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To: Mark Woelber, Asst. Bar Counsel, Alaska Bar Association

Re: Response to grievance concerning *Order of Breach of Confidentiality of the Judicial Investigation* which the Alaska Bar Association received on March 12, 2009 from the Extraordinary Chambers in the Courts of Cambodia.

Dear Mr. Woelber,

Kindly accept this statement and attached documents as a formal response to the grievance filed by the Office of the Co-Investigative Judges (OCIJ) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) on March 12, 2009. Through my affixed signature hereto, I affirm, to the best of my knowledge and belief, that the statement is true, accurate and complete.

In responding to the grievance, I will first provide some general background information, followed by a detailed account of the events that have lead up to the filing of the grievance as well as the subsequent measures currently being taken. In support of the representations made herein – and perhaps as the best evidence from which conclusions can be drawn concerning my actions and intentions which are the basis of the alleged *breach of confidentiality* – copies of official submissions before the ECCC are referenced and provided. There is also the matter of the website which can be visited (in it current and redacted form) at: <http://sites.google.com/site/iengsarydefence/>

Background

1. The ECCC was formed as a special court within the Cambodian court system for the purpose of prosecuting the leadership of the Khmer Rouge Period of Democratic Kampuchea (17 April 1975 – 6 January 1979). It is not an international court, though as part of an agreement between the Cambodian government and the UN the ECCC is assisted by foreign judges, prosecutors, defense lawyers and administrative staff. The procedure of the ECCC is based on the Cambodian system, which, for the most part, is identical to the Civil Law System of France (where an Investigative Judge is responsible for conducting the investigation once the prosecution has identified the suspects and has drafted a charging document, referred to as the Introductory Submission). The purpose of the Investigative Judge is to conduct an

objective investigation for both sides – prosecution and defense. Once the investigation is completed, the file is passed on to the Trial Chamber which will conduct the trial. At the ECCC, the OCIJ was established for the purpose of conducting the investigation and the Pre-Trial Chamber (PTC) was set up to mediate disputes at this stage of the proceedings. It bears highlighting that the investigation conducted by the OCIJ – for the most part – is confidential, as is the Introductory Submission and all supporting documents referenced therein. As in the Common Law system, opportunities exist to litigate issues by way of written submissions, which, depending on the nature and content of the submission, can be filed and/or admitted as public or confidential documents. This overview is, of course, rather simplistic, though a more detailed analysis of the ECCC system can be provided upon request. For any further consideration, the following basic documents are affixed in an Annex hereto:

- i) 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;
 - ii) Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments promulgated 27 October 2004, NS/RKM/1004/006;
 - iii) Internal Rules (Rev.3), as revised on 6 March 2009.
2. Sometime in late November early December 2007, I was contacted by Mr. Ang Udom to see whether I would be interested in acting as foreign Co-Lawyer for Mr. Ieng Sary, the Deputy Prime Minister for Foreign Affairs under the Pol Pot regime of 1975-1979. Since late December 2007 I have been engaged in that capacity, with Mr. Ang Udom being the national Co-Lawyer. Though we are retained by Mr. Ieng Sary, we are paid by the ECCC through the Defense Support Section (DSS), which is an independent section within the ECCC. The current head of DSS is Mr. Richard Rogers. He can be reached at: +855 12 488519 or rogersr@un.org.
 3. The case is currently before the OCIJ. The investigation is anticipated to conclude towards the end of 2009 or early 2010. Thus far, numerous issues have been addressed before the OCIJ, with many of them being appealed before the PTC. A full accounting of the submissions filed and answered thus far on behalf of Mr. Ieng Sary can be provided upon request.

Facts leading up to the grievance

4. To fully appreciate the alleged grievance, it is important to understand part of the procedural history of this case, particularly as it relates to the establishment of the Ieng Sary Website. The entire ethos of the website can be reduced to two words: *transparency* and *accountability*. Because of the

political nature of the tribunals that are specifically set up to deal with war crimes and crimes against humanity (a claim I make from years of experience) it is essential that there is transparency in the process and accountability for the results, i.e., how was the result reached, based on what procedure and jurisprudence, etc. To this end, it can be said that the Ieng Sary Defense has indeed been aggressive; repeatedly filing submissions it believed were essential for a fair, transparent and just process. It further bears noting that at no time has any member of the Ieng Sary Defense deviated – even a millimeter – from the ethical constraints he or she is duty-bound to operate within.

