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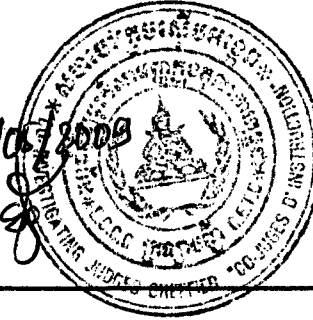
BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Criminal Case File N°: 002/19-09-2007-ECCC/OCIJ  
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IENG SARY'S THIRD REQUEST FOR INVESTIGATIVE ACTION

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*Uch Arun*

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Rule 55(10) of the ECCC Internal Rules (“Rules”), this *third request for investigative action* to the Office of the Co-Investigating Judges (“OCIJ”). This request is to place on the Case File information relating to the applicable law, the strategy and the procedures of the OCIJ’s judicial investigation. The Case File does not reflect exactly the law, strategy and methodology applied by the Co-Investigating Judges (“CIJs”) in conducting the investigation. Moreover, there is no proof as to whether there is any system in place and, if so, whether it is being scrupulously followed by OCIJ Investigators in searching for exculpatory evidence. This missing information impacts directly on how the factual conclusions reached by the OCIJ are evaluated. It therefore falls squarely within the OCIJ’s jurisdiction to “take any investigative action conducive to ascertaining the truth”<sup>1</sup> regarding the facts set out in the Office of the Co-Prosecutors’ (“OCP”) Introductory Submission (“IS”).<sup>2</sup>

## I. INTRODUCTION

1. In civil law systems with an investigative judge, the role of the investigative judge is to independently investigate the truth: he has an affirmative duty to conduct the investigation in pursuit of the truth by searching for and gathering all incriminating and exculpatory evidence and examining all relevant witnesses objectively and impartially.<sup>3</sup>
2. Similarly, the role of the OCIJ under the Rules is to conduct a fair, diligent and thorough judicial investigation: collecting and evaluating the evidence relating to the allegations contained within the IS from the perspective of the OCP, Defence and Civil Parties. It is crucial that such an investigation is conducted by impartial, independent and competent individuals. Thus, it stands to reason, that the CIJs would need to design an investigative

<sup>1</sup> Rule 55(5).

<sup>2</sup> Rule 55(2).

<sup>3</sup>As one professor/expert in the American legal system, Professor Renée Lettow Lerner, who was present as a defence witness on American criminal procedure at a murder trial before the *Cour d’ Assises* in France observed: “The investigating judge investigates the matter laid out in the prosecutor’s request: within those bounds, he is required to look for both exculpatory and inculpatory evidence. He is broadly charged with pursuing all inquires that he deems useful in discovering the truth (*la manifestation de la verite*)”. Professor Lerner goes on to recount how during the trial before the *Cour d’ Assises*, the French judge needed to learn that the prosecutor and police in California may have “some duty to investigate exculpatory evidence, at least in theory, generally they do so only to satisfy themselves that they have the right defendant (or at least a plausible one) and possibly to rebut defence evidence”. Occasionally, Professor Lerner felt the need to point out to the French Judge that unlike in the statements taken by the investigative judge, the investigative authorities in California did not “necessarily record all exculpatory information a witness has given”, and therefore the statements from the American investigators should not be relied upon as if they had been produced by a French investigative judge. Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d’ Assises*, 2001 U. ILL. L. REV. 791, 802 (2001).

system to be followed by judicial police or investigators, analysts (“OCIJ Investigators”) who carry out investigative actions on behalf of the OCIJ.

3. From the evidence placed on the Case File it is indiscernible whether a fair, diligent and thorough judicial investigation is being conducted. Collections of witness interviews are arbitrarily placed on the Case File, often months after the interviews were conducted,<sup>4</sup> with little or no explanation of how these interviews fit in to the judicial investigation. The Case File contains no discernable trace of exculpatory evidence being added or any proof that it has actually been sought by OCIJ Investigators. The OCIJ appears to select witnesses merely because they were mentioned by the OCP. There is no evidence that an independent analysis of these witnesses was conducted by the CIJs before selecting them.<sup>5</sup> This raises serious concerns; hence this request.

