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BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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

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Judge Katinka LAHUIS

Judge Rowan DOWNING

Co-Prosecutors:

CHEA Leang

Robert PETIT

I. INTRODUCTION

1. The Co-Lawyers for Mr. IENG Sary, Ang Udom and Michael G. Karnavas, ("The Defence") submit this Appeal against the "Order on Breach of Confidentiality of the Judicial Investigation" ("Confidentiality Order") issued by the Office of the Co-Investigating Judges ("OCIJ") on 3 March 2009.[1] While the Defence welcomes the debate on transparency which has been triggered by the Confidentiality Order,[2] the Confidentiality Order is clearly based on misconceptions, factual errors and flawed legal reasoning all of which drastically undermine the principle that "the applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to [...] ensure legal certainty and transparency of proceedings."[3] Only by vacating the Confidentiality Order and permitting the Defence to maintain a website throughout the entirety of the ECCC proceedings which posts the Defence team's *public filings* before the ECCC, will the Pre-Trial Chamber be able to ensure that there is no chilling effect on the right of each party to the proceedings to advocate its interests freely, openly and transparently.

II. FACTUAL BACKGROUND

2. Throughout the judicial investigation, the Defence has been completely open and transparent in its criticism of the unnecessary and contradictory level of confidentiality of the judicial investigation. Coupled with this issue of confidentiality is the problem of significant delays between when a document is filed by one of the parties and when the notification of the filing of the document is given to the parties.[4] As the timing of filings is an inextricable part of a party's strategy and tactics, the inexplicable delays in notifying the parties of the filing of a document – a purely administrative process which at the *ad hoc* Tribunals takes little more than a few hours at most– gives the unambiguous impression that these filings are either being suppressed or delayed for improper motives.

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[1] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009.
[2] *See e.g.* 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, attached as Annex A ("Joint NGO Statement").
[3] Rule 21(1) (emphasis added).
[4] *See* Annex B: List of selected filings before the OCIJ and Pre-Trial Chamber and the time taken between the date of filing and the date of notification.

Repeated notice has been given by the Defence to the OCIJ, the Pre-Trial Chamber, and the Administration of the Defence's concerns regarding transparency and improper judicial interference in other organs of the Court such as, the Court Management Section.

3. On 3 December 2008, the Defence wrote to the Director and Deputy Director of Administration detailing its concerns regarding its frustrated attempts to file – as part of the record – submissions on the application of Joint Criminal Enterprise liability in the Duch case.[5] Having met with the Deputy Director of Administration on 11 December 2008 to discuss the concerns set out in the letter, on 18 December 2008 the Defence wrote again to the Director and Deputy Director of Administration and the Chief of Court Management to reinforce the concerns expressed in the original letter. In this letter the Defence explicitly informed the Administration that *"to further demonstrate our commitment to a fair and transparent judicial process at the ECCC, we would also like to reiterate the intention expressed in our meeting to establish a website to provide access to all public filings submitted by the IENG Sary Defence team."*[6] In a letter dated 22 December 2008, Tony Kranh, Officer in Charge of the Office of Administration declared that it "would be inappropriate for the Office of Administration to comment on, or take further action in relation to, the independent judicial decisions."[7] No comment was made in relation to the Defence's intention to establish a website.
4. Seemingly unaware of the Defence's letter to which the OCIJ had been copied, the OCIJ wrote to the Defence on 20 January 2008 referring to an article in the Cambodia Daily on 19 December 2008 which had referred to the Defence's intention to establish a website.[8] In response, the Defence informed the OCIJ that:

> "it was unnecessary for you to have read about our intention to publish a website to display Defence public filings in the Cambodia Daily on 19 December 2008. We have, at all times, striven to be open and transparent with regards to our intentions on this matter. We had informed the Head of Public Affairs, Helen Jarvis, of our intention to create a website, an intention that was repeated to the Director and Deputy-Director of Administration in a letter of

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[5] *See* Annex C: Letter to SEAN Visoth and Knut ROSANDHAUG titled "Improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section", 3 December 2008. This letter has not been entered into the Case File.

[6] *See* Annex D: Letter to SEAN Visoth, Knut ROSANDHAUG and Tony KRANH titled "Meeting to discuss our letter of 3 December 2008 regarding the improper intervention by the Pre-Trial Chamber into the judicial functions of the Court Management Section, 18 December 2008" (emphasis added). This letter has not been entered into the Case File.

[7] *See* Annex E: Letter to Mr. ANG Udom and Mr. Michael G. Karnavas, 22 December 2008. This letter has not been entered into the Case File.

[8] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from the OCIJ titled "Confidentiality of Case File Documents", 15 January 2009 ("15 January Letter").