5. The grievance resulted from the posting of public submissions filed on behalf of Mr. Ieng Sary. The Website, which is at the core of the controversy, was born out of concern and frustration that efforts were being taken by the PTC primarily (and to a lesser extent by the OCIJ), to deprive the Ieng Sary Defense from making a full and public record of its submissions. *The rub*: it is one thing for a Chamber to deny a submission, but it is quite different – if not nefarious in nature – to deny the very *filing* of the submission, thus eradicating even the mere scent of any action having been taken, which, quite obviously, may be important for public scrutiny and relevant for further judicial review.
6. The “saga”, as it were, began with the attempt by the Ieng Sary Defense to intervene as an interested party having standing in the issue of the applicability of the mode of liability known as joint criminal enterprise (JCE) in the case of Kaing Guek Eav (Duch).¹ This issue was and remains one of first impression. There were several reasons why the Ieng Sary Defense felt compelled to intervene, not least of which was the fact that this issue of great importance – the results of which would inevitably impact Mr. Ieng Sary – was not being challenged by the Duch Defense,² since Duch had admitted to being guilty and the trial (mandatory in the Civil Law system) was going to

¹ See Case of Kaing Guek Eav “Duch”, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary’s Expedited Request to Make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”, 15 September 2008. See also Case of Kaing Guek Eav “Duch”, 001/18-07-2007-ECCC-OCIJ (PTC02), Decision on Ieng Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”, 6 October 2008.

² See Case of Kaing Guek Eav “Duch”, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary’s Motion for Reconsideration of Decision On Ieng Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”, 20 November 2009, p.1 where the Defense highlighted that “the Duch Defence team’s tactical decision not to meaningfully respond to any of the substantive arguments on the application of joint criminal enterprise liability (“JCE”) submitted by the Co-Prosecutors (“OCP”) results in a manifest injustice to Mr. IENG Sary.”

be, for all intents and purposes, a protected change of plea / sentencing hearing.³

7. Intervening in another case is not something out of the ordinary, particularly when an issue is of first impression and other accused in separate cases are likely to be impacted.⁴ Indeed, it bears highlighting that the Ieng Sary Defense had attempted to intervene in the Duch case when the PTC – seeking an independent and impartial opinion as to whether JCE was part of customary international law - appointed as an *amicus curie* one of the founding fathers of JCE (Professor Cassese, former President of the ICTY and current President of the Special Tribunal for Lebanon). Observing that either through ignorance or design the PTC was *gaming* the process, the Ieng Sary Defense moved to object to the appointment of Cassese.⁵ Though the motion was denied, what is most relevant is the fact that the motion was in fact accepted for filing and was made part of the record.⁶ This point is relevant because it demonstrates how the process – even if the outcome is somewhat questionable - should operate in a transparent and accountable manner. By accepting the filing a record was made. Indeed, the Ieng Sary Defense would have fallen short of its obligation to act in a due diligent manner had it not sought to intervene in the way that it did.⁷

³ In most Civil Law systems, and in particular the French system, even if an accused wishes to plead guilty, a trial must nonetheless be held; the Trial Chamber, bearing the burden of ascertaining the *material truth*, must be convinced as to the guilt of the accused.

⁴ See *Prosecutor v. Kallon*, SCSL-2004-15-AR72(A), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, at 3, where the Appeals Chamber at the Special Court for Sierra Leone (SCSL) permitted written submissions to be filed on behalf of Moinina Fofana and Augustine Gbao intervening in support of a Defence challenge to jurisdiction, even though Fofana was in a separate case. See also with regard to the International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, where the Appeals Chamber, faced with an appeal regarding one small aspect of JCE liability which potentially affected all accused exposed to JCE liability, requested the *Association of Defence Counsel Practising Before the ICTY* (ADC-ICTY) to make written submissions on that issue in support of those filed by the Defense team responding to that appeal.

⁵ See *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary's Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor's Appeal of the Closing Order Against Kaing Guek Eav "Duch", 3 October 2008 ("Motion to Disqualify").

⁶ See *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Decision on Ieng Sary's Motion to Disqualify *Amicus Curiae*, 14 October 2008.