## II. FACTS

4. The judicial investigation into Mr. IENG Sary was initiated on 18 July 2007 with the filing of the IS by the OCP<sup>6</sup> and then separated from the case against Kaing Guek Eav “Duch” on 19 September 2007.<sup>7</sup> Mr. IENG Sary was arrested on 12 November 2007.<sup>8</sup>
5. Although the allegations in the IS are confidential, the OCP has *publicly* confirmed that the alleged crimes referenced in the IS were “committed as part of a common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups.”<sup>9</sup> The OCP also confirmed that the IS comprised “twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution”<sup>10</sup> for whom the OCP had identified and named in the IS five suspects who had allegedly “committed, aided, abetted and/or bore superior responsibility for those crimes.”<sup>11</sup> The OCP provided the OCIJ with “more than 1,000 documents constituting over 14,000 pages, including third party statements and/or written records of over 350 witnesses, a list

<sup>4</sup> See *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ, Rogatory Letter, “D166” which is dated 11 September 2008 and yet was only placed on the Case File on 12 May 2009.

<sup>5</sup> See 002/19-09-2007-ECCC/OCIJ, Redacted version of the Rogatory Letter, 12 September 2008, “D107”. This Rogatory Letter simply states to interview a specific witness named in the IS and then “any other witnesses conducive to establishing the truth” without any further instructions on how this truth may be uncovered.

<sup>6</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007.

<sup>7</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Separation Order, 19 September 2007.

<sup>8</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Police Custody Decision, 12 November 2007.

<sup>9</sup> See Press Release, Statement of the Co-Prosecutors, 18 July 2007, p. 3 (“OCP Press Release”).

<sup>10</sup> *Id.*, p. 4.

<sup>11</sup> *Id.*, p. 5.

of 40 other potential witnesses, thousands of pages of Democratic Kampuchea-era documentation and the locations of over 40 undisturbed mass graves.”<sup>12</sup>

6. Since the commencement of the judicial investigation the CIJs, either directly or through the OCIJ Investigators, have conducted approximately 415 interviews pursuant to 14 Rogatory Letters. The OCIJ has also obtained documents and video evidence from various sources which have been placed on the Case File.<sup>13</sup>

### III. SUMMARY OF REQUEST

7. The Defence requests the OCIJ to add the following information to the Case File:
- i. Information concerning the procedural law applied by the CIJs and OCIJ Investigators to the judicial investigation;
  - ii. Information concerning the CIJs’ planning and overall strategy of the judicial investigation;
  - iii. Information on the qualifications and experience of OCIJ Investigators and their Standard Operating Procedures;
  - iv. Information on the collection and analysis of exculpatory evidence by the OCIJ. This encompasses information on the alternative theories of events set out in the IS considered by the OCIJ and information on how these alternative theories are translated into systems for identifying, collecting and analyzing exculpatory evidence.

### IV. LAW

#### A. Legal Duties and Obligations of the OCIJ with Regards to Judicial Investigations

##### 1. Jurisdiction and Scope of the Judicial Investigation

8. The competence of the ECCC is set out by Article 2 of the law which created the ECCC.<sup>14</sup> Article 5(1) of the Agreement between the UN and the Royal Cambodian

<sup>12</sup> *Id.*, p. 6.

<sup>13</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, D161/1, Report of Execution of Rogatory Letter, 4 February 2009, explaining the 54 documents obtained from the National Archive of Cambodia. See also *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, D43/IV, Report of Execution of Rogatory Letter, 22 February 2008 explaining that 99 documents (confessions from S-21) were received from DC-Cam.

<sup>14</sup> See 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 Oct 2004, NS/RKM/1004/006. Under Article 2, the purpose of the ECCC is to bring to trial “those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international

Government mandates the OCIJ to exclusively conduct the pre-trial investigation.<sup>15</sup> The scope of the OCIJ's judicial investigation is limited by Rule 55(2) to investigating the "facts set out in an Introductory Submission or a Supplementary Submission". The Defence is prohibited from carrying out its own investigations and must channel all requests to the OCIJ.<sup>16</sup> Rule 55(5) confirms that this broad power held by the OCIJ is channeled towards "ascertaining the truth" regarding the facts set out in the IS.

## 2. Duty to conduct the judicial investigation impartially

9. The OCIJ is empowered to conduct any investigative action that collects information conducive to ascertaining the truth.<sup>17</sup> Rule 55(5) places upon the CIJs the obligation to act as an impartial organ of justice, gathering and evaluating evidence whether it is incriminating or exculpatory with equal zeal.<sup>18</sup>

## 3. Delegation of investigative tasks to OCIJ Investigators by the CIJs

10. Investigative actions carried out during the OCIJ's judicial investigation may be conducted either personally by the CIJs or delegated to judicial police or investigators to carry out investigative actions on their behalf. This delegation occurs through Rogatory Letters. Here the CIJs require investigators from their office or from the judicial police to conduct investigative actions under Rule 62(1) on their behalf. Rule 62(2) provides in pertinent part that Rogatory Letters "shall not be issued in a general form, and shall clearly specify the nature of investigative work to be done, which must relate directly to the crime or crimes under investigation."<sup>19</sup>

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humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."