18 December 2008. This letter was copied to Your Honours."[9]

5. Thus, as can been seen, the Defence did not surreptitiously launch the website in the vain hope that no one from the OCIJ would become aware of it: the website was launched openly and for the purpose of rendering the judicial proceedings at the ECCC more transparent. It is against this factual matrix of the open and transparent conduct of the Defence that the Confidentiality Order and the sanctions which it imposes must be assessed.

III. ADMISSIBILITY OF THE APPEAL

6. The Confidentiality Order is somewhat unclear with regards to the precise rules upon which it is based. Reference is however made to the Defence having violated "Internal Rule 56(1) and Article 21(3) of the 2003 Agreement;"[10] a breach that "may be sanctioned under Rules 35 and 38 of the Internal Rules."[11]
7. Rule 35(6) of the ECCC Internal Rules ("Rules") provides that "any decision under this Rule shall be subject to appeal before the Pre-Trial Chamber or the Supreme Court Chamber as appropriate."[12] This right of appeal is confirmed by Rule 73(c) which sets out the jurisdiction of the Pre-Trial Chamber. It appears to be beyond doubt that the Confidentiality Order constitutes a "decision under this Rule" and as such is subject to appeal before the Pre-Trial Chamber.

IV. EXPEDITED FILING SCHEDULE AND PUBLIC ORAL HEARING

8. The Defence requests an expedited filing schedule for this Appeal, an option that the Pre-Trial Chamber has frequently elected.[13] Despite being permitted to file its Appeal within 30 days of the Confidentiality Order, the Defence has completed and filed its Appeal within a week of the notification of the Confidentiality Order. Therefore the Defence respectfully requests the Pre-Trial Chamber to direct the other parties to respond within 7

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[9] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter by the Defence titled "Confidentiality of Case File Documents", 20 January 2009.
[10] Confidentiality Order, para. 19.
[11] *Id.*, para. 20.
[12] ECCC Internal Rules ("Rules"), Rule 35(6).
[13] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Directions to the Parties Concerning IENG Sary's Request to Summon Medical Experts for the Oral Hearing, 12 February 2009.

days of notification of the Appeal. Assuming that such a filing schedule is ordered by the Pre-Trial Chamber, briefing on this Appeal will be completed by 17 March 2009, making it possible to hold the public oral hearing on this Appeal on 3 April 2009. All parties should be available for a hearing on this date having spent the previous day on oral submissions on the appeal against the Extension of the Provisional Detention Order.[14]

9. Rule 77(3) sets out the procedure for pre-trial appeals. It provides:

> (a) The President of the Chamber shall verify that the case file is up to date and set a hearing date.
> (b) The Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal or application on the basis of the written submissions of the parties only.
> (c) The Greffier of the Chamber shall notify the Co-Investigating Judges, the parties and their lawyers of the hearing date or the decision to proceed on the basis of written submissions only. [15]

10. It appears from this Rule that the presumption for all pre-trial appeals is that there will be an oral hearing. The Pre-Trial Chamber may exercise its discretion to determine if an exception to this principle is permitted. No criteria are set out in the Internal Rules as to when to depart from the presumption of an oral hearing. There have been various appeals decided upon written submissions alone, generally due to agreement between the parties that an oral hearing was not required.[16] The Pre-Trial Chamber has repeatedly granted a request for an oral hearing in an appeal for which there was disagreement between the parties.[17] The two criteria that seem to have been employed to justify an oral hearing are: (1) the importance of the issue; and (2) the fact that one of the parties had requested an oral hearing.[18]

11. The Confidentiality Order raises fundamental issues affecting not only the IENG Sary Defence team, but all parties before the ECCC. As a slight against the Defence, it also acts as *the sword of Damocles*,[19] continually hanging over the Defence, chillingly

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[14] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC17), Written Version of Oral Decision of 26 February 2009 on the Requests Presented Before the Pre-Trial Chamber During the Hearing Held on the Same Day, 27 February 2009.
[15] Internal Rules (Rev.2), as revised on 5 September 2008.
[16] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC10), Decision on the Requests to Determine IENG Sary's Appeal on Appointment of Expert on the Basis of Written Submissions Only, 7 August 2008.
[17] *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC11), Decision on KHIEU Samphan's Request for a Public Hearing, 4 November 2008; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Decision on Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 29 January 2009, ("Written Submissions Decision").
[18] Written Submissions Decision, para. 6.
[19] This expression, which means *being under constant and imminent threat* as if you have a sword hanging precariously over your head, ready to fall at any moment. It alludes to the legend of Damocles, a servile courtier to King Dionysius I of Syracuse. The king, weary of Damocles' obsequious flattery, invited him to a banquet and seated him under a sword hung by a single hair, so as to point out to him the precariousness of his position.