⁷ See for example, *Prosecutor v. Barayagwiza*, ICTR-97-19-AR2, Decision on Prosecutor's Request for Review of Reconsideration, 31 March 2000, para. 50, where the Appeals Chamber remarked that:

[N]o counsel can be criticized for lack of due diligence in exhausting all available course of action, if that counsel makes a reasonable determination that the material in question is irrelevant to the matter in hand, even if that determination turns out to be incorrect. Counsel may have chosen not to present the evidence at trial because of his litigation strategy or because of the view taken by him of the probative value of the evidence.

See also *Prosecutor v. Tadić*, IT-94-1 -A, Decision on Appellant's Motion for the Extension of Time Limit and Admission of New Evidence, Appeals Chamber, 15 October 1998, para 44. It further bears highlighting that the PTC, in rejecting the initial motion to intervene on the issue of JCE, made the following observation: "The Pre-Trial Chamber considers that it is inherent to courts where several

8. When Cassese was allowed to remain as an *amicus curie* – even after it was shown that he was biased, subjective and that he was likely chosen in order to effectuate a particular result⁸ – the Ieng Sary Defense moved for reconsideration to intervene.⁹ The motion was comprehensive: setting out the reasons for intervention as well as a substantive analysis of the law surrounding JCE, including commentary in opposition to certain matters raised by Cassese which seemed intellectually questionable under international customary law.¹⁰ In this instance, rather than accept the filing – as the PTC had previously done – it instructed the greffier (clerk) to hand back the filings, thus ensuring that there was no record whatsoever.¹¹
9. Based on the PTC actions, a second motion for reconsideration was filed, pointing out, in detail, the obligation of the PTC to accept the filing, even if it had predetermined to reject it.¹² In this instance, the PTC held onto the submission (the motion and accompanied annex) for nearly two weeks before

proceedings are pending that a decision in one case on a legal issue will guide the court in future similar cases where no new circumstances or arguments are raised.” (Para. 14.) Unquestionably, the PTC was acknowledging the Ieng Sary Defense’s worst fears : the PTC’s decision regarding JCE in Duch would be binding on other cases facing the same issue, i.e., the Ieng Sary case

⁸ See Motion to Disqualify, paras. 23-25: “Professor Cassese has a clear and demonstrable interest in providing an affirmative answer [as to] “whether joint criminal enterprise as a mode of liability can be applied before the ECCC, taking into account the fact that these crimes were committed in the period 1975-79.” [...namely] this would insulate Professor Cassese against this sustained criticism [against using customary international law to create of JCE as a mode of liability in *Tadić*]. It would also ensure Professor Cassese’s legacy. That does not mean it is necessarily a correct statement of the law.”

⁹ See *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary’s Motion For Reconsideration of Decision on Ieng Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”, 20 November 2008.

¹⁰ *Id.* As set out in the ‘Summary of Argument Section’ at p.1 of the Motion for Reconsideration, Joint Criminal Enterprise Liability is not applicable before the ECCC for the following reasons:

- A. JCE is not applicable at the ECCC because it is barred by the principle of *nullum crimen sine lege*. This fundamental protection prevents the retroactive application of criminal law.
- B. JCE is not a form of liability over which the ECCC has jurisdiction by virtue of Article 29 of the Establishment Law. It is neither found explicitly in Article 29, nor can it implicitly be considered a form of “commission.”
- C. JCE is not recognized by Cambodian law applicable in 1975-79.
- D. JCE is not currently established in customary international law nor was it recognized in customary international law during 1975-79.
- E. JCE was neither foreseeable nor accessible in 1975-79.
- F. Customary international law is not directly applicable in Cambodian courts and so may not be applied at the ECCC.

¹¹ See *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ruling on the Filing of a Motion by the Charged Person Ieng Sary in the Case Against the Charged Person “Duch”, 21 November 2008.

¹² See *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC-OCIJ (PTC02), Motion for Reconsideration of the Pre-Trial Chamber’s Ruling on the Filing of a Motion by the Charged Person IENG Sary in the case against the Charged Person “Duch”, 24 November 2008.

accepting the motion but rejecting the annex which contained the previous filing for reconsideration.¹³

10. As a result of this action by the PTC, the Ieng Sary Defense sent a letter to the ECCC Administrator complaining about this practice. The letter was widely circulated.¹⁴
11. Subsequent to the letter of 3 December 2008, a meeting was held with Knut Rosandhaug, the Deputy Director of Administration,¹⁵ on 11 December 2008. The purpose of the meeting, *inter alia*, was to alert the international side of the ECCC that this practice by the PTC was unsound and that because of the general lack of transparency within the ECCC the Ieng Sary Defense would set up a website to publicize all public submissions. This meeting was followed up by a second letter.¹⁶
12. As a result of the aforementioned history, the Ieng Sary Defense established a website. Other than a short mission statement¹⁷ which was from one of the

¹³ See *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File, 3 December 2008.