<sup>15</sup> 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").

<sup>16</sup> The OCIJ has emphasized the role of the parties with respect to ECCC investigations: "Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. [...] The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action." *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2. (emphasis added)

<sup>17</sup> For the type of investigative actions conducted by the OCIJ, *see Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's First Request for Investigative Action, 20 March 2009, paras. 2-8.

<sup>18</sup> Rule 55(5) provides in relevant part that "[i]n the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory..."

<sup>19</sup> Emphasis added.

## V. REQUEST

### A. Information concerning the procedural law applied by the CIJs and OCIJ Investigators to the judicial investigation

11. From the Case File, it is uncertain which law governs the judicial investigation. It is unclear whether the OCIJ Investigators and CIJs themselves are following the procedure established by the Internal Rules or that established by the Cambodian Code of Criminal Procedure (“CPC”). Although the Pre-Trial Chamber has held that the Internal Rules have primacy over the CPC,<sup>20</sup> it is equally unclear what happens if an investigative action were conducted by either the CIJs or an OCIJ Investigator in accordance with CPC but in violation of the Rules. As a consequence it is also unclear whether the OCIJ considers that it may pick and chose between the two sources of law and, as long as the specific action in question complies with one of them, it is considered to be procedurally correct.<sup>21</sup>
12. The judicial investigation would have to comply with provisions of the CPC as the ECCC is a Cambodian court. However, there is a lack of clarity as to whether this is in fact the case. Under the CPC, Judicial Police<sup>22</sup> shall produce written record of any statement of the person questioned by them during the course of their preliminary investigation.<sup>23</sup> Alternatively, when a preliminary investigation is taking place under the CPC, the Judicial Police can interrogate any person who is suspected of committing an offence. A written record of such interrogation must be established<sup>24</sup> together with the signature or fingerprint of the interrogated person marked on each page of that record<sup>25</sup> in addition to

<sup>20</sup> *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ (PTC06), Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008, paras. 14-15.

<sup>21</sup> For example the Rogatory Letters refer to provisions of the Internal Rules such as Rules 28, 60 and 62 but do not refer to provisions of the CPC even though equally applied to ECCC proceedings as a Cambodian Court. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Rogatory Letter, 27 November 2007, “D91”.

<sup>22</sup> CPC, Art. 56 (Duties of the Judicial Police): “The judicial police perform their duties in support of the judicial body. Judicial police have the duty to examine felonies, misdemeanors and petty offenses, to identify and arrest offenders and to collect evidence”. *See also* CPC, Art. 60 (Officers of the Judicial Police) which states in relevant part “The persons who are capable of performing the duty of Judicial Police include: (1) Police officers who hold the grade of at least major lieutenant and who have at least two years of work experience in the service of national police, after obtaining a Higher Diploma of the Judicial Police;”

<sup>23</sup> CPC, Art. 84 (Different Investigative Powers of Judicial Police Officers): “The authority delegated to judicial police officers varies according to whether the investigation of a *flagrante delicto* or a preliminary investigation is taking place.”

<sup>24</sup> For statement produced during the course of Enquiry of *Flagrante Delicto* case *see* CPC, Art. 93 (Interrogation Records) and Art. 94 (Order to Appear – Inquiry of *Flagrante Delicto* Cases) and for Preliminary Police Inquiry *see* CPC, Art. 114 (Order to Appear – Preliminary Inquiry) and Art. 115 (Record of Interrogation – Preliminary Inquiry).

<sup>25</sup> CPC Art. 93 (Interrogation Records) and 115 (Record of Interrogation – Preliminary Inquiry).

the identity of the interrogator.<sup>26</sup> This must occur only after the interrogated person has read and agreed on the content of the statement.<sup>27</sup> Failure to follow these procedural rules results in the interview being annulled.<sup>28</sup> It is unclear whether these formalities are being applied at all.

13. The obligation to clearly delineate the law applicable to investigation actions is accentuated by the fact that the OCIJ contains two sets of investigators: one Cambodian and the other foreign. While the former would more logically follow the system imposed by the CPC, the latter group would logically look first to the Rules. By failing to clarify the law which regulates the judicial investigation, the OCIJ is disallowing the parties the ability to follow, understand and verify the judicial investigation.
14. **THEREFORE**, the Defence respectfully requests the OCIJ to add the following information to the Case File:
- i. which law is being applied by the OCIJ to the judicial investigation;
  - ii. if more than one law is being applied, what criteria are used in the selection process.

