

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA  
BEFORE THE PRE- TRIAL CHAMBER**

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**STATEMENT OF CO-LAWYERS FOR CIVIL PARTIES ON IENG SARY'S  
APPEAL AGAINST THE OCIJ ORDER ON BREACH OF CONFIDENTIALITY  
OF THE JUDICIAL INVESTIGATION**

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## I. PROCEDURAL AND FACTUAL BACKGROUND

1. On 3 March 2009, the Office of the Co-Investigating Judges (“OCIJ”) issued an Order on Breach of Confidentiality of the Judicial Investigation<sup>1</sup> (“Order”) in which it directed the Defense,
  - (i) To cease posting documents/information related to the judicial investigation on their website other than those being published on the ECCC website;
  - (ii) To remove the offending content within 48 hours from their website.
2. On 10 March 2009, the Defense for IENG Sary filed their Appeal against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation (“Appeal”) in which they demand vacation of the Order<sup>2</sup>.

## II. SUMMARY OF ARGUMENT

3. Documents which do not affect the rights and interests of the parties are not encompassed within the principle of confidentiality.
4. Once declared ‘public’ a document remains ‘public’ and can be published by any party regardless if it is published on the Court’s homepage or not.

## III. ARGUMENT

5. The discussion on the transparency of the Court is very crucial and fundamental and the OCIJ Order affects Civil Parties and their Co-Lawyers as well.
6. Co-Lawyers for Civil Parties suffer the same experiences as the Defense as it pertains to:

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<sup>1</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Doc.No. D138, Order on Breach of Confidentiality of the Judicial Investigations, 3 March 2009.

<sup>2</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Doc.No. D138/1/1, Ieng Sary’s Appeal against the OCIJ Order on Breach of Confidentiality of the Judicial Investigations, 10 March 2009.

- (i) the long time between filing of a document and notification, and
- (ii) the – not understandable- selectiveness of documents being published on the Court’s website.

7. To name only one example, on 16 June 2008, Co-Lawyers for Civil Parties filed ‘General Observations’ on Civil Parties’ rights.<sup>3</sup> Although we repeatedly requested the publication of this document, it was not made available to the public until today. But, surprisingly the decision by the Pre-Trial Chamber on these ‘General Observations’<sup>4</sup> was promptly published on the website of the Court. This policy is simply not comprehensible or justified at all. Co-Lawyers for Civil Parties note that the concerned document contains complaints of discriminatory measures against Civil Parties by the Court.
8. Rule 56 of the Internal Rules (“IR”) states, that the judicial investigations are not to be conducted in public, but the *telos* of this limitation of publicity is stated in the same Rule: “In order to preserve the rights and interests of the parties [...]”. Hence, this Rule as well as the corresponding exceptions to it, should be interpreted in a teleological manner.
9. Also, in other Civil Law jurisdictions the confidentiality of investigations serve a specific purpose, and is interpreted accordingly. In Germany the principle is to guarantee, that the investigations are not compromised and that the personal, social and professional protection requirements of the charged person are met.<sup>5</sup> In France “[t]he secrecy of the early stages of the criminal procedure means that investigations can be carried out without prior communications taking place between accomplices, relevant evidence being destroyed and pressure being placed on witnesses. It is claimed that it protects the presumption of innocence, by

<sup>3</sup> *Case against Ieng Sary*, Civil Party Co-Lawyers’ General Observations, 16 June 2008, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 03), Doc. C22/I/38.

<sup>4</sup> *Case against Ieng Sary*, Decision of Admissibility of Civil Party General Observations, 24 June 2008, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC03), Doc. C22/I/41.