¹⁴ See Letter from Ang Udom and Michael G. Karnavas to Sean Visoth and Knut Rosandhaug, ECCC Director and Deputy Director of Administration respectively titled "Improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section." This letter was copied to, *inter alia*, H.E. Ms. Patricia O'Brien, the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, H.E. Ambassador Léo Mérorès, President of the United Nations Economic and Social Council and H.E. Sok An, Deputy Prime Minister, Minister in Charge of the Office of the Council of Ministers and Chairman of the Royal Government Task Force of the Khmer Rouge Trials, as well as the major UN donor states to the ECCC.

¹⁵ It further bears noting that the Ieng Sary Defense was not able to meet with the Director of Administration, Sean Visouth because he was on "sick leave". In the midst of this controversy, Sean Visoth was at the center (or apex) of a corruption scandal currently engulfing the ECCC; Sean Visoth stands accused of collecting money from every Cambodian in his department, including court employees and Cambodian legal assistants in the OCIJ and OCP. See further "The Khmers Rouges and Justice: The Court on Trial" *The Economist*, 2 April 2009; Dan Rivers, 'Cambodian war crimes court in corruption probe', aired on CNN on 31 March 2009.

¹⁶ See Letter from Ang Udom and Michael G. Karnavas to Sean Visoth and Knut Rosandhaug, ECCC Director and Deputy Director of Administration respectively titled Meeting to discuss our letter of 3 December 2008 regarding the improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section, 18 December 2008.

¹⁷ Quoting from the letter submitted by Michael G. Karnavas and Ang Udom to the ECCC Director of Administration, 18 December 2008.

"...the current practice by the Judicial Chambers and Co-Investigating Judges at the ECCC, of suppressing Defence filings which may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges, all under the fig leaf that these are necessary measures to protect the supposed confidentiality and integrity of the investigation or judicial decision-making process, must be discontinued without exception. Submissions which are solely the work of the Defence team and which do not relate to the substance of the ongoing judicial investigation but relate solely to legal issues, must be debated under the watchful eye of the public. To allow non-confidential issues to be debated behind closed doors not only deprives Mr. IENG Sary of a fair and public trial but also deprives Cambodia of a demonstration of how complex trials for the most serious crimes can be conducted openly and transparently."

letters to the ECCC Administration the website contained the public submissions filed by the Ieng Sary Defense.

The grievance

13. The crux of the grievance is the content placed on the website for dissemination. To the best belief of the Ieng Sary Defense, all documents placed on the website were of a public nature. None of the documents contained confidential information, such as names of witnesses, supporting documents to the Introductory Submission, etc. It did contain Mr. Ieng Sary's medical records, though Mr. Ieng Sary had provided a waiver.¹⁸ The issue of the health of Mr. Ieng Sary – a matter which is of great concern and litigation¹⁹ – is being ignored by the OCIJ and PTC, which is why it was felt

¹⁸ See *Waiver of IENG Sary* which comprehensively set out his position regarding his health situation. It reads: "I, IENG Sary, consent to all motions concerning my health condition submitted by ANG Udom and Michael G. KARNAVAS, my legal representatives in the criminal investigation reference 002/19/09/2007 before the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), including any attached health records and any further reports prepared on the basis of these health records, to be 'public' in the sense of Articles 3.12 and 3.14 of the Practice Direction on the Filing of Documents Before the ECCC (*Practice Direction ECCC/01/2007/Rev.3*). I further consent to any discussion of my health issues during the oral hearing on 26 February 2009 in my Appeal against the Provisional Detention Order, being held in public session."

