

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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IENTG SARY'S MOTION FOR A HEARING ON THE CONDUCT OF THE JUDICIAL INVESTIGATION

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves the Trial Chamber to hold a hearing on the conduct of the judicial investigation. This Motion is made necessary because the Defence has repeatedly attempted to obtain information concerning the conduct of the judicial investigation and such information was not provided. The Defence has reason to believe that there were flaws in the judicial investigation and that the investigation may have been biased. Any flaws or bias in the judicial investigation will affect the material available to the Trial Chamber and the parties at trial. This is particularly true considering that the Defence was prohibited from conducting its own investigations at that time. If it is true, as has been alleged, that the judicial investigation focused on inculpatory evidence rather than equally seeking exculpatory evidence, the documents on the Case File will not present a clear picture as to the Accused’s guilt or innocence and will not allow the Judges to reach the material truth. Information concerning the conduct of the investigation is further necessary prior to the start of trial because without knowing what flaws existed or whether the investigation was biased, the Defence will not properly be able to challenge the credibility of evidence at trial – the Defence will be unaware of what weaknesses might exist in relation to the evidence. The Defence recognizes that Rule 76(7) states that “[s]ubject 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.” The Defence submits that in circumstances such as exist in the present case, this Rule cannot bar a hearing concerning the flaws and bias which may have existed in the judicial investigation. The Defence has had no recourse to adequately address these flaws and this bias until now. If a hearing is not held, the Defence will be left with no remedy to cure defects in the judicial investigation and the resulting violation of Mr. IENG Sary’s fair trial rights. The Defence requests that the Trial Chamber call former Co-Investigating Judge Marcel Lemonde, Co-Investigating Judge You Bunleng, former Chief of the Intelligence and Analysis Unit of the OCIJ Wayne Bastin, OCIJ Legal Officer David Boyle, OCIJ Investigator Stephen Heder, OCP Analyst Craig Etcheson and all others who may have information as to the conduct of the judicial investigation to give evidence prior to the start of the substantive trial.

**I. CLASSIFICATION OF THIS MOTION**

1. This Motion has been filed with a suggested classification of “Public.” Certain matters referred to herein are currently classified as confidential; however, the Defence submits that there is no reason that any material contained in this Motion should not be made

available publicly.<sup>1</sup> This Motion must be classified as Public for reasons of transparency. The public is entitled to scrutinize the proceedings and should be made aware of any flaws which occurred during the judicial investigation. Classifying this Motion as Confidential will only create the impression that the Judges believe there is something to hide. A Strictly Confidential Annex is attached which deals with one matter currently classified as “Strictly Confidential.” The Defence submits that this Annex, as well, should be classified as Public. The Defence will file a Request to Reclassify all documents related to the Strictly Confidential matter contained in the Annex as Public.

## II. APPLICABLE LAW

2. According to Article 31 of the Cambodian Constitution, “[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women’s and children’s rights.”<sup>2</sup> In accordance with this, Article 13(1) of the Agreement states that “[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing...”<sup>3</sup> Article 33 new of the Establishment Law contains a substantially similar provision.<sup>4</sup>

<sup>1</sup> For example, the Defence’s request for the OCIJ to provide it with an analytical table which would link each material fact to each relevant inculpatory or exculpatory piece of evidence, as well as to each element of the crimes charged and each constituent element of the modes of participation is classified as confidential, as is the OCIJ’s response. The Request and the OCIJ’s response do not contain any confidential information. *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Response to IENG Sary’s Request to Provide the Defence with an Analytical Table of the Evidence, 8 April 2010, A372/1, ERN: 00495269-00495269; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Response to IENG Sary’s Request to Conduct Audio/Video Recording of IENG Sary in the Detention Facility, 9 April 2010, A371/1, ERN: 00495263-00495264.

<sup>2</sup> 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999.

<sup>3</sup> Emphasis added. Article 14(1) of the International Covenant on Civil and Political Rights provides in relevant part, “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The fundamental human right of an accused to be tried before an independent and impartial tribunal is also recognized in other major human rights treaties. The 1948 Universal Declaration of Human Rights provides in Art. 10 that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him.” Art. 6(1) of the 1950 European Convention on Human Rights provides *inter alia* that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Art. 8(1) of the 1969 American Convention on Human Rights provides that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law.” Art. 7(1)(d) of the 1981 African Charter on Human and Peoples’ Rights provides that every person shall have the right to have his case tried “within a reasonable time by an impartial court or tribunal.”

