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

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**IENG SARY'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO THE
APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER DENYING THE
JOINT DEFENCE REQUEST FOR INVESTIGATIVE ACTION TO SEEK
EXCULPATORY EVIDENCE IN THE SHARED MATERIALS DRIVE**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Article 8.4 of the Practice Direction¹ and the Decision of the Pre-Trial Chamber,² this Reply to the Co-Prosecutors’ Combined Response (“OCP Combined Response”) to Ieng Sary’s Appeal Against the Co-Investigating Judges’ Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive (“Appeal”). This Reply, which is submitted in lieu of the oral submissions the Defence had sought to make in an open and transparent forum, is made for the following reasons: (a) the OCP recognizes the inherent illegality of the OCIJ only investigating until it finds enough evidence to indict, yet, inappropriately, it re-characterizes this unequivocal and explicit holding in an approving and benign light;³ (b) the Pre-Trial Chamber must address what the OCIJ states (and effectively will do to the detriment of all the Charged persons) rather than the OCP’s spin of what it wished the OCIJ had said; and (c) the OCP glosses over the clear violation of Mr. Ieng Sary’s right to a fair trial and in so doing it is, effectively, encouraging the OCIJ to act with reckless abandonment: to simply forgo its obligation to investigate on behalf of the Charged Persons. Due to the Pre-Trial Chamber’s reasoning for denying the Defence’s request for an oral hearing (and what appears to be all such future requests) and the extremely restrictive time limit afforded to the Defence to reply, this Reply will first address this reasoning, which it finds to be alarming, before cogently replying to the arguments raised by the OCP in its Combined Response. Having joined and adopted the Joint Appeal by Nuon Chea and Ieng Thirith against the Order,⁴ the Defence limited itself⁵ to supplementary submissions on (a) the supposed “principle of sufficiency” that is invoked by the OCIJ;⁶ and (b) the OCIJ’s reliance upon Mr. Ieng Sary’s right to a trial without undue delay, as a means of

¹ Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/Rev.4, 5 June 2009.

² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC25), Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, 20 August 2009 (“Decision”).

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC25), Co-Prosecutors’ Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the Co-Investigating Judges’ Order Denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 10 August 2008, paras. 27-32 (“OCP Combined Response”).

⁴ *Case of Ieng Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC24), Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, 24 July 2009.

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC25), Ieng Sary’s Appeal Against the Co-Investigating Judges Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 24 July 2009.

⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request to Seek Exculpatory Evidence in the SMD, 19 June 2009, paras. 6-8 (“OCIJ Order”).

denying him his right to a fair trial.⁷ This Reply will be limited to the OCP's arguments on these two issues.

I. OBSERVATIONS RELATED TO THE PRE-TRIAL CHAMBER'S REFUSAL TO GRANT AN ORAL HEARING

1. The denial of an oral hearing by the Pre-Trial Chamber requested by the Defence on this Appeal on the basis that all appeals of denials of investigative action would "as a general rule [be decided]... on written submissions alone"⁸ displays an unfortunate and mistaken understanding of the purpose and role of an oral hearing.
2. The basis for this assertion was the supposed principle of confidentiality set out in Internal Rule 56 ("Rules"). However, as explained at length in the past by the Defence, this Rule does not result in the blanket confidentiality of the entire judicial investigation.⁹ While requests to interview certain specific witnesses may be confidential, an investigative request on whether certain materials must be reviewed by the OCIJ, namely the current Appeal, without referring to the substance of these materials, may be discussed publicly. Indeed, this has been recognized by the Pre-Trial Chamber as manifested by publicly issuing the Decision.¹⁰ Hence, some parts of the investigation can – and the Defence submits should – be public.¹¹
3. Beguilingly, this is also recognized – albeit reluctantly and after extensive external pressure – by the OCIJ which holds press conferences on its activities and releases many documents as public.¹² However, by rejecting a prior Defence appeal for

⁷ *Id.*, paras. 9-10.

⁸ Decision, para. 5.

⁹ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC18), Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation & Request for Expedited Filing Schedule and Public Oral Hearing, 10 March 2009.