**B. Information concerning the CIJs' planning and overall strategy of the judicial investigation**

15. The responsibility over the judicial investigation is shared between the two Co-Investigating Judges, one Cambodian and the other foreign.<sup>29</sup> They must agree on any action or decision under the system created by the Establishment Law<sup>30</sup> and must therefore work together to design the strategy for conducting the investigation.<sup>31</sup> Moreover, due to the scale and complexity of the IS, it appears that the principal responsibility of the CIJs is not to carry out investigative actions themselves. Rather, they are to establish the overall strategy of the judicial investigation: to plan and direct the different stages of the investigation which will then be implemented under their

<sup>26</sup> CPC Art. 108 (Contents of Police Records): "The records prepared by judicial police officers shall include: The names and titles of the judicial police officers; The unit of such judicial officers; The date. Each page or the records shall be signed by the judicial police officers. The Approval of any stricken word or reference shall be indicated by the signature of a judicial police officer in the margin of the page. The identity shall be mentioned in the written record of interrogation or police custody."

<sup>27</sup> CPC Art. 93 (Interrogation Records) and 115 (Record of Interrogation – Preliminary Inquiry).

<sup>28</sup> For Annulment of Enquiry of *Flagrante Delicto* case see CPC, Art. 109 (Mandatory Rules) and of Preliminary Police Inquiry see Art. 117 (Mandatory Rules).

<sup>29</sup> Article 5(1), Agreement.

<sup>30</sup> Article 23, Establishment Law.

<sup>31</sup> See Rule 72 which sets out the procedure to resolve disputes between the CIJs. Rule 72(3) mandates that in the event of a disagreement, "no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate."

- supervision by the OCIJ Investigators. The implementation of the investigation *must* therefore be conducted within the limits of the investigative strategy designed by the CIJs.
16. The Case File does not reveal *plainly and transparently* the CIJs' strategy for carrying out the investigation. The Charged Persons cannot discern whether their rights are being protected by the OCIJ which *must* act as an impartial body.
  17. In a common law system, the Prosecutor is responsible for conducting the judicial investigation and is not necessarily required to investigate on behalf of the Defence. The common law Prosecutor is a party to the proceedings and is not required to provide information on his investigative strategy to the Defence. By contrast the ECCC follows the civil law system<sup>32</sup> with the OCIJ being a judicial organ *required* to conduct an impartial investigation by collecting and evaluating evidence from the perspective of the OCP, Defence and Civil Parties. As a consequence, the investigation conducted by the OCIJ should be neutral, transparent, and readily apparent from reviewing the Case File.
  18. At present, the judicial investigation is entirely opaque as to the overall strategy of the investigation. The results of Rogatory Letters are simply placed on the Case File almost at random with very little explanation of why certain witnesses were interviewed and how such interviews relate to the allegations in the IS.<sup>33</sup> It is perfectly possible that the investigation is conducted either in geographical stages or by issue, yet there is no information concerning these stages or their point of completion.
  19. Adding the strategy for carrying out the investigation to the Case File would allow the parties to file investigative requests or the OCP to file a supplementary submission in a timely manner, namely before all the witnesses related to a certain topic have been interviewed. It would also allow for a better understanding of the judicial investigation.
  20. **THEREFORE**, the Defence respectfully requests the OCIJ to add the following information to the Case File:
    - i. the overall strategy of the OCIJ in conducting the judicial investigation, the stages into which the judicial investigation has been separated and the schedule by which the OCIJ plans to complete these stages;
    - ii. whether any concrete data exist relating to the information requested in (i).

<sup>32</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, para. 13, ("Confidentiality Order"). See also *supra* note 5.

<sup>33</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Rogatory Letter, 26 May 2008, "D125" which comprises 167 witness statements taken from witnesses all over Cambodia relating to various different crimes and different geographical areas covered by the IS. See also *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ, Rogatory Letter, 11 September 2008, "D166" in which approximately 124 witnesses are interviewed pursuant to the same scattergun approach of the OCIJ.