<sup>4</sup> Article 33 new *inter alia* states that: “The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with

3. The right to a fair trial includes the right to be tried before a competent, independent and impartial tribunal. According to Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”), “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
4. The requirement of an independent and impartial tribunal requires that the judges who make up the Tribunal be independent and impartial. Article 128 of the Cambodian Constitution ensures this by stating that “[t]he Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.”<sup>6</sup> The Agreement and Establishment law confirm this. Both state that judges “shall be independent in the performance of their functions and shall not seek any instructions from any government or any other source.”<sup>7</sup>
5. This duty of impartiality is further set out in Article 2 of the ECCC Code of Judicial Ethics, which requires without exception that:
  1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.
  2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.<sup>8</sup>

### III. ARGUMENT

#### A. There is sufficient evidence to suggest that the judicial investigation was biased and otherwise flawed

6. Throughout the judicial investigation, the Defence was confronted with several issues which led it to conclude that the judicial investigation was flawed and biased. A full procedural history relating to these matters cannot be set out herein due to space limitations. The following matters, especially when considered cumulatively, indicate that flaws have occurred and bias seems to have existed. They warrant a full hearing on the conduct of the investigation.

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a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level. The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.”

<sup>6</sup> 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999.

<sup>7</sup> Agreement, Art. 3(3); Establishment Law, Art. 10 new (emphasis added).

<sup>8</sup> Adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, amended on 5 September 2008. *See also* Article 4 of the ICC Code of Judicial Ethics, adopted and entered into force on 9 March 2005, which describes the judges’ duty of impartiality in exactly the same terms.

- A. The OCIJ appears to have acted without due regard for Mr. IENG Sary's fundamental fair trial rights from the time it became seized with Mr. IENG Sary's case. In its first Provisional Detention Order, and without any warning to the parties that these matters would be addressed, the OCIJ decided that Mr. IENG Sary's amnesty and pardon and the principle of *ne bis in idem* would not bar his current prosecution.<sup>9</sup> The parties were not afforded the right to offer any input into these complicated issues before the OCIJ issued its decision. It appeared to the Defence that the OCIJ was attempting to dispense with these issues before the Defence could act.
- B. The OCIJ employed two overtly biased staff members:<sup>10</sup>
- Apparently without regard for its duty of absolute impartiality, the OCIJ employed David Boyle as a Legal Officer, despite certain biased statements Mr. Boyle made. For example, in 2005 Mr. Boyle stated:

The case of Ieng Sary is an example of the problems that will arise before the Cambodian court. Ieng Sary has been granted a constitutionally valid

<sup>9</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, 14 November 2007, C22, ERN: 00153253-00153260. The OCIJ made another decision in this Order which appears to have been made in order to reach a desired result, rather than because it was warranted by the available evidence. It determined that Mr. IENG Sary must be held in detention because of the risk: to public order, to his safety, to potential witnesses, and that he might flee. It made this decision despite the fact that Mr. IENG Sary had been living freely in Cambodia for years even though he knew that he might be a suspect at the ECCC, yet he did not flee, threaten public order or witnesses and suffered no threats to his safety.

<sup>10</sup> *See, e.g., Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning Potential Conflict of Interest, 10 January 2008, A121, ERN: 00157760-00157761; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Apparent Bias & Potential Existence of a Conflict of Interest of OCIJ Legal Officer David Boyle, A162, ERN: 00165542-00165547; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled "Request concerning the interview of Mr. IENG Sary on his conditions of detention on 2 May 2008," 24 April 2008, A121/II, ERN: 00185454-00185456, p. 2-3; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled "Request for information on 'the apparent bias and conflict of interest concerning MM S. Heder and D. Boyle,'" 26 May 2008, A121/III, ERN: 00193591; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC08), Appeal of Mr. IENG Sary against the OCIJ's Decision on the *Defence Request for Information Concerning the Apparent Bias & Potential Existence of a Conflict of Interest of OCIJ Legal Officer David Boyle*, 6 June 2008, A162/III/1, ERN: 00195028-00195035; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC08), Decision on IENG Sary's Appeal against Letter Concerning Request for Information Concerning Legal Officer David Boyle, 28 August 2008, A162/III/6, ERN: 00221204-00221208; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009, A252, ERN: 00282718-00282722; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled "Your Request for Information Concerning Mr. Stephen Heder", 29 May 2009, A252/2, ERN: 00335321-00335322; *Case of IENG Sary*, 002/08-07-2009-ECCC/PTC, IENG Sary's Application for 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; *Case of IENG Sary*, 002/08-07-2009-ECCC-PTC, Decision on the Charged Person's Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, 3, ERN: 00378097-00378103; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to Co-Prosecutors' Request for Appointment of Experts, 15 January 2010, D281/2, ERN: 00429181-00429187; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Co-Prosecutors' Request for Appointment of Experts, 23 February 2010, D281/3, ERN: 00464901-00464904; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Request to Limit the Scope of Duties of OCIJ Investigator Stephen Heder, 13 April 2010, D377, ERN: 00498513-00498520; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter Re: Request to Limit the Scope of Duties of OCIJ Investigator Stephen Heder, D377/1, ERN: 00505302.