¹⁹ See for example (1) Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Interoffice Memorandum titled "Meeting of 18 December 2007", 20 December 2007, "As we noted, Mr. IENG Sary wishes to have an opportunity to fully apprise himself of not only the Introductory Submission but also all of the supporting documentation listed in the endnotes." (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, "As noted in our previous discussion and correspondence Mr IENG Sary has every intention of assisting his legal team in preparation of his defence". (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. "24. As the Pre-Trial Chamber is undoubtedly aware, Mr. IENG Sary has been suffering from a variety of health problems in recent weeks, requiring him to be repeatedly taken into hospital. Consequently, the Defence Team has been unable to converse with him on the factual questions mentioned above. This has rendered Mr IENG Sary unable to participate in his own defence, a right guaranteed by the ECCC Law and confirmed by a multitude of human rights instruments. It bears underscoring that Mr. IENG Sary has not waived his right to assist in his own defence. Moreover, given his current state of health, it is doubtful whether Mr. IENG Sary is even competent to provide such a waiver. [...] 26. It is well established that a Charged Person, such as Mr. IENG Sary, must be deemed legally fit for trial in order to execute a valid waiver. Fitness for trial is conditioned upon the accused's ability to effectively participate in any and all relevant proceedings, by being able to: understand the nature of the charges; understand the course of the proceedings; understand the details of the evidence; instruct counsel/assist in his or her own defence; and, to understand the consequences of the proceedings, etc. 27. [...] Mr. IENG Sary has an unqualified right to participate effectively in any and all criminal proceedings against him, including, inter alia: the right to be present and assisted by/provide assistance to counsel, as well as the right to hear and follow proceedings. Accordingly, even if a waiver were to be provided by Mr. IENG Sary, it is respectfully submitted that acting upon such waiver by the Co-Lawyers would constitute a denial of due process to Mr. IENG Sary, and a breach of the principle of equality of arms. Simply, the assigned Co-Lawyers cannot proceed uninstructed and unaided by a healthy and fully cognizant Mr. IENG Sary." (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, "25. [...] The Pre-Trial Chamber was aware that IENG Sary had been hospitalized

necessary to publicize these records. There were other submissions which might have been embarrassing to the OCIJ, but again, these submissions contained no confidential information.²⁰

14. To fully appreciate the events leading up to the grievance the following material affixed hereto should be reviewed:

- 15 September 2008 - Ieng Sary's Expedited Request to Make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch";
- 3 October 2008 - Ieng Sary's Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor's Appeal of the Closing Order Against Kaing Guek Eav "Duch";
- 6 October 2008 – Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch";

on 13 February and that preparation of the Defence submissions on jurisdiction "requires the active and sustained participation of Mr. IENG Sary" which is the exercise of "an unqualified right to participate effectively in any and all criminal proceedings against him"; (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, "The failure of the OCIJ to resolve this most pressing issue may have contributed to the deteriorating health condition of Mr. IENG Sary." (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, "6. [...]Unquestionably, Mr. IENG Sary is in a state of weak physical and mental capacity, due to his current illnesses and the medication he is receiving, and it is feared that his mental state may deprive him of this essential ability to consult with his Defence Team. My IENG Sary has an unqualified right to participate effectively in any and all criminal proceedings against him, including, inter alia, the right to be present and the assisted by/provide assistance to counsel, as well as the right to hear and follow proceedings". (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, "3. The translation of documents into Mr. IENG Sary's language is indispensable if he is to fully exercise his right to participate in his own defence". (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, "2. The right to participate in one's own defence is a fundamental right of the accused, and is guaranteed by ECCC Law and confirmed by a multitude of human rights instruments as detailed in the Request".

²⁰ See e.g. Case of Ieng Sary, 002/19-09-2007-ECCC-OCIJ, Request For Information Concerning The Apparent Bias & Potential Existence Of Conflict Of Interest Of Ocij Legal Officer David Boyle, 4 March 2008; See also 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.

- 14 October 2008 – Decision on Ieng Sary’s Motion to Disqualify *Amicus Curiae*;
- 20 November 2008 - Ieng Sary’s Motion For Reconsideration of Decision on Ieng Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”;
- 21 November 2008 – Ruling on the Filing of a Motion by the Charged Person Ieng Sary in the Case Against the Charged Person “Duch”;
- 24 November 2008 - Motion for Reconsideration of the Pre-Trial Chamber’s Ruling on the Filing of a Motion by the Charged Person IENG Sary in the case against the Charged Person “Duch”;
- 3 December 2008 - Letter from Ang Udom and Michael G. Karnavas to Sean Visoth and Knut Rosandhaug, ECCC Director and Deputy Director of Administration respectively titled “Improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section”;
- 3 December 2008 - Decision on Ieng Sary’s Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File;
- 18 December 2008 - Letter from Ang Udom and Michael G. Karnavas to SEAN Visoth and Knut Rosandhaug, ECCC Director and Deputy Director of Administration respectively titled Meeting to discuss our letter of 3 December 2008 regarding the improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section;
- 3 March 2009 - Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009.