¹⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC18), Decision on Admissibility on "Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation", 13 July 2009.

¹¹ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC18), Co-Prosecutors' Observations on Ieng Sary's Appeal Against the Co-Investigating Judges' Confidentiality Order, 27 March 2009. See also Joint Statement of NGOs, Concern about the Restrictions on Transparency Resulting from the Co-Investigating Judges Order on Breach of Confidentiality, Phnom Penh, 6 March 2009.

¹² See OCIJ Press Statement, Phnom Penh, 3 March 2009 where the Co-Investigating Judges revealed that "they will communicate more systematically about their activities in future, and will publish an increased number of documents with regard to the judicial investigation."

allegedly violating confidentiality,¹³ the Pre-Trial Chamber, lamentably, failed to grasp the opportunity to clarify the nature and scope of this principle.

4. Confidentiality and oral hearings are not mutually exclusive. Assuming, *arguendo*, that the “confidentiality” principle mandated that the oral hearing be confidential, nothing – other than lack of inclination – would prevent the Pre-Trial Chamber from conducting an oral hearing in closed session. Such hearings are common practice at domestic and international tribunals.
5. In the instant case, an oral hearing, public or not, would have provided the parties with adequate time to properly plan and prepare. Instead the Pre-Trial Chamber issued a decision on Thursday 20 August 2009, with no warning, requiring the Defence to file a written reply, in both English and Khmer by Monday 24 August 2009. There is no necessity for such an expedited filing schedule, which is far shorter than the time limits in place at other tribunals,¹⁴ when the Pre-Trial Chamber often takes many months to issue its decisions.¹⁵

II. ARGUMENT RELATED TO THE OCP RESPONSE

A. The OCP may not re-characterize the OCIJ’s clear and unequivocal assertion that it must only investigate until there is enough evidence to indict

6. The OCIJ Order provides 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.”¹⁶ The OCP recognises that this alleged principle is not based “on any legal provision or authority”¹⁷ and is in fact “unsound.”¹⁸ The OCP seeks to prevent any reversal of the OCIJ Order on this ground, however, by referring to the alleged context of this

¹³ *Supra*, note 10.

¹⁴ *See e.g.* Rule 126 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) which provides that “A reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber.” In addition, it bears noting that at the ICTY the day of notification is not included in the calculation of time limits which means that it would actually amount to 8 days in comparison with the ECCC system.

¹⁵ As a practical matter, the 5 day deadline for filing replies also renders impossible a request for an extension of time under Rule 39. It is extremely doubtful that any request for such an extension, which would have to be reasoned and filed in English and Khmer within the 5 day deadline, would be decided upon by the Pre-Trial Chamber in that time.

¹⁶ OCIJ Order, para. 6. Emphasis added.

¹⁷ OCP Combined Response, para. 27.

¹⁸ *Id.*, para. 28.

statement of principle¹⁹ and concluding that “on balance, [...] despite the reference in the Order to the principle of sufficiency, the Co-Investigating Judges properly understood the nature of their obligations.”²⁰ Quite simply, this attempt by the OCP to re-characterize the clear words and intention of the OCIJ is unsubstantiated and essentially irrelevant.

7. For once, the OCIJ was unambiguous in explaining its attitude towards its investigative obligations: it investigates until it has enough evidence to indict and may then close the investigation.²¹ By clear and logical extension the OCIJ asserts that it would be able to reject investigative requests filed after this time as the investigation could be closed. This is a fundamentally incorrect manner of conducting an impartial judicial investigation.
8. The OCP’s reliance on the OCIJ’s arguments that: (1) it systematically places any document which is conducive to ascertaining the truth on the case file, whether inculpatory or exculpatory; and (2) the Defence may bring evidence to the attention of the OCIJ,²² does not support the OCP’s re-characterization of the OCIJ’s sufficiency principle. In fact it merely indicates that the OCIJ is waiting for evidence to magically appear rather than systematically and proactively searching for it. It also demonstrates that the OCIJ is improperly shifting the burden of searching for exculpatory evidence onto the Defence while simultaneously warning the defence teams about conducting their own investigations.²³
9. Simply, the OCIJ Order appears to demonstrate that the judicial investigation in Case File 002, which is being carried out by a French Investigative Judge and a Cambodian Investigative Judge trained in the French legal system is, effectively, being conducted in a Common Law fashion, or as if the Co-Investigating Judges were Common Law prosecutors -- as opposed to the prevailing Civil Law tradition applied before the ECCC. The inherent violations of Mr. Ieng Sary’s rights in taking such an approach

¹⁹ *Id.*

²⁰ *Id.*, para. 32.