threatening its ability and stifling its efforts to defend Mr. IENG Sary. Furthermore, somewhat obviously, the Defence wishes to debate these fundamental issues in a public oral session. The public at large can only benefit by observing issues of such great importance being transparently debated, especially when these issues are likely to impact the viability and credibility of the end results of the ECCC proceedings. The public viewing of fair and transparent judicial proceedings – assuming that is in fact what transpires at the ECCC - may be, after all, one of the most enduring legacies of this institution

V. SUMMARY OF ARGUMENT

12. The Defence will show:

A. The principle of publicity of judicial proceedings ensures that not every document filed before the OCIJ is protected by the confidentiality of the judicial investigation;

B. Any allegedly confidential document posted on the Defence website was only confidential to protect the rights of Mr. IENG Sary, rights which he may waive;

C. The letter warning the Defence team about intention to produce its own website and publish its own filings does not constitute a decision, nor does it constitute a warning pursuant to Rule 38(1); and

D. The failure of the OCIJ and Pre-Trial Chamber to sanction their own repeated violations of their obligations of confidentiality displays discrimination in treatment between the Defence team and other organs of the ECCC.

VI. LAW

A. Publicity of proceedings

13. Under Article 11 of the Universal Declaration of Human Rights "[e]veryone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."[20] Article 31 of the Cambodian Constitution implements these international conventions at

[20] Universal Declaration of Human Rights (UDHR), Art. 11 (emphasis added); *see also* International Covenant of Civil and Political Rights (ICCPR), Art. 14(1); European Convention for the Protection of Human Rights (ECHR), Art. 6(1), American Convention on Human Rights ("Pact of San José, Costa Rica"), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Art. 8(5).

the domestic level in providing that "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter [and] the Universal Declaration of Human rights."[21]

14. At the European level, the European Court of Human Rights has held that the public character of proceedings "protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial."[22]

15. The former Vice-President and ICTY Appeals Judge Florence Mumba has underscored that while there may be a need for limited exception to the right of a public trial, public hearings "serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on "framed" trials, and giving the public a chance to suggest changes to the law or justice system."[23] Similarly, the Trial Chamber in the case of *Prosecutor v. Delalić* held:

> 33. It is important to note that the Trial Chamber cannot without good reason, deny the accused the right to a public hearing enshrined in Articles 20(4) and 21(2). Rule 75(A) enacted pursuant to Article 22 provides.
>
> > A Judge or a Chamber may *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses provided that the measures are consistent with the rights of the accused.
>
> Accordingly the measures formulated by virtue of Article 22 must be consistent with the rights of the accused. The Statute of the International Tribunal emphasises the public nature of a trial as an essential feature of the proceedings (Articles 20(4), 21(2)).
>
> 34. The principal advantage of permitting the public and the press access to a hearing is that their presence contributes to ensuring a fair trial. In Pretto & Ors v Italy, (Series A, No. 71 (1984) 6 EHRR 182) the ECHR stated that "[p]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered". Thus, a public hearing is mainly for the benefit of the accused and not necessarily of the public. The following dictum of Chief Justice Warren in Estes v Texas, a case decided by the United States Supreme Court, supports this view.
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> > There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial

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[21] Constitution of the Kingdom of Cambodia, Art. 31, adopted by the Constitutional Assembly in Phnom Penh on 21 September 1993 at its 2nd plenary session, and adopted by the National Assembly of the Kingdom of Cambodia on the 4th March, 1999 in its 2nd plenary meeting.

[22] ECHR , *Werner v. Austria*, Judgement of November 24, 1997, para. 45 (emphasis added).

[23] Florence Mumba, Ensuring a Fair Trial Whilst Protecting Victims and Witnesses--Balancing of Interests, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (Richard May et al. eds., 2001), pp. 359, 365.

> participants to perform their duties more conscientiously. . . .381 U.S. 532 at 583 (1965).[24]

16. Turning to the French system, which is very similar to the system adopted by the Internal Rules at the ECCC,[25] the "notions of equality of arms and of open debate are increasingly cited as guarantees of fairness and incorporated into the various stages of criminal procedure" within the French legal system.[26] A key example is the introduction of public hearings before the *chambre d'instruction* at the request of the charged person, unless this threatens the security of the instruction or a third party.[27]
17. The Defence fully appreciates and has constantly strived to abide by Internal Rule 56(1), which mandates that "*In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality.*"[28] Additionally, the Defence recognizes that Article 121 of the Cambodian Criminal Procedure Code ("CPC") which provides that "The investigation is confidential" echoes this precept of confidentiality. It bears highlighting, however, that subsequent provisions of the Rules and international human rights law – which are not to be disregarded – nuance this supposedly unequivocal assessment of confidentiality.
    a. Firstly, Article 121 of the CPC further provides that "professional confidentiality cannot be used as an obstacle to the right of self-defense."[29] This clearly shows the limits of the supposed confidentiality principle.