pardon and immunity for certain crimes and for prosecution under the 1994 law. To what extent is this constitutionally valid amnesty and pardon applicable before the Khmer Rouge trial? This has been left to the court to decide. All these questions will be raised by the defense, *and should be dealt with beforehand in order to avoid that talented lawyers will slow trials down so much that three years will not be enough to finish. There are two possible avenues for partially resolving these issues. One would be for the judges immediately after having been nominated by the SCM [Supreme Council of Magistracy] to get together with prosecutors and investigating judges and work out exactly what is the applicable procedure for the courts. They cannot change the law, but they can work out what the law means.*<sup>11</sup>

It appears that Mr. Boyle likely influenced the OCIJ's handling of the amnesty and pardon and *ne bis in idem* issues in the Provisional Detention Order.

- The OCIJ employed Stephen Heder as an Investigator after Mr. Heder had worked for the OCP preparing its Introductory Submission against Mr. IENG Sary. In essence, Mr. Heder was tasked with drafting allegations against Mr. IENG Sary and then investigating these very same allegations. Mr. Heder may also have been employed by the CIA during the period relevant to the Indictment, which could have created a conflict of interest.<sup>12</sup> He was also one of the authors of SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE, which included Mr. IENG Sary as one of the "seven candidates."<sup>13</sup>

C. The OCIJ appointed an unqualified and potentially biased demographer as its supposedly impartial demographic expert<sup>14</sup> and denied repeated Defence requests to appoint an additional expert to counter this bias and lack of expertise.<sup>15</sup>

<sup>11</sup> Report from a conference held in Phnom Penh March 2-3, 2005 organized by FIDH, LICADHO and ADHOC, *International Criminal Court Programme: Articulation between the International Criminal Court and the Khmer Rouge Tribunal: the Place of Victims*, 3. B. David Boyle, The Legal Framework of the Khmer Rouge Tribunal, p. 18 (emphasis added), available at <http://www.vrwg.org/Publications/02/FIDHcambodge420ang.pdf>.

<sup>12</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009, A252, ERN: 00282718-00282722.

<sup>13</sup> STEPHEN HEDER & BRIAN TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE (2004).

<sup>14</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Expertise Order, 10 March 2009, D140, ERN: 00287168-00287172.

<sup>15</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Request for Additional Demographic Expert, 22 July 2009; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Additional Expert, 18 August 2009; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Request for the appointment of an additional demographic expert to re-examine the subject matter of the expert report submitted by Ms. Tabeau and Mr. They Kheam, 6 January 2010, D140/7, ERN: 00425270-00425285; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on IENG Sary's Request for Appointment of an Additional Demographic Expert, 23 February 2010, D140/8, ERN: 00464873-00464875.



- D. The OCIJ prohibited Mr. IENG Sary from visiting his wife in the Detention Facility, stating – without explanation – that “given the ongoing judicial investigation ... we are not planning any change in the conditions that currently apply for visits. Therefore, no meeting between IENG Thirith and your client is possible for the time being.”<sup>16</sup> The OCIJ’s decision was reversed on appeal. The Pre-Trial Chamber stated that it was unclear how prohibiting or limiting visits between Mr. IENG Sary and Mrs. IENG Thirith, who had been married for 57 years, would protect the judicial investigation.<sup>17</sup> The Pre-Trial Chamber found that the OCIJ’s decision was a coercive measure not strictly limited to the needs of the proceedings.<sup>18</sup>
- E. The OCIJ prohibited the Defence from conducting any of its own investigations during the judicial investigation. The OCIJ stated:

Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. ... The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action.<sup>19</sup>

This placed the Defence in an unequal position vis-à-vis the OCP, since the OCP had already investigated Case 002<sup>20</sup> for nearly a year before handing over the Case File to the OCIJ.<sup>21</sup> When the Defence attempted to clarify whether and to what extent it could conduct any investigations,<sup>22</sup> the OCIJ refused to provide a comprehensive response and instead issued a warning to the Defence.<sup>23</sup>

<sup>16</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Memorandum: Meetings between Ieng Sary and his Wife, 22 January 2008, A104/I, ERN: 00159511-00159511.

<sup>17</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC05), Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7, ERN: 00184951-00184956, paras. 19-20.

<sup>18</sup> *Id.*, paras. 15-20.

<sup>19</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Letter from the OCIJ to the NUON Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/I, ERN: 00157729-00157730, p. 2 (emphasis added).

<sup>20</sup> The OCP also investigated Case 001 and participated in the trial in Case 001, which shares a common crime base with Case 002. This further places the OCP and Defence in unequal positions.