<sup>5</sup> Bundesverfassungsgericht (Vorprüfungsausschuß), Beschluss 08.11.1983- 2 BvR 1138/83, in NSTz 1984, S. 228; Oberlandesgericht Braunschweig, Urteil vom 24.10.1974- 1 U 55/73, in NJW 1975, S. 651 (652); See with regard to media: Christian-Alexander Neuling, „Strafjustiz und Medien – mediale Öffentlichkeit oder „justizielle Schweigepflicht“ im Ermittlungsverfahren?“, Onlinezeitschrift fuer höchstrichterliche Rechtsprechung im Strafrecht, HRRS 2006, page 97.

preventing the media from declaring guilt before a court has reached its judgement. [...]In recent years it has been accepted that too great an emphasis on secrecy during the judicial investigation can lead to an abuse of power, since it places the suspect in a very vulnerable position.”<sup>6</sup>

10. In light of these purposes, Co-Lawyers for Civil Parties note that confidentiality is not an end in itself. The reason for confidentiality is the protection of parties’ rights and interests. If, however, any document or information does not affect those rights and interests, the documents/information must be public.
11. The prosecution’s interest is to conduct investigations without any potential obstruction, which includes that witnesses and other evidence cannot be influenced, weakened nor destroyed and that the investigations are not obstructed.
12. The Charged Person has the right to be protected from public exposure and his/her guaranteed right to presumption of innocence must be upheld.
13. Civil Parties have the interest to be protected from the public and to give their statements in a safe atmosphere.
14. According to Rule 56 (2) IR, it is the Co-Investigating Judges who decide whether an exception to the confidentiality of the judicial investigations can and should be made in order to keep the public informed. Therefore, Co-Lawyers for Civil Parties suggest that OCIJ should execute its discretion in a manner according to the aims and whole purpose of IR Rule 56 instead of declaring the whole case as confidential.
15. Hence, those documents/information that do not affect the rights and interest of any party must be made available to the public as soon as possible and posted on the Court’s website to enhance the transparency of the proceedings and to keep the public informed about the work of the Court.
16. Especially, where there are only legal matters and arguments exchanged, there is no reason whatsoever to not publish them, except to conceal the work of the ECCC. The confidentiality of the judicial investigation should not lead to the secrecy as to the legal arguments in front of the Court and the proceedings thereof.

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<sup>6</sup> Catherine Elliott, French criminal law, Portland (2001), p. 14, 16.

17. Co-Lawyers for Civil Parties note that documents which are, in part, confidential already have been published on the Court's homepage in a redacted version which shows that it is possible even to publish documents that are in part confidential<sup>7</sup>.
18. The same policy, of course, should apply, if a document does affect rights or privacy of a party, and if the concerned party waives his or her right based on an informed decision, then, grounds for confidentiality no longer exist and the document can and must be declared 'public'.
19. When executing the discretion concerning the classification of documents, according to Art. 3.12 of the Practice Direction on filing documents.<sup>8</sup> ("PD") the OCIJ and PTC should act pursuant to the above mentioned aim of confidentiality and take into account the classification of the filing party. Where the filing party is the only one whose rights and interest are affected by the document, their proposal as to the classification of that document should be binding. Until now, however, the criteria on classification remain unclear and non-transparent.
20. Co-Lawyers for Civil Parties further submit that a document that has been classified by Judges as 'public' remains, of course, public and does not become again confidential, only, because Public Affairs do not wish to publish it on the Court's website. Public Affairs does not have the authority on its own to decide which documents are to be published and which documents are not.
21. Furthermore, Co-Lawyers for Civil Parties suggest, that all documents which are declared as 'public' (or where a confidential document is encompassed by a public – redacted- version), should be published on the ECCC website. However, Public Affairs seems to be selecting which documents it wishes to publish. If they do not publish all those documents on the homepage of the Court, which are declared as 'public,' it is the right of the parties to publish any of those documents.

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<sup>7</sup> See *Case of Ieng Sary*, Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the OCIJ Order on Extension of Provisional Detention [Redacted], 002/19-09-2007-ECCC/OCIJ, Doc. No. D22/5/6 published on 2 February 2009.

<sup>8</sup> Practice Direction ECCC/01/2007/Rev.3 on Filing Documents before the ECCC.

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Signed in Phnom Penh on 26 March 2009.