**C. Information on the qualifications and experience of OCIJ Investigators and their Standard Operating Procedures**

**1. Qualifications and experience of OCIJ Investigators**

21. OCIJ Investigators appear to wield an inordinate amount of power over the selection of witnesses to be interviewed and over the questions posed to those witnesses.<sup>34</sup> The reports drawn up by the OCIJ Investigators regarding the witnesses they have interviewed pursuant to Rogatory Letters demonstrate the power over CIJs' ultimate factual conclusions. In these reports, stark and wide-ranging assessments are made about the credibility and relevance of the testimony of the witnesses they have interviewed.<sup>35</sup> It is unclear whether the CIJs actually verify these assessments directly with the interviewed witnesses. One may legitimately question whether the CIJs solely rely on the assessments made by their investigators.
22. Due to the power wielded by the OCIJ Investigators, the Defence has previously requested background information on two OCIJ Investigators/Analysts, David Boyle<sup>36</sup> and Stephen Heder.<sup>37</sup> Inexplicably, as of this date, well over 3 months after the Heder Request was filed (*seeking information concerning an alleged book proposal wherein Heder is purported to have represented himself as "researched the CPK for 30 years, as a journalist, intelligence officer, human rights advocate, historian, UN official, legal scholar and political scientist" before working as an investigator for the OCIJ*)<sup>38</sup> the OCIJ has yet to be forthcoming. This lack of action by the OCIJ is surprising, not least

<sup>34</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Rogatory Letter, 26 May 2008, "D125". Under this Rogatory Letter OCIJ Investigators are instructed to interview certain named witnesses and "any other witnesses conducive to establishing the truth." This dictates that the OCIJ Investigators may select witnesses and by extension ask them whichever questions are conducive to establishing the truth.

<sup>35</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Report of Execution of Rogatory Letter, 29 January 2007, "D92/10". The two OCIJ Investigators who drafted this report make an assessment of whether the witness is competent or reluctant. They also direct the CIJs towards issuing a subpoena to one of the name witnesses.

<sup>36</sup> *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. Although the Defence believed that the title of 'Legal Officer' best reflected the main role of Mr. Boyle within the OCIJ, the Defence is aware that Mr. Boyle's his official job title may be that of 'Investigator/Analyst'. This characterization of Mr. Boyle's position was confirmed by the OCIJ. See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled "Request for information on "the apparent bias and conflict of interest concerning MM S. Heder and D. Boyle", 26 May 2008.

<sup>37</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Regarding the Potential Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009 ("Heder Request"). The Defence had previously sought other information on Mr. Heder's prior employment with the OCP. See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Regarding an Eventual Conflict of Interest, 24 January 2008.

<sup>38</sup> Heder Request, para. 1 (Emphasis added).

because the OCIJ has very publicly asserted that the Heder Request goes to the substance of the investigation.<sup>39</sup>

23. Although under a legal obligation to act impartially during the judicial investigation, it is only natural that all OCIJ Investigators may be under intense political pressure from a variety of Cambodian and international sources to locate or prioritize incriminating evidence against the Charged Persons rather than evidence which may be exculpatory. This pressure is most likely due to the continued demonization of the Khmer Rouge.<sup>40</sup>
24. The well publicized allegations of corruption within the Administration Section and the OCIJ itself<sup>41</sup> are likely to place significant - albeit different - pressure on OCIJ Investigators. In light of such pressure, OCIJ Investigators may deliberately take improper decisions contrary to the interests of the Defence as the party which brought this embarrassing issue to light.<sup>42</sup> Some OCIJ Investigators may seek to gloss over the investigation with unnecessary speed and undue carelessness thus neglecting key exculpatory evidence. Simply, this will leave the ECCC as a tainted institution.
25. The ability of OCIJ Investigators to carry out their legal obligation to investigate impartially and competently, while withstanding the pressures described above, depends to a large extent on the qualifications and experience they possess.
26. **THEREFORE**, the Defence respectfully requests the OCIJ to add the following information to the Case File:<sup>43</sup>
- i. whether any investigators have worked in any other key investigative entity such as DC Cam or OCP in addition to the OCIJ;
  - ii. the prior investigative experience of each investigator before joining the OCIJ;

<sup>39</sup> Confidentiality Order, para. 17. *See also* Press Statement of Co-Investigating Judges, Phnom Penh, 3 March 2009.

<sup>40</sup> In the recent oral hearing on provisional detention, the OCP quoted a survey which concluded that "Four out of five respondents in our survey said that they harboured feelings of animosity towards those Khmer Rouge members who were responsible for violent acts. 71 per cent said they wanted to see them suffer in some way. A third said they wished they could take revenge against the former Khmer Rouge, and that they could do so if they had the opportunity." This statement, inappropriate as it was during a hearing on provisional detention, demonstrates the continued public pressure on OCIJ Investigators to bring an indictment against the Charged Persons and to possibly favour any evidence which facilitates doing so. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC17), Transcript, 2 April 2009, p. 68.

