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D164/3/1

BEFORE THE PRE-TRIAL CHAMBER
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IENG SARY'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER DENYING THE JOINT DEFENCE REQUEST FOR INVESTIGATIVE ACTION TO SEEK EXCULPATORY EVIDENCE IN THE SHARED MATERIALS DRIVE

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D164/3/1

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rule 74(3)(b) of the ECCC Internal Rules ("Rules"), this Appeal Against the Co-Investigating Judges' Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive ("SMD"), issued on 19 June 2009 ("Order"). The OCIJ, through its Order, displays a fundamentally incorrect approach to its duty to investigate impartially, which, if not corrected by the Pre-Trial Chamber, will result in a manifestly inadequate, biased and unfair judicial investigation. Having reviewed the Joint Appeal by Nuon Chea and Ieng Thirith against the Order,[1] the Defence, for judicial economy, joins and adopts all relevant facts and legal arguments set out therein, and further makes supplementary submissions on two grounds: (a) the supposed "principle of sufficiency" that is invoked by the OCIJ;[2] and (b) the OCIJ's reliance upon Mr. Ieng Sary's right to a trial without undue delay, as a means of denying him his right to a fair trial.[3]

I. LAW

1. The Defence incorporates by reference the law set out in the Joint Appeal.[4]

II. SUMMARY OF ARGUMENT

2. The Defence will show that:

A. There is no "principle of sufficiency" in a civil law system; and

B. The OCIJ is absolutely prohibited from invoking one of Mr. IENG Sary's human/fair-trial rights to deny him the full and complete exercise of another.

III. ARGUMENT

A. There is no principle of sufficiency of evidence in a civil law system

[1] The Appeal by Nuon Chea and Ieng Thirith is titled 'Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009 ("Joint Appeal").
[2] *Id*, paras. 18-21.
[3] *Id*, paras. 29-34.
[4] *Id*, paras. 10-17.

3. The Order provides that "the principle of sufficiency of evidence outweighs that of exhaustiveness: an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person."[5]
4. It is true that under Rule 67(3)(c), the OCIJ may issue a closing order dismissing the case if "there is not sufficient evidence against the Charged Person or persons of the charges." *A contrario,* the OCIJ may issue a closing order against a Charged Person if there is sufficient evidence. Presumably, this was the Rule upon which the OCIJ's supposed principle of sufficiency is based, although no citation was given by the OCIJ.
5. The requirement that a Charged Person may only be sent for trial if there is sufficient evidence against him or her is wholly different from allowing the OCIJ to close the judicial investigation as soon as this evidence has been gathered as the OCIJ claims. Allowing the OCIJ to close the investigation as soon as it believed it had enough evidence to indict would be completely antithetical to a legal system where the investigating judge has exclusive jurisdiction over the investigation[6] and must conduct its investigations in an impartial manner, searching with equal zeal for both exculpatory and inculpatory evidence.[7]
6. The OCIJ prohibits parties from conducting their own investigations, and so each party is completely reliant upon the OCIJ to conduct investigations on their behalf.[8] Closing the investigation as soon as the OCIJ believes that there is sufficient evidence to indict would deprive the Charged Persons of the thorough investigation of exculpatory evidence to which he or she is entitled. Indeed, if such a principle of sufficiency was in force, the OCIJ could simply deny requests for investigative action submitted by the Defence on the principle that it had already located enough evidence to indict and could therefore close the investigation.
7. Furthermore, as an OCIJ investigation is initiated under Rule 55(1) through the filing of an Introductory Submission ("IS") by the OCP under Rule 53(1), ending the investigation as soon as there is sufficient evidence to indict inherently prejudices the Defence. The OCP only submitted evidence in support of the allegations in the IS, an approach it

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[5] Order, para. 6. Emphasis added.
[6] *See* 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, Article 5(1) ("Agreement").
[7] Rule 55(5).
[8] "The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action." *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2.

appears to follow with its legal filings regardless of the ethical considerations involved.[9] To cease the judicial investigation early, and neglect to conduct the necessary investigations of exculpatory evidence which may "suggest the innocence or mitigate the guilt of the Suspect or Charged Person or affect the credibility of the prosecution evidence"[10] means that only 'Prosecution' evidence is on the Case File. Since only evidence that is on the Case File may be referred to during trial proceedings, and may form the basis of the Trial Chamber's Judgement,[11] failing to properly investigate this evidence during the judicial investigation will ineluctably result in an unfair trial, in clear violation of Rule 21(1)(a).