    b. Secondly, both the Pre-Trial Chamber and the OCIJ are permitted to publicise some proceedings that form part of the judicial investigation. Under Rule 56(2) the OCIJ may "issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the

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[24] *Prosecutor v. Delalić*, IT-96-21-PT, Decision on the Motions by the Prosecution or Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through To "M" 28 April 1997, paras 33- 34. Emphasis added.
[25] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Decision on IENG Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 February 2009, para. 20.
[26] Jacqueline Hodgson, Suspects, Defendants and Victims in the French Criminal Process, 51 Int'l & Comp. L.Q. 781 (is not cited!!), 785 (2002).
[27] In *Reinhardt and Slimane-Ka d v. France* and in *Kress v. France* the European Court of Human Rights held that certain aspects of appellate procedure before the Court of Cassation and the Council of State did not afford litigants the right to a "fair and public hearing" as guaranteed by Article 6(1) of the European Convention. Martin A. Rogoff, Application of treaties and the decisions of international tribunals in the United States and France, Maine Law Review 2006 Symposium, 58 ME. L. REV. 406, 458 (2006).
[28] Rule 56(1).
[29] Cambodian Criminal Procedure Code ("CPC"), Art. 121

proceedings, or to rectify any false or misleading information."[30] The Pre-Trial Chamber meanwhile is obliged under Rule 78 to publish in full "All decisions and default decisions of the Chamber, including any dissenting opinions [...] except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation."[31] This reverses the presumption of the confidentiality of the investigation as all the Pre-Trial Chamber decisions are part of the Case File.

c. Thirdly, Article 3.12 of the Practice Direction on the Filing of Documents – while maintaining the alleged confidentiality of the investigation – provides that the "filing party may indicate whether it wishes a document to be marked 'Public', "Confidential", or 'Under seal'."[32] The fact that each party has this option shows there is the possibility that some filings that do not relate to the substance of the judicial investigation submitted by the parties may be published. Indeed, a brief glance at the ECCC's official website shows the number of submissions produced by each party that have been published and made public online.[33] Although the OCIJ published far fewer of its decisions than other parties, it nonetheless publicised 22 documents as of 3 March 2009.

B. Ethical obligations of counsel

18. The provisions relating to obligations of counsel appearing at the ECCC are set out in Rules 35 and 38. In pertinent part these Rules provide:

> **Rule 35. Interference with the Administration of Justice**
>
> 1. The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:
> a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;
>
> [...]
>
> 5. If a lawyer is found to have committed any act set out in sub-rule 1, the Co-Investigating Judges or the Chambers making such finding may also determine that such conduct amounts to misconduct of a lawyer pursuant to Rule 38.

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[30] Rule 56(2).
[31] Rule 78.
[32] Practice Direction on the Filing of Documents, Art. 3.12.
[33] See Annex F: List of filings submitted by either the Pre-Trial Chamber, OCIJ, Co-Prosecutors or Defence as downloaded from the ECCC Official Website on 10 March 2009.

6. Any decision under this Rule shall be subject to appeal before the Pre-Trial Chamber or the Supreme Court Chamber as appropriate. Notice of appeal shall be filed within 15 (fifteen) days of notice of the decision to the person concerned.

Rule 38. Misconduct of a Lawyer

1. The Co-Investigating Judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.[34]

19. There is a conflict between these Internal Rules and Article 21 of the Agreement between the United Nations and the Cambodian Government Establishing the Extraordinary Chambers.[35] Under Article 21(1) of this Agreement, "The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Royal Government of Cambodia to any measure which may affect the free and independent exercise of his or her functions under the present Agreement."[36] Furthermore, Article 21(2)(c) ensures that such counsel shall be accorded "immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed by them in their official capacity as counsel."[37] More specifically, Article 24 of the Cambodian Code of Ethics provides that "The lawyer has the right to express all that which he or she deems useful to the interests of his or her client."[38]

C. Reciprocal obligations of confidentiality on other ECCC organs

20. To the extent that there is a clear, transparent, and unequivocal duty of confidentiality in the judicial investigation, it applies without distinction to "prosecutors, judges, lawyers, court clerks, judicial police and military police officers, civil servants, experts, interpreters/translators, medical [and] doctors."[39] Furthermore, under Internal Rule 21(1)(b) "Persons who find themselves in a similar situation and prosecuted for the same

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[34] Internal Rules (Rev.2), excerpts of Art. 35 and 38, as revised 5 September 2008 (emphasis added).
[35] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea – 6 June 2003 ("Agreement").
[36] *Id.*, Art. 21(1) (emphasis added).
[37] *Id.*, Art. 21(2)(c).
[38] Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 24, 15 November 1995..
[39] CPC Art. 121.

offences shall be treated according to the same rules."[40] This duty of equal treatment applies not only to those facing prosecution by the ECCC for crimes that allegedly occurred during 1975-1979, but also to those who are facing administrative or disciplinary action for their activities at the ECCC.