<sup>41</sup> *See The Economist*, 2 April 2009, The court on trial, Accusations of corruption threaten to discredit the trial of the Khmers Rouges: "Three of the court's staff, who spoke on condition of anonymity, accuse Sean Visoth, the court's chief of administration, of collecting money from every Cambodian in his department, including court employees and Cambodian legal assistants in the office of the co-investigating judges and co-prosecutors. [...] Some of the cash, they were told, was intended for Sok An, a deputy prime minister." (Emphasis added).

<sup>42</sup> *See Douglas Gillison, The Cambodia Daily*, 12 May 2009, 'Gov't Claims to have Files on UN Staff', p. 1 wherein Phay Siphon, Government Spokesman, claimed to have files on UN personnel at the ECCC who were "enemies of the ECCC."

<sup>43</sup> The information requested applied to any OCIJ Investigator, either Cambodian or foreign, who has at any time worked on the judicial investigation into Case File 002, whether or not they are still employed by the OCIJ.

- iii. information which could affect the impartiality of any past or present OCIJ investigator which is either within the knowledge of the CIJs or has been brought to their attention by one of the parties;
- iv. the training (legal or otherwise) that has been provided to the investigators.

## 2. Standard Operating Procedures for OCIJ Investigators

27. Since both Cambodian and foreign investigators work for the OCIJ, they have different backgrounds and experience. There is also the apparent ambiguity over the procedural law that applies to the judicial investigation, referenced in paragraphs 11-14 herein. To prevent such differences from compromising the judicial investigation, Standard Operating Procedures (“SOPs”) for the conduct of the investigation should have been established by the CIJs. This would have guaranteed the integrity of the investigation by allowing it to be conducted in a consistent and fair manner.

28. **THEREFORE**, the Defence respectfully requests the OCIJ to add the following information to the Case File:

- i. whether all reports collated by the OCIJ are placed on the Case File and what happens to the reports that are not added to it;
- ii. whether reports have been made by investigators detailing further observations at the scene, actions of investigators and disposition of all evidence recovered and if so whether they were all placed on the Case File;
- iii. whether evidence other than witness testimony is being obtained and whether it is all placed on the Case File;
- iv. whether safeguards have been put in place to ensure that the investigations are conducted in such a manner so as not to violate the rights of suspects, not to harass or intimidate witnesses or victims, and to ensure the maximum protection and preservation of evidence;
- v. whether records are kept of every payment for expenses by OCIJ Investigators to witnesses, when these payments are made and who decides upon the amount paid;
- vi. whether there is a consistent approach by the OCIJ to insider witnesses and offers of protective measures or immunity agreements;
- vii. whether there is a consistent approach to potential defence witnesses who might require more protective measures than witnesses whose evidence incriminates the accused;

- viii. whether the OCIJ Investigators have kept a list of questions they asked of persons they interviewed;
- ix. whether the OCIJ Investigators have maintained a chain of custody of all evidence collected and added to the Case File.

#### **D. Investigation on the collection and analysis of exculpatory evidence by the OCIJ**

##### **1. Duty to investigate alternative versions of events**

29. The OCIJ has an obligation under the Rules to proactively and diligently investigate exculpatory evidence. In Rule 55(5), the use of the imperative “shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory”<sup>44</sup> rather than “may” do so shows that no discretion exists for the OCIJ with regard to the conduct of an impartial investigation. The OCIJ absolutely may not place evidence which supports the OCP’s allegations above evidence which may undermine such allegations. The OCIJ must give equal attention to the collection and analysis of both inculpatory and exculpatory evidence.
30. Once an IS has been filed by the OCP under Rule 53(1), the OCIJ is obliged to initiate a judicial investigation,<sup>45</sup> limited to the facts set out in the IS.<sup>46</sup> As a consequence the OCIJ is under a legal duty to investigate the allegations which are based on the allegedly incriminating evidence tendered in support of the IS by the OCP under Rule 53(2). A corresponding duty exists under Rule 55(5) to proactively investigate any evidence or theory which is contrary to or undermines the IS allegations. Exculpatory evidence does not exist in the abstract; it must relate in some way to incriminating evidence, for example by showing the innocence of the accused, mitigating the guilt of the accused, or affecting the credibility of Prosecution evidence.<sup>47</sup> Alternatively, it may be exculpatory in that it affects the factual conclusions reached or to be reached by the OCIJ in assessing the evidence it gathered/examined in relation to the IS.<sup>48</sup>
31. This requirement for the OCIJ to proactively investigate exculpatory evidence is consistent with the system opted by the International Criminal Court (“ICC”). Although the ICC is an international rather than domestic court it employs a system instructive to

<sup>44</sup> Emphasis added.

<sup>45</sup> Rule 55(1).