<sup>21</sup> The OCP opened Case File 002 on 14 August 2006. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission 008, 18 July 2007, D3, p. 1.

<sup>22</sup> *See Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter from the Defence to the Co-Investigating Judges Requesting whether, and to what extent, the Defence can conduct its own investigations, 10 February 2010, D346, ERN: 00446993-00446995.

<sup>23</sup> *See Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Order issuing warnings under Rule 38, 25 February 2010, D367, ERN: 00478513-00478519. “It is apparent to the Co-Investigating Judges that the Defence for IENG Sary seeks to base their investigation communication on their repudiation of the civil law process wherein the judicial investigation is conducted solely by the investigating judge.... The Co-Investigating Judges hereby warn the lawyers for IENG Sary under Rule 38 of the Internal Rules that they are prohibited from conducting

- F. The OCIJ failed to comprehensively<sup>24</sup> disclose its investigative methodology, including:
- a. the procedural law applied by the OCIJ and its Investigators;
  - b. the OCIJ's planning and overall strategy of the judicial investigation;
  - c. the qualifications and experience of Investigators and their Standard Operating Procedures; and
  - d. the collection and analysis of exculpatory evidence by the OCIJ, encompassing information on alternative theories of the events set out in the Introductory Submission which were considered by the OCIJ and information on how these alternative theories are translated into systems for identifying, collecting and analyzing exculpatory evidence.<sup>25</sup> In failing to provide this information, the OCIJ acted in complete disregard for legitimate Defence concerns about the OCIJ's conduct of the investigation.<sup>26</sup>
- G. The OCIJ failed to disclose its investigative methodology related to the way in which it identifies what material has been obtained by torture or derived from such material and what use it makes of such information, despite Defence requests for such information.<sup>27</sup> The Defence was concerned because the OCIJ stated that it might rely on torture tainted evidence in certain situations.<sup>28</sup> In response to Defence requests to clarify the OCIJ's use of torture-tainted evidence, the OCIJ stated:

a full assessment of such evidence cannot be conducted '*until the end of the judicial investigation, when the case file is deemed complete*'. It is only when each piece of direct or derivative evidence that we have identified as raising an issue of torture has been assessed, on a case by case basis, after the end of

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their own investigations and any breach of this prohibition may result in the application of sanctions against them." *Id.*, paras. 8-9.

<sup>24</sup> The OCIJ did eventually respond to the Defence's request for such information, but the response was too vague and general to be of use to the Defence. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Third Request for Investigative Action, 21 May 2009, D171, ERN: 00330819-00330834 ("Third Investigative Request"); *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC29), IENG Sary's Appeal Against the OCIJ's Constructive Denial of *IENG Sary's Third Investigative Request*, 19 October 2009, D171/4/1, ERN: 00384821-00384843.

<sup>25</sup> This information was requested by the Defence in its Third Investigative Request. This filing was later joined by the NUON Chea Defence and the KHIEU Samphan Defence. *See Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Notice of Joinder to IENG Sary's Third Request for Investigative Action, 9 June 2009, D171/2, ERN: 00337488-00337489; *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ, Notice of Adoption of IENG Sary's Third Request for Investigative Action, Rule 55-10, 24 August 2009, D171/3, ERN: 00379332-00379333.

<sup>26</sup> *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 29), IENG Sary's Appeal Against the OCIJ's Constructive Denial of *IENG Sary's Third Investigative Request*, 19 October 2009, D171/4/1, ERN: 00384821-00384843; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 29), IENG Sary's Appeal Against the OCIJ's Constructive Denial of IENG Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained Through Torture, 19 November 2009, D130/7/3/1, ERN: 00399297-00399327.

<sup>27</sup> *See, e.g., Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 17 July 2009, D130/7, ERN: 00352184-00352185; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 7 August 2009, D/130/7/21, ERN: 00360855-00360856.

<sup>28</sup> *See 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, paras. 23-28.



the judicial investigation, that *the Defence requests can be satisfied in the text of the Closing Order.*<sup>29</sup>

The OCIJ, however, did not satisfy the Defence requests in the text of the Closing Order. In fact, the Closing Order relied on torture tainted evidence<sup>30</sup> without any explanation, despite the Pre-Trial Chamber's affirmation that:

Notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order, Article 15 of the [Torture Convention] is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture.<sup>31</sup>

H. According to the former Chief of the Intelligence and Analysis Unit of the OCIJ, Mr. Wayne Bastin,<sup>32</sup> Judge Lemonde declared to the international OCIJ investigators that he **"would prefer that we find more inculpatory evidence than exculpatory evidence."**<sup>33</sup> This meeting took place without the presence of the Cambodian Co-Investigating Judge You Bunleng or any national OCIJ investigators.<sup>34</sup> Notably, Judge

<sup>29</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from OCIJ Re: NUON Chea's Fifteenth Request for Investigative Action; and Related Letters from IENG Sary's Lawyers Concerning Evidence Obtained through Torture, 30 October 2009, D130/11/2, ERN: 00398434-00398436, p. 3 (emphasis in original).