21. With regards to the right of the Co-Investigating Judges to provide public information on the judicial investigation, they may "jointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances, under their strict control *and* after seeking observations from the parties to the proceedings."[41]

VII. ARGUMENT

A. The principle of publicity of judicial proceedings ensures that not every document filed before the OCIJ is protected by the confidentiality of the judicial investigation

22. The principle expressed in Rule 56(1) that "judicial investigations shall not be conducted in public" is subject to so many exceptions that to base a sanction on this vague principle is nothing less than an arbitrary exercise of raw power rather than the sound application of law. Indeed, as described in Joint Statement by NGOs following the ECCC proceedings, "the current practice where the presumption is in favor of confidentiality and only the judges can decide what information to release is arbitrary."[42]

23. In reality the OCIJ often publicises decisions on the official ECCC website that relate to the judicial investigation such as the recent orders extending provisional detention of all the Charged Persons in Case File 002.[43] Revealingly, the OCIJ *now* concedes, *belatedly*, that it *must* function in a more open and transparent manner: "*...while upholding the principles referred to above, the Co-Investigating Judges will communicate more systematically about their activities in future, and will publish an increased number of documents with regard to the judicial investigation.*"[44] Curiously, there is nothing to distinguish the publicised decisions from the motions upon which they are based except that the decisions by the OCIJ are published whereas the motions – of non-confidential substance and from which these decisions flow – are not. This incongruity becomes even

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[40] Rule 21(1)(b).
[41] Rule 56(2)(b) (emphasis added).
[42] Joint NGO Statement (emphasis added).
[43] *See* Annex F.
[44] *See* OCIJ Press Release, 3 March 2009.

more unsustainable, if not unacceptable, when a decision of the OCIJ is appealed and the Appeal is public – whereas the original motion before the OCIJ, even if containing practically the exact information, is not.[45] The irony of it all is stupefying.

24. Coupled with this discrepancy is the somewhat Kafkaesque[46] definition of the word "public" employed by the OCIJ. Since the Confidentiality Order was issued, the Defence has diligently sought guidance from the OCIJ as to which filings were confidential and therefore had to be removed and which were public and therefore could remain on the Defence's website. According to the OCIJ, "to comply with the order you must immediately remove any document that is on the case file that is not published on the ECCC website."[47] As such, it is self-evident that the Press Section of the ECCC has become the ultimate arbiter of what is considered to be confidential as it is surely that section which determines which documents are displayed on the website.

25. Notwithstanding the fact that documents containing nothing but public information are filed and notified publicly,[48] they have been arbitrarily classified as or deemed to be confidential and, as a consequence, can neither be shared with anyone outside the Court nor displayed for public review. As noted in the Defence's communications with the OCIJ:[49]

> "It surely cannot be the role of the Press Section of the ECCC to determine which documents are public and which are not, based solely on which documents are posted on the ECCC website. Furthermore, perhaps you could clarify why, if "public" means that a document may not be circulated outside of the OCIJ or Pre-Trial Chamber to which it is filed, that document is notified to more than 50 other people? Finally, how is it that a decision by the OCIJ or Pre-Trial Chamber that is public and makes reference to submissions that are public can be put on the ECCC website for public access while the submissions on which it is based are considered to be confidential? Does this not violate the 'confidentiality of the investigation' which deems this information to be confidential?"

26. Furthermore, in seeking guidance from the Court Officer on the status of Defence filings

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[45] *See* for example, *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Apparent Bias and Potential Conflict of Interest of OCIJ Legal Officer David Boyle, 4 March 2008 which, although filed publicly by the Defence, is in fact confidential. By contrast, the appeal by the Defence against the denial of this request, which contains exactly the same information, is in fact public and posted on the ECCC website. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Appeal of Mr. IENG Sary Against the OCIJ's Decision on the Apparent Bias and Potential Conflict of Interest of OCIJ Legal Officer David Boyle, 6 June 2008.

[46] Defined as: of, relating to, or suggestive of Franz Kafka or his writings: *especially*: having a nightmarishly complex, bizarre or illogical quality. *See* http://www.merrium-webster.com/dictionary/kafkaesque.