<sup>46</sup> Rule 55(2).

<sup>47</sup> See Rule 53(4) which provides this same definition of exculpatory evidence.

<sup>48</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC19), Ieng Sary’s Appeal Against the Co-Investigating Judges’ Order on Request for Investigative Action regarding ongoing allegations of corruption & Request for an Expedited Oral Hearing, 4 May 2009, paras. 39-40.

the ECCC. The ICC Statute places a similarly broad obligation upon the Prosecutor, who at that court has the responsibility for conducting the investigation rather than an investigating judge,<sup>49</sup> to “investigate incriminating and exonerating circumstances equally.”<sup>50</sup> The ICC Appeals Chamber has held that this duty to search for and disclose exculpatory information exists independently of the Defence: the Prosecution has a positive duty - based on its understanding of the case - to anticipate defences or information that could be useful for the Defence.<sup>51</sup> The Defence is free to exercise its right of silence without suffering any adverse consequences concerning its right to rely on the Prosecutor’s independent duty to search for and disclose exculpatory information.<sup>52</sup>

32. At the ECCC, the OCIJ’s duty to proactively search for any exculpatory evidence exists independently from the Defence’s right to request specific investigative actions under Rule 55(10). Investigative requests submitted under this Rule, are intended to supplement the OCIJ’s exculpatory investigations; not to be a substitute for them. There are three principal reasons for this interpretation:

- a) Submitting requests for investigative action is entirely optional for the Defence. In contrast to the obligation on the OCIJ to investigate impartially by the use of the word “shall” in Rule 55(5), the Defence “may request the Co-Investigating Judges to make such orders or undertake such investigative actions as they consider necessary.”<sup>53</sup> There is clearly no obligation on the part of the Defence to do so.<sup>54</sup>
- b) Imposing on the Defence a requirement to identify each question that should be asked, each witness that should be interviewed or each document that should be located in order to elicit exculpatory information would completely usurp the OCIJ’s exclusive jurisdiction over the investigation. In fact, it would mean that the OCIJ would benefit from the advantages of the Defence not being able to carry out

<sup>49</sup> Article 53, ICC Statute.

<sup>50</sup> Article 54(1)(a), ICC Statute.

<sup>51</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-1433, Judgement on the appeal of Mr. Lubanga Dyilo against the Oral decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 36.

<sup>52</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-1311-Anx3, Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, paras. 41-44, 50.

<sup>53</sup> Rule 55(10) (Emphasis added).

<sup>54</sup> Indeed it is noticeable that under the Rules, during the investigative stage, there is no obligation on the Defence to submit a Pre-Trial Brief as it is obliged to do at other International Tribunals. *See* ICTY RPE 65ter(F) which obliges the Defence, after the submission by the Prosecutor of its Pre-Trial Brief, list of witnesses and exhibits, to “file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out: (i) in general terms, the nature of the accused’s defence; (ii) the matters with which the accused takes issue in the Prosecutor’s pre-trial brief; and (iii) in the case of each such matter, the reason why the accused takes issue with it.”

- its own investigations, without the OCIJ equally taking on the burden of properly and impartially conducting investigations itself.
- c) Requiring Defence teams to submit investigative requests before conducting any exculpatory investigations would violate the right of the Charged Person to remain silent. Any investigative request submitted by the Defence on behalf of a Charged Person implies a certain association between the submissions in the investigative request and the position of the Charged Person himself. Forcing a Charged Person to file investigative requests for exculpatory evidence to ensure that such evidence is added to the Case File when he or she has chosen to exercise his or her right to remain silent is a clear violation of this right.
33. It is unclear from the information in the Case File whether the OCIJ has complied with this duty to independently and proactively search for exculpatory evidence by contemplating the alternative theories of the allegations and events described in the IS. Indeed, there is no evidence in the Case File that the investigation teams have been provided with any guidance which would enable them to understand and consider alternative theories and to investigate those accordingly.
34. The approach adopted by the OCIJ gives the perception of an inherent prejudice to the Defence. Evidence, especially witness statements (sworn or unsworn) have to be carefully examined from all perspectives at the time at which it is obtained. Only a simultaneous review of all the perspectives of the evidence can ensure impartiality of review. The Defence, at a minimum, is entitled to expect that its (anticipated or actual) version of events is not downgraded to an afterthought: it must remain within contemplation at all times, especially during the initial questioning of witnesses concerning emotive and traumatic events. An investigation that resolutely ignores alternative possibilities at the time of discovery or recovery of evidence does nothing other than favor the Prosecution.
35. The Defence has filed investigative requests suggesting possible alternative versions of events relating to the allegations in the IS.<sup>55</sup> These investigative requests supplement rather than substitute the proactive and independent undertakings expected of the OCIJ.
36. **THEREFORE**, the Defence respectfully requests the OCIJ to add the following information to the Case File:

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<sup>55</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's First Request for Investigative Action, 20 March 2009; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Second Request for Investigative Action, 2 April 2009.