8. The OCIJ has an obligation under the Rules to proactively and diligently investigate exculpatory evidence. Rule 55(5) provides that the OCIJ "shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory".[12] It is pertinent that the use of the imperative "shall" is used rather than "may", as this shows that no discretion exists for the OCIJ with regard to the conduct of an impartial investigation. The OCIJ is prohibited from favoring evidence which supports the OCP's allegations over any evidence which may undermine such allegations. The OCIJ must give equal attention to the collection and analysis of both inculpatory and exculpatory evidence.[13]
9. In support of the supposed principle of sufficiency, the OCIJ further declares that "the Co-Investigating Judges have the discretionary power to choose the means of ascertaining the truth."[14] The OCIJ recognises its duty to ascertain the truth. Nonetheless, the OCIJ through the order implies that indicting as soon as there is sufficient evidence - irrespective of whether the investigation is complete with all avenues leading up to

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[9] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutor's Response to Ieng Sary's Application for Sanctions Against the Co-Prosecutors for Allegedly Misleading the Court Regarding the Law on Joint Criminal Enterprise, 16 July 2009, para. 3. where the OCP asserts "... that the Supplementary Observations correctly reflected their understanding of the law on JCE on the date of its filing. While no legal pleading can claim to refer to all the available authorities on its subject matter, to the Co-Prosecutors' knowledge and belief, the Supplementary Submission contained a comprehensive review of authorities to support the Co-Prosecutors' submission ..." ; *see also* para 5. "If the Applicant is aggrieved that the Co-Prosecutors have not filed a document that may undermine the Co-Prosecutor's case, then it is open for the Applicant to bring that document to the attention of the Co-Investigating Judges to assist them in reaching a just determination of the issue of the application of JCE." Contextually, this clearly demonstrates that the OCP is of the opinion that it need only provide to the OCIJ (and the Court in general) information – factual or legal – which it believes favors its position, though not necessarily reflective of all relevant information necessary for a fair and just determination of the proceedings. Obviously the OCP's understanding of its functions and duties is contrary to the Civil Law system under which the ECCC is founded.

[10] *See* Rule 53(4) which provides this definition of exculpatory evidence.

[11] Rule 87(3).

[12] Emphasis added.

[13] *See* generally *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Third Request for Investigative Action, 21 May 2009, para. 29.

[14] Order, footnote 2.

exculpatory material having been exhausted - is, in fact, a method of ascertaining the truth. This is incorrect. There is an inherent contradiction between ascertaining the truth, and indicting as soon as the minimum threshold of evidence is reached to indict. Searching for the truth of a fact implies looking at a factual situation from all sides and examining all the evidence supporting each side. By clear contrast, indicting as soon as there is sufficient evidence to do so, does not even claim to seek the truth. It is certainly not a method of doing so.

10. Far from being a civil law concept therefore,[15] indicting as soon as there is sufficient evidence is more akin to the approach of a common law prosecutor. In the United Kingdom, the Crown Prosecution Service will only bring charges against someone if there is "enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge."[16] However, in such a common law system, the Defence is responsible for its own investigations and so may at least counterbalance the Prosecution. Similarly, such is the case before the *ad hoc* International Criminal Tribunals (ICTY/ICTR).[17] By following this so called "principle of sufficiency", the OCIJ is acting like a common law prosecutor but doing so with the power of a French investigating judge. This leaves Mr. IENG Sary facing the worst of both the common law and civil law systems with neither of the built-in protections inherent in both systems.

B. Persons Charged by the ECCC must not be forced to choose between their fundamental human rights.

11. The OCIJ has repeatedly invoked one right of the Charged Persons to seek to deprive them from exercising other rights. It has blamed Mr. IENG Sary for exercising his right to

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[15] The ECCC is a Civil Law system as recognized by the OCIJ. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, para. 13.

[16] Section 5.2, United Kingdom Code for Crown Prosecutors, 2004.