Response to the Grievance

15. In response to the OCIJ Order on Breach of Confidentiality of the Judicial Investigation, the Ieng Sary Defense filed an appeal before the PTC arguing that (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 Website was only confidential to protect the waivable rights of Mr. Ieng Sary; (c) the letter warning the Defense team about intention to produce its own website and publish its own filings did not constitute a decision, nor a warning in accordance with the relevant provisions of the Rules; and (d) the failure of the OCIJ and PTC to sanction their own repeated violations of confidentiality

demonstrated discrimination in treatment between the Defense team and other organs of the ECCC.²¹

16. The following excerpts from the appeal submission encapsulate the essence of my response concerning the judicial capriciousness of the OCIJ in characterizing or treating public documents as confidential as well as the general absurdity of the alleged grievance against me.²²

“Curiously, there is nothing to distinguish the publicized 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 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. The irony of it all is stupefying.” (Para. 23.)

“Coupled with this discrepancy is the somewhat Kafkaesque 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 [...] 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.” (Para. 24.)

“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:

‘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:

I know of only one authority which might justify the suggested method of construction:

‘When I use a word,’ Humpty Dumpty said in a rather 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

²¹ *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 (“Confidentiality Appeal”).

²² Footnotes omitted.

different things. 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'" (Para. 27.)

"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 [...] 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." (Para. 29.)

"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 [...] 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*." (Para. 37.)

17. To fully appreciate the actions taken following the grievance – as well as those currently pending – the following material affixed hereto should be reviewed:
- 6 March 2009 - Statement of NGOs, Concern about the Restrictions on Transparency Resulting from the Co-Investigating Judges Order on Breach of Confidentiality, Phnom Penh;
 - 10 March 2009 - 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;
 - 25 March 2009 - Statement of Unrepresented Civil Party [Theary C. Seng] on Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation;
 - 25 March 2009 - Statement of Co-Lawyers for Civil Parties on Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation;
 - 27 March 2009 - Co-Prosecutors' Observations on Ieng Sary's Appeal Against the Co-Investigating Judges' Confidentiality Order;
 - 7 April 2009 – Directions to the Co-Lawyers for Ieng Sary Concerning "Co-Prosecutors' Observations on Ieng Sary's Appeal Against the Co-Investigating Judges' Confidentiality Order;

- 13 April 2009 – Internal Memorandum from the Greffiers concerning the rules and procedures aimed at managing the public, confidential and strictly confidential portions of the case files at the judicial investigation stage;
- 21 April 2009 – Co-Lawyers for Ieng Sary’s Response to the Directions Issued by the Pre-Trial Chamber on 7 April 2009.

Affirmation concerning alleged breach of confidentiality

18. As can be seen from the submissions before the PTC concerning the alleged breach,²³ including the reactions from the NGOs as reflected in their press release,²⁴ there is, essentially, a consensus against the OCIJ’s actions and conclusions.²⁵ In what may be quite simply described as an eloquent and cogent *Clarion Call*, the NGOs in their Joint Response note:

“The current controversy between the Co-Investigating Judges and the defense teams should be seen against a background in which the Office of the Co-Investigating Judges have failed to meet public demands and expectations for a reasonable level of disclosure of information regarding the pre-trial phase, and to fulfill their promises to make more information public...[w]e believe this Order on Breach of Confidentiality places too high a priority on the need for secrecy, and does not adequately respect the protections that should be afforded to defense counsels when pursuing the best interests of their client. While we accept that any breach of confidentiality on the part of the defense that specifically undermines reasonable requirements for confidentiality should be reprimanded, we believe the Order to extend the requirements for confidentiality beyond what is reasonably required, and the actions taken by the OCIJ in this instance were unduly harsh towards the defense. As a result, the Order further contributes to broader perceptions of pervasive practices of non-transparency at the ECCC.”

19. Moreover, a recent memorandum issued by the greffier of the court sought to clarify the procedures surrounding confidentiality at the ECCC, implicitly suggesting that the previous procedure was less than clear. The memorandum

²³ *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 (“OCP Observations”); Statement of Unrepresented Civil Party [Theary C. Seng] on Ieng Sary’s Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation, 25 March 2009; Statement of Co-Lawyers for Civil Parties on Ieng Sary’s Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation, 25 March 2009 (“Civil Parties Statement”).

²⁴ 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.