[47] *See* Annex G: Email correspondence between Geoff Roberts, Legal Consultant for the IENG Sary Defence team and Ly Chantola, OCIJ Greffier (emphasis added).

[48] *See* for example, *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Expedited Request for Ieng Sary to be Examined by Well Qualified Medical Specialists & for his Continuing Stay/Detention in Proper Medical Facilities Until Recovered, 18 February 2008. This document was notified as public and yet was never displayed on the ECCC's official website.

[49] Annex G.

it appears that "*the Greffier fills in the Notification Instruction and sends it back down to us. We keep a scanned version for our records, but it is not in Zy[lab]. We also file the original together with the KH paper version in the archives. So the filing party does not see the filing instruction at the end.*"[50] Therefore the decision of the OCIJ Greffier to change the status of a motion from public to confidential is neither notified to the filing party nor added to the case file.

27. Simply put, the OCIJ cites no authority which would justify its interpretation of public submissions to be confidential. Indeed, the OCIJ's whimsical interpretative methods of justifying its ends, brings to mind Judge David Hunt's observations concerning a certain elusiveness in judicial interpretation by his fellow colleagues on the Appeals Chamber of the ICTY:[51]

> A greatly respected English judge, Lord Atkin, when – in the darkest days of World War II – his four colleagues in the House of Lords similarly sought to stand common sense on its head when interpreting a Defence Regulation in order to favour the Executive, said of the interpretation which they gave to the Regulation:[52]
>
> > *I know of only one authority which might justify the suggested method of construction:*
> >
> > *"When I use a word,'" Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all".* [53]

28. It appears from the Confidentiality Order that the OCIJ believes it can stampede over the rights of Mr. IENG Sary to have open and transparent proceedings during the judicial investigation phase because the principle of confidentiality "only concerns the preparatory stage of proceedings, and does not apply during the trial stage."[54] This disquieting, myopic definition of "fair trial" and dismissal of rights during the pre-trial phase echoes the previous approach of the OCIJ to the right of a Charged Person to participate in his or her own defence during the judicial investigation. For example, in response to NUON Chea's request to appoint an expert to determine whether he was fit to

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[50] *See* Annex H: Email correspondence between Geoff Roberts, Legal Consultant for the IENG Sary Defence team and Christopher Fry, International Court Officer.

[51] *Prosecutor v. Slobodan Milosević*, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision given on 30 September 2003), 21 October 2003, para. 19.

[52] *Liversidge v Anderson* [1942] AC 206 at 245.

[53] From the children's book by Lewis Carroll, *Alice Through the Looking Glass*, Chapter VI. [More correctly entitled *Through the Looking Glass, and What Alice Found There* (1871), published as a sequel to *Alice in Wonderland* (1865)

[54] Confidentiality Order, para. 11.

stand trial,[55] the OCIJ held that the issue of whether Mr. NUON Chea was fit to stand trial "does not arise at this stage".[56] In other words, the OCIJ's expressed position is that even if a Charged Person may not be fit to stand trial at the investigative stage of the proceedings, he or she should nonetheless remain in detention without any medical testing to determine his or her mental or physical fitness. This investigative stage is likely to last upwards of 2 to 3 years. The Pre-Trial Chamber strongly rejected this constricted definition of pre-trial rights.[57] Thus, it is against this backdrop that the Defence respectfully submits that the OCIJ may not and should not continue to violate the Mr. IENG Sary's right to public proceedings in the hope that the Trial Chamber - years down the line - will rectify its errors and transgressions.

B. Any allegedly confidential document posted on the Defence website was only confidential to protect the rights of Mr. IENG Sary, rights which he may waive

29. The intention behind the creation of the Defence's website was never to illicitly reveal confidential information that would compromise in any way the judicial investigation or any protective measures ordered by the OCIJ. By contrast, the intention was to improve the functioning of the OCIJ's investigation by submitting the non-confidential aspects of it to public scrutiny. As explained in the above referenced Defence email correspondence with the OCIJ, it has always been the intention of the Defence to comply with the Confidentiality Order as soon as some clarity could be provided as to exactly which documents had to be removed from the website.[58]

30. Of the Defence filings that appear to have been notified as confidential, or which were later ruled to be confidential by the Pre-Trial Chamber, the Defence notes that these concerned the health condition of Mr. IENG Sary and the effect this has on either his detention or his ability to participate in his own defence. They were all filed publicly by the Defence, reflecting the fact that Mr. IENG Sary had waived his right to keep filings related to medical issues confidential.[59] The issue of Mr. IENG Sary's health and its