<sup>30</sup> For instance, paragraph 1188 of the Closing Order cites a confession by Penh Thuok, alias Von Vet, to support an assertion that it "appears that Khieu Samphan witnessed the arrest of Vorn Vet on 2 November 1978." *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246, para. 1188. Furthermore, it is clear that the OCIJ relies upon several secondary sources such as books by David Chandler and Steve Heder which rely on confessions for the truth of their contents. Footnotes 37-39 of the Closing Order, for example, rely upon DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 63-64, 67-69, 191, 201-02 (1999). These pages of BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT rely upon confessions from Siet Chhae, Chou Chet, Chhim Samauk, Kheang Sim Hon, Im Naen, Som Chea, Vorn Vet, Keo Moni, Kol Thai, and Keo Meas. As another example, footnotes 41 and 42 of the Closing Order cite STEVE HEDER, CAMBODIAN COMMUNISM AND THE VIETNAMESE MODEL 88, 92, 109-10 (White Lotus Press 2004). These pages of Heder's book rely on confessions by Saom Chea, Bou Phat, Suo Keum An, Tauch Chaem, Meah Chhuon, Kae San, and Kung Sophal.

<sup>31</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC31), Decision on Admissibility of IENG Sary's Appeal against the OCIJ's Constructive Denial of IENG Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained through Torture, 10 May 2010, D130/7/3/5, ERN: 00512912-00512924, para. 38 (emphasis added).

<sup>32</sup> Mr. Bastin is currently serving as a Police Officer in Australia. He has 31 years of service, mostly in the areas of Organized Crime and Homicide, where his major role is that of an Intelligence Manager. He has previously served for 12 months with the International Criminal Tribunal for Rwanda as an Analyst/Investigator, and has spent 12 months with the Special Court for Sierra Leone where he was Chief of the Intelligence Unit. He was also a senior Investigator with the U.N. Independent Special Commission of Inquiry for Timor Leste in 2006, and was responsible for establishing the Intel Unit at the ECCC in 2007. He returned to the ECCC in 2008 and served as Chief of the Intelligence and Analysis Unit.

<sup>33</sup> See *Case of IENG Sary*, 002/09-10-2009-ECCC/PTC(01), IENG Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, 9 October 2009, 1, ERN: 00386956-00386968, opening, Annex 1.

<sup>34</sup> *Id.*

Lemonde never denied that he made such a statement, but merely claimed that he could not remember doing so and if he made it, it would have been made in jest.<sup>35</sup>

- I. Judge Lemonde has also demonstrated bias and partiality in another instance,<sup>36</sup> calling into question his ethical behavior and fitness in carrying out the functions of his position as mandated by the accepted practices of judicial conduct.<sup>37</sup>
- J. The OCIJ demonstrated a lack of concern for witness safety, which it jeopardized through:
- allowing members of a film crew to view a confidential witness database;<sup>40</sup>
  - giving a confidential document containing S-21 hierarchy to this film crew;<sup>41</sup>
  - allowing the film crew to secretly tape insider witness interviews without the witnesses' knowledge or consent;<sup>42</sup>
  - allowing members of the OCIJ without special training to have access to the insider witness database;<sup>43</sup> and
  - ignoring a claim of alleged intimidation of potential witnesses rather than following up with these complaints.<sup>44</sup>
- K. The OCIJ employed translators without legal qualifications to summarize witness statements.<sup>45</sup> This may have led to vital information being excluded unwittingly from such summaries.
- L. The OCIJ refused to reissue summonses and to put forth the necessary effort in enforcing the summonses to several potential witnesses, despite the fact that Judge

<sup>35</sup> *Case of IENG Sary*, 002/09-10-2009-ECCC/PTC(01), Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of IENG Sary and KHIEU Samphan, 5 November 2009, 4, ERN: 00399405-00399416, para. 8.

<sup>36</sup> See Strictly Confidential Annex.

<sup>37</sup> The Defence is in the process of exploring the possibilities of formally filing an ethical complaint against Judge Lemonde.

<sup>40</sup> See *Case of IENG Sary*, 002/11-12-2009-ECCC/PTC(07), 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, 1, ERN: 00414160-00414179, para. 1(c), Annex 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, para. 1(d), Annex 1.

<sup>44</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OIJ, Request for Information Concerning Complaint Made by Potential Witnesses, 1 March 2020, A363, ERN: 00482726-00482727.