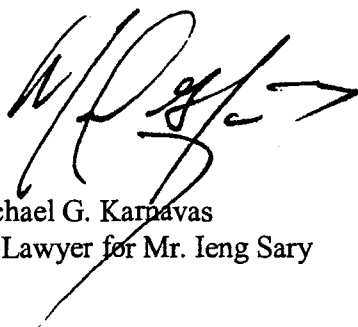
²⁵ OCP Observations, paras. 30-31, 44-50; Civil Parties Statement, paras. 5-7, 15-21.

further states that “a document labeled public by the Co-Investigating Judges remains public for all sources and persons anywhere.”²⁶

20. The Ieng Sary Defense maintains that it has always acted appropriately, even though it went ahead and withdrew certain submissions from the website. Tellingly, the OCIJ has belatedly come around and acknowledged that it has been less than transparent,²⁷ though it has yet to grasp the essence of what constitutes transparency.²⁸
21. Though the OCIJ did not provide the Ieng Sary Co-Lawyers with a hearing before alleging – very publicly – a breach,²⁹ the matter is currently pending before the PTC.³⁰ A public hearing has been requested, which hopefully will be granted;³¹ the PTC is scheduled to sit again in June 2009.

I affirm, to the best of my knowledge and belief, that this statement is true, accurate and complete.

Respectfully submitted,



Michael G. Karnavas
Co-Lawyer for Mr. Ieng Sary

²⁶ Internal Memorandum, 13 April 2009.

²⁷ OCIJ Press Release, 3 March 2009.

²⁸ Since the grievance, the OCIJ has recently been faced with a request filed by several Defence teams for access to a United Nations drafted report detailing the widespread and systematic corruption that has allegedly occurred at the ECCC within the Administration. The OCIJ denied this request as being outside of its jurisdiction within a week of the filing; a stark contrast when considering that the majority of Defence filings are left languishing for months. *See Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action, 3 April 2009; *See also* Press Release in response to the statement of H.E. Peter Taksoe-Jensen, the United Nations Assistant Secretary-General for Legal Affairs, dated 8 April 2009, by Ang Udom and Michael G. Karnavas, Co-Lawyers for Mr. IENG Sary, 9 April 2009.

²⁹ In issuing a public decision, the OCIJ also issued a press release for journalistic consumption; *see* attached OCIJ Press Release of 3 March 2009.

³⁰ *See* Confidentiality Appeal; *See also Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC18), Co-Lawyers for Ieng Sary’s Response to the Directions Issued by the Pre-Trial Chamber on 7 April 2009, filed 21 April 2009 (pending translation) (“Response to Directions”).

³¹ Confidentiality Appeal, paras. 8-11; Response to Directions, paras. 7-9.

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1. 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;
2. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments promulgated 27 October 2004, NS/RKM/1004/006;
3. Internal Rules (Rev.3), as revised on 6 March 2009;
4. 15 September 2008 - Ieng Sary's Expedited Request to Make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch";
5. 3 October 2008 - Ieng Sary's Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor's Appeal of the Closing Order Against Kaing Guek Eav "Duch";
6. 6 October 2008 – Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch";
7. 14 October 2008 – Decision on Ieng Sary's Motion to Disqualify *Amicus Curiae*;
8. 20 November 2008 - Ieng Sary's Motion For Reconsideration of Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch";
9. 21 November 2008 – Ruling on the Filing of a Motion by the Charged Person Ieng Sary in the Case Against the Charged Person "Duch";
10. 24 November 2008 - Motion for Reconsideration of the Pre-Trial Chamber's Ruling on the Filing of a Motion by the Charged Person IENG Sary in the case against the Charged Person "Duch";
11. 3 December 2008 - Letter from Ang Udom and Michael G. Karnavas to Sean Visoth and Knut Rosandhaug, ECCC Director and Deputy Director of Administration respectively titled "Improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section";
12. 3 December 2008 - Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File;
13. 18 December 2008 - Letter from Ang Udom and Michael G. Karnavas to SEAN Visoth and Knut Rosandhaug, ECCC Director and Deputy Director of Administration respectively titled Meeting to discuss our letter of 3 December 2008 regarding the

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- improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section;
14. 3 March 2009 - Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009.
 15. 6 March 2009 - Statement of NGOs, Concern about the Restrictions on Transparency Resulting from the Co-Investigating Judges Order on Breach of Confidentiality, Phnom Penh;
 16. 10 March 2009 - 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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