- i. whether alternative versions of the events set out in the IS have been discussed by the OCIJ;
- ii. what these alternative versions of events are.

**2. Information on the OCIJ's system for identifying, collecting and analyzing exculpatory evidence**

37. The CIJs' duty to investigate impartially cannot be delegated to the OCIJ Investigators without having instituted a robust system for identifying and collecting exculpatory evidence. The Case File lacks any indication that the OCIJ has established a system, let alone a robust one. It follows that the CIJs have failed to adopt a uniform, consistent and fair system applicable to its OCIJ Investigators. At best the CIJs appear to have opted for an *ad hoc* approach in searching for exculpatory evidence.
38. The importance of a systematic approach to identifying, collecting and analyzing exculpatory evidence can not be overstated. It is the foundation for a fair, impartial and competent judicial investigation. The lack of a standardized investigative system invariably increases the likelihood that much exculpatory evidence will be missed by OCIJ Investigators: either because they do not think to ask questions which might produce exculpatory evidence, or because they purposefully elect not to ask such questions.
39. The importance of instituting a robust system for locating exculpatory evidence is accentuated by various other factors. As there are both Cambodian and foreign investigators, the manner in which, for example, an Australian or American may conduct his or her investigation may be very different from how a Cambodian conducts the same task. This is a consequence of their very different legal and criminal systems. The differences between foreign investigators themselves are no less pronounced. Evidence that may be considered exculpatory in one legal system may not be considered as such in another. Without instituting a standardized system for identifying and preserving exculpatory evidence, the gathering of such evidence is unacceptably left to chance.
40. Finally, the nature of what actually constitutes exculpatory evidence is extremely complicated, especially in complex cases where judicial investigation encompasses a large number of events, involving a large number of people and over an extended crime period as alleged in the IS. As such, the OCIJ Investigators must not only be aware of all the allegations in the IS and the evidence submitted in support of them before conducting interviews, but must also have considered all possible lines of defence to these allegations and be prepared to ask questions about such lines of defence. This requires the OCIJ

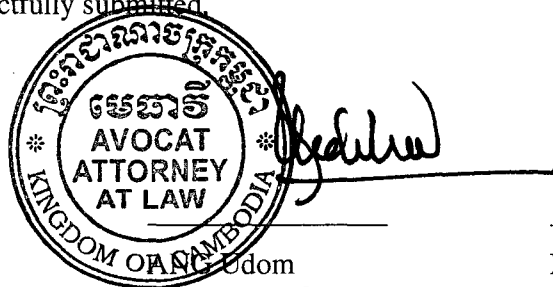
Investigators to put their mind to what could be exculpatory and turn their thoughts to recognized and standardized questions to be asked of those interviewed.

41. For all the above reasons, the OCIJ must have in place a robust, verifiable and transparent system for identifying, collecting and analyzing exculpatory evidence and adding it to the Case File in a form that may be accessed and used by the Defence. To this end it must have a system in place which explains: (1) what the OCIJ considers to be exculpatory, namely by establishing certain criteria or categories of this material;<sup>56</sup> (2) how this information is obtained; and (3) how the CIJs verify that the judicial police or investigators who carry out investigative actions on their behalf have properly complied with this system. At present, this information does not appear anywhere on the Case File.
42. **THEREFORE**, the Defence respectfully requests the OCIJ to add the following information to the Case File:
- i. whether the CIJs have instituted a robust system for identifying, collecting and evaluating exculpatory evidence during the judicial investigation;
  - ii. whether the CIJs verify that such a system is being applied by all OCIJ Investigators to whom they delegate responsibility for carrying out investigations via Rogatory Letters.

## VI. RELIEF SOUGHT

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the OCIJ to provide the information requested in paragraphs 14, 20, 26, 28, 36 and 42 of this *third request for investigative action*.

Respectfully submitted,



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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 21<sup>st</sup> day of May, 2009

<sup>56</sup> See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Réplique du Bureau du Procureur aux Réponses de la Défense sur la « Réponse de l'Accusation au Paragraphe 8 de l'Ordonnance [du 10 décembre 2008] enjoignant aux participants et au Greffe de déposer des documents complémentaires », 9 February 2009, para. 10.