<sup>45</sup> *Case of IENG Sary*, 002/11-12-2009-ECCC/PTC(07), 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, 1, ERN: 00414160-00414179, para. 1(a), Annex 1.



Lemonde recognized that these officials are likely to be able to supply the Court with relevant information.<sup>46</sup>

- M. The OCIJ conducted its investigation with the mistaken belief that that it could rely on a “principle of sufficiency.” It stated, “The logic underpinning a criminal investigation is that the principle of sufficiency of evidence outweighs that of exhaustiveness: an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person.”<sup>47</sup> The fallacy of this position was explained by the Pre-Trial Chamber:

the Co-Investigating Judges have a duty, pursuant to Internal Rule 55(5), to investigate exculpatory evidence. To fulfil this obligation, the Co-Investigating Judges have to review documents or other materials when there is a prima facie reason to believe that they may contain exculpatory evidence. This review shall be undertaken before the Co-Investigation Judges decide to close their investigation, regardless of whether the Co-Investigating Judges might have, or not have, sufficient evidence to send the case to trial. In this respect, the Internal Rules indicate that the Co-Investigating Judges first have to conclude their investigation, which means that they have accomplished all the acts they deem necessary to ascertain the truth in relation to the facts set out in the Introductory and Supplementary Submissions, before assessing whether the charges are sufficient to send the Charged Person to trial of whether they shall dismiss the case. ... By reasoning that ‘an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person’, the Co-Investigating Judges have overlooked this preliminary obligation to first conclude their investigation before assessing whether the case shall go to trial or not. This first step is necessary to ensure that the Co-Investigating Judges have fulfilled their obligation to seek and consider exculpatory evidence, which shall equally be sent to the Trial Chamber. By incorrectly interpreting their obligation to seek exculpatory evidence, the Pre-Trial Chamber finds that the Co-Investigating Judges have made an error in law.<sup>48</sup>

The OCIJ continued to follow this principle of sufficiency even after this explanation by the Pre-Trial Chamber. For example, Judge Lemonde admitted that the investigation ended even though relevant evidence was not obtained. He stated at a press conference:

<sup>46</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Order on Nuon Chea and Ieng Sary’s Request to Summon Witnesses, 13 January 2010, D314, ERN: 00446652-00446658; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Note by Co-Investigating Judge Lemonde regarding the Order on Nuon Chea and Ieng Sary’s Request to Summon Witnesses, 11 January 2010, D301, ERN: 00455446-00455449.

<sup>47</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2, ERN: 00343271-00343278, para. 6.

<sup>48</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, ERN: 00384466-00384483, paras. 35-37 (emphasis added).

We were unable to obtain everything we wanted. We were unable to hear certain witnesses. This is no scoop. We sometimes had problems in obtaining answers from governments to which we were asking questions.<sup>49</sup>

The Defence requested Judge Lemonde to provide clarification and further disclosure concerning these remarks,<sup>50</sup> but the OCIJ returned the Defence request, claiming it was no longer seized with the case.<sup>51</sup>

- N. The OCIJ did not allow the Defence to be present during Mr. IENG Sary's psychiatric evaluation as he had requested,<sup>52</sup> although this would have allowed the Defence to determine whether it was necessary to seek additional expertise.
- O. The OCIJ did not address jurisdictional challenges such as the applicability of genocide, crimes against humanity, grave breaches of the Geneva Conventions, and command responsibility until the issuance of the Closing Order,<sup>53</sup> despite the fact that a decision on these issues could have terminated proceedings. This indicates that the OCIJ never intended to seriously consider these challenges or it would have determined them immediately.
- P. The OCIJ failed to decide on the applicability of JCE until almost the end of the investigation.<sup>54</sup> It is thus questionable whether the existence of a common plan could have been properly investigated during the judicial investigation.

<sup>49</sup> Julia Wallace, *Four Senior KR Leaders Indicted, Will Be Tried*, THE CAMBODIA DAILY, 17 September 2010.

<sup>50</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Request to be Provided with Clarification and Disclosure Regarding International Co-Investigating Judge Lemonde's Remarks at the OCIJ Press Conference on 16 September 2010 Announcing the Issue of the Closing Order, 29 September 2010, 1.3, ERN: 00612411-00612421.

<sup>51</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Notice of Deficient Filing, 1 October 2010.

<sup>52</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Re: Request of the Co-Lawyers for Khieu Samphan for the Placing of a Document on the Case File, 21 October 2009, D219/3, ERN: 00390852, para. 2: "Mr. IENG Sary further wishes to have one of his co-lawyers present at his upcoming psychiatric assessment in order to ensure that this right is respected"; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Psychiatric Expertise, 6 October 2009, A305, ERN: 00386397-00386398.