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[55] *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Application to Appoint Expert, 21 December 2007.
[56] *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Letter, 14 March 2008.
[57] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Decision on Ieng Sary's Appeal Regarding the Appointment of an Expert, 21 October 2008, para. 35.
[58] Annex G.
[59] Annex I: Waiver of Mr. IENG Sary for discussion of his medical situation and any Defence filings on his health situation to be filed publicly.

impact on his *fair-trial rights*, which, *inter alia*, encompass the right to participate in his own defence, is an issue that the Defence has repeatedly raised[60] and debated extensively in *public session* before the Pre-Trial Chamber on 30 June 2008. It appears, therefore, that a decision made by the Pre-Trial Chamber to protect the rights of Mr. IENG Sary is being manipulated by the OCIJ in order to sanction his very Co-Lawyers who are trying to protect these rights. Unquestionably, the Defence recognizes that under Rule 56(1) confidentiality is justified to "preserve the rights and interests of the parties." However, as filings relating to Mr. IENG Sary's health only affect his rights and interests and he does not wish the filings to be confidential, then this denudes the confidential status of such documents of any justification.

31. The Defence further notes that if the Confidentiality Order was based on genuine concerns about the leaking of confidential information from the judicial investigation, the OCIJ would have immediately alerted the Defence of its concerns as soon as the website became active rather than wait for the Confidentiality Decision to be translated into three languages. Indeed, it is extremely illuminating that the OCIJ chose to wait until the Foreign Co-Lawyer for Mr. IENG Sary, Michael G. Karnavas, had just left Phnom Penh, where he had been working for the preceding 8 days to take action, rather than to file the

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[60] 1) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ*, Interoffice Memorandum titled "Meeting of 18 December 2007", 20 December 2007; (2) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ*, Request for Expedited Translation of All Supporting Documentation to the Introductory Submission, 10 January 2008; (3) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03)*, Expedited Request for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues & Reply Per the Invitation of the Pre-Trial Chamber to the OCP'S Response to the Defence Appeal on Provisional Detention Reply to invitation of PTC, 18 February 2008; (4) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ(PTC03)*, IENG Sary's Expedited Request for an Extension of the Page and Time Limits, 12 March 2008; (5) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03)*, IENG Sary's Request for Leave to Suspend the Consideration of His Appeal to be Placed Under House Arrest in Lieu of being held in Custody at the ECCC Detention Facilities & Request for an Order Directing the OCIJ to Place IENG Sary in a Hospital Facility for the Duration of the Investigative Phase of the Proceedings, 13 March 2008; (6) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ*, Request for IENG Sary to be Examined by a Psychiatric Expert to Determine Fitness to Stand Trial, 14 March 2008; (7) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ*, Letter to OCIJ titled "Lack of Response to Request for Expedited Translation of All Supporting Material to the Introductory Submission into Khmer and English", 6 May 2008; (8) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ*, Letter to the OCIJ titled "Lack of Response to "Request for IENG Sary to be examined by a Psychiatric Specialist to Determine Fitness to Stand Trial" filed on 14 March 2008, 19 June 2008; (9) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03)*, Written Record of Hearing, 30 June 2008; (10) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17)*, Ieng Sary's Response to the Pre-Trial Chamber's Directions Concerning the Co-Prosecutors' Request to Determine the Appeal on Written Submissions Alone, 19 January 2009; (11) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17)*, Ieng Sary's Request to Summon Medical Experts to Give Evidence During the Oral Hearing on Provisional Detention, 9 February 2009; (12) *Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17)*, Ieng Sary's Request to add the medical report of Dr. Paulus Falke to the Case File and Request to Permit Dr. Paulus Falke to Give Evidence via Videolink During the Hearing on 26 February 2009, 20 February 2009.

Confidentiality Order – or even discuss the matter – at a time when he was present and could, along with his Co-Lawyer Ang Udom, effectively respond to these allegations. By issuing the Confidentiality Order at the precise time that Mr. Karnavas was on a plane back to The Netherlands suggests that this timing was not serendipitous, but a tactical maneuver by the OCIJ.

C. The letter warning the Defence team about intention to produce its own website and publish its own filings does not constitute a decision, nor does it constitute a warning pursuant to Rule 38(1)

32. The OCIJ asserts in the Confidentiality Order that the 15 January Letter regarding the Defence's intention to establish a website constituted a decision which the Defence violated by posting confidential documents on its website. To justify this rebranding of its letter into a decision, the OCIJ relies upon a decision of the Pre-Trial Chamber which had previously declared a Defence appeal to be admissible against a decision of the OCIJ notwithstanding the fact that the decision came in the form of a letter.[61] For the OCIJ to take advantage of a decision by the Pre-Trial Chamber that seeks to protect the rights of the parties to appeal the OCIJ's decisions, notwithstanding the form of the decision, is simply insincere. Indeed, the Defence submits that if the OCIJ wishes to declare that the Defence has violated a decision, it is obliged, in a procedurally correct manner, to identify a specific "decision" that has been violated. The OCIJ should not seek to take advantage of jurisprudence of the Pre-Trial Chamber which is intended to protect the parties against abuse by the OCIJ.

