at the ECCC premises as opposed to proposing to hear his testimony at the Royal Palace appeared deliberately designed to ensure a negative result.
- The OCIJ's *ex parte* communication with the OCP.<sup>15</sup>
- The inability of the OCIJ to verify the accuracy of written records of interviews.<sup>16</sup>
- The use of datacoders/analysts to summarize written records of interviews without translation or legal qualifications.<sup>17</sup>
- The lack of competence and impartiality in appointed Demographics Expert.<sup>18</sup> An issue which was dismissed by the OCIJ.<sup>19</sup>

The ECCC is a domestic court established within the existing court structure of the national legal system of Cambodia. This has been confirmed by the Pre-Trial Chamber in its first decision.<sup>20</sup> There is nothing stated in Cambodian law specifically prohibiting the Defence

<sup>7</sup> *Case of IENG Sary*, 002/07-12-2009-ECCC-PTC (06), Ieng Sary's Rule 35 Application for Judge Marcel Lemonde's Disqualification, 7 December 2009, 1, ERN: 00411800-00411815.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Case of IENG Thirith*, 002/19-09-2007-ECCC-OCIJ, Order on Use of Statements which were or may have been obtained by Torture, 28 July 2009, D130/8, ERN: 00355926-00355933.

<sup>11</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ-D171, D130/7 & D130/7/2, 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 ("Response"), 11 December 2009, D171/5, ERN: 00414038-00414049.

<sup>12</sup> *Id.*

<sup>13</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Request for Investigative Action to seek exculpatory evidence on the SMD, 19 June 2009, D164/2, ERN: 00355530-00355539, para. 6.

<sup>14</sup> *Id.*, para. 15.

<sup>15</sup> *Case of IENG Sary*, 002/11-12-2009-ECCC/PTC(PTC 07), IENG Sary's Second Rule 34 Application to Disqualify Judge Marcel Lemonde and Joinder to IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and request for a public hearing, 11 December 2009, 1, ERN: 00414160-00414179, para. 1

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Request for Additional Demographics Expert, 22 July 2009, D140/2, ERN: 00355530-00355539.

<sup>19</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Order on Request for Additional Expert, 18 August 2009, D140/3, ERN: 00364629-00364633.

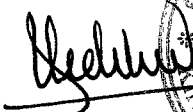

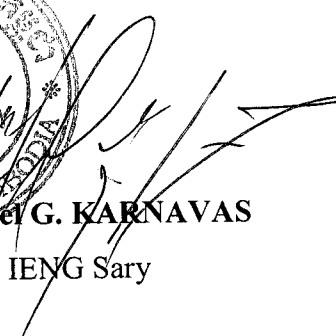
<sup>20</sup> The Chamber held that "for all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure." *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-

from conducting its own investigation. Article 121 of the Cambodian Criminal Procedure Code states that “Persons who participate in the judicial investigation, especially Prosecutors, judges, lawyers, court clerks, judicial police and military police officers, civil servants, experts, interpreters/translators, medical doctors and other persons mentioned in Art. 95 (Technical or Scientific Examination) of this Code, shall maintain professional confidentiality.”<sup>21</sup> Article 121 allows for the participation of the Defence in the judicial investigation as long as confidentiality of the investigation is kept. The Defence interprets the Cambodian Criminal Procedural Code positively in allowing the Defence to participate in the judicial investigation. Furthermore, there is nothing in the Internal Rules of the ECCC specifically prohibiting the Defence from conducting its own investigation.

For all the reasons stated above, we ask that you promptly reply to this request in the interests of clarity and specificity.

It is imperative the public, as well as the Defence, are aware of the correct procedure by which a criminal trial must be held. As such, this request is being filed as a public document and should be noticed to the public accordingly.

Respectfully submitted,




  
**ANG Udom**      **Michael G. KARNAVAS**  
 Co-Lawyers for Mr. IENG Sary

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OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias “Duch”, 3 December 2007, para. 19. (Emphasis added). See also *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 35), IENG Sary’s Appeal against the OCIJ’s Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/14/5, ERN: 00429213-00429253, paras. 7-24.

<sup>21</sup> Cambodian Criminal Procedure Code, Khmer-English Translation, First Publication September 2008, Art. 121.