<sup>53</sup> Instead, the OCIJ repeatedly stated that it could ignore jurisdictional challenges at the investigation stage, since it "is not required, and indeed, will not pre-judge any legal characterisation of the facts until the Closing Order." *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on IENG Sary's Motion Against the Application of Command Responsibility, 19 March 2010, D345/4, ERN: 00487605-00487608, para. 11. See also *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Extension of Page Limit, 12 February 2010, D345/1, ERN: 00452734-00452736, para. 5; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Civil Party Request for Investigative Action concerning Enforced Disappearance, 21 December 2009, D180/6, ERN: 00417295-00417299, para. 7; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, 28 December 2009, D240/3, ERN: 00421137-00421140, para. 4; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations, 18 December 2009, D268/2, ERN: 00417249-00417254, para. 9.

<sup>54</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, ERN: 00411047-00411056; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Notice of Conclusion of Judicial Investigation, 14 January 2010, D317, ERN: 00428885-00428886.

- Q. The OCIJ rejected Defence Requests without providing reasoning or logical explanation,<sup>55</sup> and it issued warnings to the Defence for making valid requests, rather than responding to such requests on the merits.<sup>56</sup>
- R. The OCIJ refused to provide the parties with a copy of its CaseMap after the close of its investigation. Such a copy would have linked each material fact to each relevant inculpatory or exculpatory piece of evidence, as well as to each element of the crimes charged and each constituent element of the forms of participation. This would have been the clearest method by which all parties could have evaluated whether the OCIJ had thoroughly investigated and analyzed all exculpatory evidence. It would also have ensured that the OCIJ set out the material facts in sufficient detail, thereby avoiding some of the problems the OCIJ encountered with the *Duch* Closing Order.<sup>57</sup>
- S. The OCIJ refused to allow the Defence to record its meetings with Mr. IENG Sary for the benefit of Mr. IENG Sary's international Co-Counsel.<sup>58</sup> The OCIJ's sole reason for this refusal was that the Agreement, Establishment Law, and ICCPR did not explicitly state that such recordings are permitted!<sup>59</sup> This was overturned on appeal.<sup>60</sup>
- T. The OCIJ appears to have treated requests for evidence to be placed on the Case differently depending on whether such evidence was tendered by the OCP or one of the Defence teams. For example, an OCP request to add 21 books to the Case File was granted in full within one month, without reasons or reference to the applicable legal standard.<sup>61</sup> The OCIJ also admitted another OCP request to place 11 books on the Case

<sup>55</sup> See e.g. *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Response to IENG Sary's Request to Provide the Defence with an Analytical Table of the Evidence, 8 April 2010, A372/1, ERN: 00495269-00495269; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Response to IENG Sary's Request to Conduct Audio/Video Recording of IENG Sary in the Detention Facility, 9 April 2010, A371/1, ERN: 00495263-00495264; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter to the OCIJ from the IENG Sary: Your letter responding to our request to limit the scope of duties of OCIJ Investigator Stephen Heder, 4 May 2010, D377/2, ERN: 00507782-00507783.

<sup>56</sup> See, e.g., *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Order Issuing Warnings under Rule 38, 25 February 2010, D367, ERN: 00478513-00478519.

<sup>57</sup> See *Case of KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal against the Closing Order Indicting KAING Guek Eav alias "Duch," 5 December 2008, D99/3/42, ERN: 00249846-00249887, paras. 56-57.

<sup>58</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Response to IENG Sary's Request to Conduct Audio/Video Recording of IENG Sary in the Detention Facility, 9 April 2010, A371/1, ERN: 00495263-00495264.

<sup>59</sup> *Id.*, p. 1.

<sup>60</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC64), Decision on IENG Sary's Appeal against the Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, ERN: 00531173-00531191.

<sup>61</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Your Request for Admission of Books Regarding Democratic Kampuchea Written by Witnesses and Experts, 23 October 2009, D222/1, ERN: 00392330-00392330.



File.<sup>62</sup> The OCIJ rejected<sup>63</sup> a request from the Nuon Chea Defence<sup>64</sup> to add one book to the Case File.