33. Furthermore, the Defence notes that under Rule 38(1), the OCIJ or the Chambers may only impose sanctions against a lawyer "after a warning." In the 15 January Letter, there was no reference to Rule 38(1), nor was there any specific warning provided in the text of the letter of the consequences that would flow if the warning was not heeded. This warning would allow the Defence to be "afforded the opportunity to change the [...] circumstances, whether resulting from deliberate misconduct or unintentional factors, so as to avoid surrendering those rights."[62] Instead, the OCIJ appears to have retroactively

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[61] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ[PTC05}, Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights, 21 March 2008.

[62] *Prosecutor v. Šešelj*, IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 23. Query also whether a hearing on an order to show cause

relied upon this letter as a required procedural step in issuing a sanction under Rule 38. This failure by the OCIJ to pursue the proper administrative rules in issuing a warning constitutes a fatal flaw, and as such, the Confidentiality Order must be quashed for procedural irregularity.

D. The failure of the OCIJ and Pre-Trial Chamber to sanction their own repeated violations of their obligations of confidentiality displays discrimination in treatment between the Defence team and other organs of the ECCC

34. It is striking that the OCIJ has sought to expend considerable time and energy in sanctioning the Defence for publishing allegedly confidential information on its website while it has seemingly been responsible for various far more serious violations of confidentiality itself. In two principal ways the OCIJ has violated the confidentiality of the investigation in a manner far more serious than any supposed violation by the Defence. Accordingly, under the principle of equal treatment established under Article 21(1)(b), the Defence submits that such instances of violations of confidentiality by the OCIJ should equally be investigated with equal zeal.
35. Firstly, it has become apparent that the Co-Investigating Judges have granted access to a French film crew to film the judicial investigation. Under Rule 56(2)(b) the OCIJ was obliged to seek the views of the parties prior to granting any access to the media. To the knowledge of the Defence, the views of the parties have never been sought. Indeed, it is even unclear as to whether a contract even exists between the OCIJ and the film crew that has been granted access to the most intimate details of the judicial investigation. If such a contract has been signed, it is equally unclear what level of protection it provides for the information on the Case File.
36. Secondly, it appears from information in the public domain that the OCIJ sent the unredacted Closing Order in the Duch case to NGOs without informing them it was confidential. It was subsequently posted on various websites and included the names of protected witnesses. While undoubtedly an error by a staff member of the OCIJ, it does

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should have been afforded to the Co-Lawyers before levying a sanction. *See Kyprianou v. Cyprus*, no. 73797/01, ECHR, 27 Jan. 2004, where the European Court of Human Rights reversed the conviction of contempt and vacated the 5 day sentence imposed on a lawyer who was summarily punished without any due process because the judges during the trial felt offended when the lawyer got angry and argued with them.

put the Defence's supposed violation of confidentiality into perspective. By comparison the Defence simply published its own filings which related solely to legal issues and which did not refer to confidential case file information. To seek to sanction the Defence for this action, which was only undertaken for the purpose of providing greater transparency and public scrutiny of proceedings, strongly suggests that the OCIJ is seeking to deflect attention from its own failures and confidentiality breaches.

VIII. CONCLUSION & RELIEF SOUGHT

37. The Co-Lawyers have, at all times, abided by the CPC and the Internal Rules of the ECCC. Moreover, they have acted in accordance with their obligations as set out in Article 24 of the Cambodian Code of Ethics the Co-Lawyers by making accessible to the public all of its submissions on behalf of Mr. IENG Sary which contain non-confidential information for the purpose of protecting and furthering Mr. IENG Sary's constitutionally guaranteed *fair trial rights*.

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

a. GRANT the Defence's Appeal Against the Order on Breach of Confidentiality of the Judicial Investigation, dated 3 March 2008;

b. VACATE the Confidentiality Order issued 3 March 2009;

c. PERMIT the Defence to maintain a website throughout the entirety of the ECCC proceedings which posts the Defence team's public filings before the ECCC together with any public decisions issued on those filings;

d. ORDER all parties to Case File 002 to respond to the Appeal within 7 days of notification;

e. SCHEDULE and oral hearing on the Appeal for 3 April 2008;

f. ORDER that this submission be publicised on the ECCC website forthwith.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **10th** day of **March, 2009**