[17] The procedure at the *ad hoc* International Tribunals has been characterized as hybrid, in that it is part adversarial and part inquisitorial; *see* Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the ICTY*, 11 E.J.I.L. 569 (2000); Kai Ambos, *International Criminal Procedure: Adversarial', Inquisitorial' or Mixed'*, 3 INT'L CRIM. L. R. 1 (2003); Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings* in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, vol 2, 1439-1495 (Judge Antonio Cassese et al. eds., Oxford University Press, 2002). Essentially, it is a party-driven process: the parties (prosecution and defence) are involved in gathering their respective evidence and putting on their respective cases. The prosecution is independent in choosing who to investigate, who to indict, the evidence it wishes to gather, the manner in which it collects the evidence, the witnesses it wishes to speak to, the charges it wishes to include in the indictment, and the evidence it wishes to present at trial; *see* Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 Wash. U. J. L. & POL'Y, 87, 99-101 (2001). Likewise, the defence is independent in conducting its own investigation: which witnesses to speak to, what evidence to gather, which witnesses and what evidence to present at trial; see John R.W.D. Jones, *The Gamekeeper-Turned-Poacher's Tale*, 2 J. INT'L CRIM. JUSTICE 2 (2004).

remain silent for delaying the judicial investigation and therefore depriving him of the right to a fair trial.[18] It has also invoked the fact that Mr. NUON Chea was exercising the right to remain silent to deprive him of the right to participate in his own defence.[19] It is therefore not surprising that it has invoked the right of a Charged Person to a trial without undue delay to deny the request for the OCIJ to investigate the SMD.[20] It bears re-emphasizing that the OCIJ is not entitled to be "cherry picking"[21] amongst the various human/fair-trial rights set out in the Rules and in Cambodian and International Human Rights Treaties: all must be given full effect. The OCIJ must not repeatedly and disingenuously justify the violation of one right by claiming to be protecting another.

12. However, in this situation, to further facilitate the investigation of the materials on the SMD by the OCIJ, Mr. Ieng Sary has signed a waiver of his right to a trial without undue delay for a period of one month in order for the OCIJ to undertake the investigative action requested.[22] The Defence submits that the investigators, analysts, legal support staff and Co-Investigating Judges themselves should be able to conduct the tasks requested regarding this material in such a period. If the OCIJ persists in forcing Mr. IENG Sary to choose one right over another, he must at least be permitted to select which of those rights is more important to him in this particular situation. In this case, he prefers that the proceedings be fair above all else.

IV. CONCLUSION & RELIEF SOUGHT

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

a. QUASH the Co-Investigating Judge's Order on the Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive;

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[18] *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Extension of Provisional Detention, 10 November 2008, para. 41.

[19] *Case of Nuon Chea,* 002/19-09-2007-ECCC/OCIJ, Letter, 14 March 2008. The Pre-Trial Chamber reversed this aspect of the OCIJ's decision was reversed by the Pre-Trial Chamber. *See Case of Nuon Chea,* 002/19-09-2007-ECCC/OCIJ (PTC07), Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, 22 October 2008.

[20] Order, para. 10.

[21] *See* generally Order, para. 7. where the OCIJ asserts that "... being selective must not be constructed as cherry picking the existing evidence ..." This phrase used by the OCIJ generally refers to: "the activity of pursuing the most lucrative, advantageous, or profitable among various options and leaving the less attractive ones for others." *See* http://encarta.msn.com.

[22] *See* Annex A. If the Pre-Trial Chamber, reverses the decision of the OCIJ on this ground, this period of 1 month will be subtracted from any challenge to the proceedings based on undue delay. This waiver does not have any effect on the time calculated for provisional detention under Rule 63(7) or sentence under Rule 98(5).

b. DECLARE that the principle of sufficiency of evidence espoused by the OCIJ has no place in the ECCC legal system and that the OCIJ must proactively search for and take into account all exculpatory evidence when assessing whether to indict a Charged Person under Rule 67(1);
c. ORDER the OCIJ to review all the documents placed in the SMD;
d. ORDER the OCIJ to produce a sufficiently detailed report of their analysis to enable the defence to ensure that all necessary investigative actions have been undertaken to identify potential exculpatory evidence; and
e. ORDER the OCIJ to provide a list of exculpatory material contained in the SMD.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

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