- U. The OCIJ admitted in the Closing Order that there had been a disagreement between the Co-Investigating Judges as to whether Article 3 new of the Establishment Law could be applied, and the Co-Investigating Judges decided to apply Article 3 new anyway,<sup>65</sup> in violation of the constitutional principle of *in dubio pro reo*.<sup>66</sup> The Co-Investigating Judges similarly stated that they could not determine whether the principle of *ne bis in idem* prohibits Mr. IENG Sary's current prosecution because "a great deal still remains unclear" concerning the 1979 trial of Mr. IENG Sary.<sup>67</sup> The Co-Investigating Judges thus decided to leave the matter to the Trial Chamber.<sup>68</sup>

**B. A biased and flawed investigation affects Mr. IENG Sary's right to a fair trial**

7. Mr. IENG Sary has a right to a fair trial conducted by a competent, independent, and impartial tribunal. If the judicial investigation was biased or otherwise flawed and efforts are not made to correct these flaws before proceeding to trial, Mr. IENG Sary's right to a fair trial will be violated. Even if the trial itself is conducted with complete independence and impartiality, if it relies upon the products of a biased and flawed judicial investigation, it can never be completely independent or impartial.
8. Flaws and bias in the judicial investigation could not be corrected by the fact that the Defence was entitled to submit investigative requests to the OCIJ. Bias can affect the way in which investigations are conducted, including how seriously Defence requests were pursued. The Defence was prohibited from conducting its own investigations and so could not uncover and place material on the Case File which might counteract biased or flawed material.
9. Bias in the investigation furthermore cannot be disregarded by stating that reports of bias are not credible. When the Defence attempted to disqualify Judge Lemonde for bias after he encouraged his investigators to seek more inculpatory rather than exculpatory evidence, the Pre-Trial Chamber found that Mr. Bastin's statement in support was "not

<sup>62</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Order on Co-Prosecutors' Request to Place Additional Evidentiary Material on the Case File, 13 January 2010, D313/1, ERN: 00428802-00428805.

<sup>63</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Order on NUON Chea's Eighteenth Request for Investigative Action, 17 February 2010, D273/2, ERN: 00456261-00456264.

<sup>64</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Eighteenth Request for Investigative Action, 10 December 2009, D273, ERN: 00414350-00414354.

<sup>65</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246, para. 1574.

<sup>66</sup> 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999, Art. 38.

<sup>67</sup> Closing Order, para. 1332.

<sup>68</sup> *Id.*, para. 1333.



very strong.”<sup>69</sup> This was in part because the statement was not notarized and no verification of Mr. Bastin’s identity was made at the time his statement was taken.<sup>70</sup> The Defence notes that a later statement made by Mr. Bastin concerning the OCP’s *ex parte* communication with the OCIJ was accorded more weight by the Pre-Trial Chamber, and it later proved to be correct.<sup>71</sup> Holding a hearing to determine whether flaws and bias existed in the judicial investigation and taking testimony from Mr. Bastin and others would be the best way to determine what Judge Lemonde said and meant.

**C. A biased and flawed investigation cannot be cured by the Closing Order**

10. Rule 76(7) states, “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.” However, the Closing Order cannot cure all procedural defects in the judicial investigation because the Defence had no remedy during the investigation to address these defects.
11. The Pre-Trial Chamber only had very limited jurisdiction to hear Defence appeals during the judicial investigation.<sup>72</sup> Many issues relating to the judicial investigation, therefore, were only decided upon by the very body that the Defence was attempting to demonstrate was acting with bias or in an otherwise flawed manner. The Closing Order furthermore cannot be considered to cure all procedural defects since the Defence was only authorized to appeal jurisdictional issues raised by the Closing Order.<sup>73</sup> The Defence was not allowed to appeal other issues such as the Closing Order’s use of torture tainted evidence.
12. Applying Rule 76(7) to bar the Defence from raising issues which occurred before the issuance of the Closing Order would violate Mr. IENG Sary’s fundamental fair trial rights, since he had no means to adequately address defects in the judicial investigation until now. The Rules must always be interpreted to safeguard the interests of the

<sup>69</sup> *Case of IENG Sary*, 002/09-10-2009-ECCC/OCIJ(PTC01), Decision on IENG Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, 7, ERN: 00407716-00407724, para. 23.

<sup>70</sup> *Id.*, para. 20.

<sup>71</sup> *See Case of IENG Sary*, 002/14-12-2009-ECCC/PTC(08), Transcript, 17 February 2011, 22, ERN: 00649417-00649434.

<sup>72</sup> *See* Rule 74(3) which limits the Pre-Trial Chamber’s jurisdiction to hear Defence appeals, while Rule 74(2) allows the Pre-Trial Chamber to exercise jurisdiction over any OCP appeal. Note, however, that the Pre-Trial Chamber did occasionally find the Rule 21 required it to hear certain appeals which it would otherwise not have jurisdiction to hear in order to protect the Accused’s fundamental fair trial rights. *See, e.g., Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC64), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, ERN: 00531173-00531191, para. 18.

<sup>73</sup> *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 75), Decision on IENG Sary’s Expedited Request for Extension of Page Limit to Appeal the Jurisdictional Issues Raised by the Closing Order, 1 October 2010, D427/1/3, ERN: 00611380-00611383, para. 10.