²¹ Emphasis added.

²² OCP Combined Response, para. 30 summarizing OCIJ Order, para. 15.

²³ The OCIJ has previously emphasized the limited role of the parties with respect to ECCC investigations: “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.” *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2.

must be redressed by the Pre-Trial Chamber and appropriate guidance and strict guidelines given to the OCIJ for the remainder of the judicial investigation.²⁴

B. The OCIJ Order does not place the rights to a fair trial and to a trial without undue delay on an equal footing nor seeks to protect these rights in dismissing investigative requests

10. In an attempt to justify the OCIJ's specious reasoning, the OCP claims that the OCIJ Order "(1) places the obligations to comply with the right to a fair trial and the right to a trial without undue delay on an equal footing, and applies them cumulatively, and (2) seeks to protect these rights by dismissing imprecise and unspecific requests."²⁵ This is simply not borne out by any logical interpretation of the OCIJ Order.

11. The OCIJ asserts that the "Co-Investigating Judges must refrain from continuing the judicial investigation beyond a certain length of time in order to avoid the danger of infringing the fairness of the trial," and that "judges have the right and even the duty to dismiss requests for investigative action submitted by the parties where they do not consider such requests to be conducive to ascertaining the truth."²⁶ This does not mean, however, that the rights to a fair trial and the right to a trial without undue delay are placed on an equal footing. Instead, it strongly implies that the OCIJ is improperly relying on the right to a trial without undue delay to dismiss otherwise legitimate investigative requests.

12. Conveniently, the OCIJ Order does not address the specific waiver signed and filed by Mr. Ieng Sary to facilitate the OCIJ investigating the SMD without violating his right to a trial without undue delay.²⁷ Indeed, even if the OCIJ's concern over the length of the investigation is legitimate, rather than a convenient excuse to deny a valid investigative request, the OCP fails to address whether Mr. Ieng Sary may himself request the enforcement of one right over another.

WHEREFORE, for all the reasons stated herein, the Defence respectfully renews its requests for the Pre-Trial Chamber to:

²⁴ See generally *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Third Request for Investigative Action, 21 May 2009 which requested information from the OCIJ on the manner, procedure and scope of the judicial investigation. This request was rendered necessary by the lack of information on the rules and procedures followed by the OCIJ on the Case File.

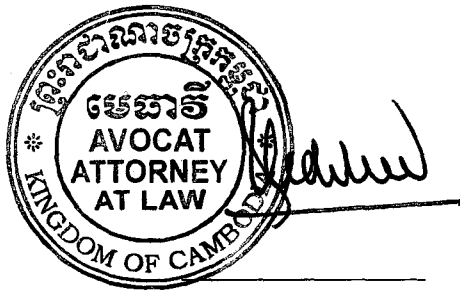
²⁵ OCP Combined Response, para. 40.

²⁶ *Id.*

²⁷ Appeal, para. 12.

- a. QUASH the Co-Investigating Judge's Order on the Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive;
- b. DECLARE that the principle of sufficiency of evidence espoused by the OCIJ has no place in the ECCC legal system and that the OCIJ must proactively search for, and take into account, all exculpatory evidence when assessing whether to indict a Charged Person under Rule 67(1);
- c. ORDER the OCIJ to review all the documents placed in the SMD;
- d. ORDER the OCIJ to produce a sufficiently detailed report of their analysis to enable the defence to ensure that all necessary investigative actions have been undertaken to identify potential exculpatory evidence; and
- e. ORDER the OCIJ to provide a list of exculpatory material contained in the SMD.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 24th day of August, 2009