

D354

ក្រុមមេធាវីការពារក្តី អៀង សារី

ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ខ្មែរ
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date /Date de certification):
15...../.....02...../.....2010.....
ឯកសារទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé
du dossier:.....Uch ARUN.....

IENG SARY DEFENCE TEAM
EQUIPE DE DEFENSE DE IENG SARY

ANG Udom and Michael G. KARNAVAS
Co-Lawyers for IENG Sary
12 February 2010

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):
12...../.....02...../.....2010.....
ម៉ោង (Time/Heure):.....13:20.....
ឯកសារទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé
du dossier:.....SAMN RADA.....

To: Judge **YOU Bunleng**
Judge **Marcel LEMONDE**
Co-Investigating Judges

Re: Request access to the entire dossier, including all documents in your possession not available to the parties and, if one is prepared, access to the case map.

PUBLIC
 ព័ត៌មាន
 CONFIDENTIAL
 CONFIDENTIEL

12/02/2010

Your Honors:

Internal Rule 55(11) allows the Parties the “right to consult the original case file.”¹ Accordingly, as Mr. IENG Sary’s Co-Lawyers (“the Defence”), we request access to the following:

- (i) the entire dossier, including all documents in your possession not available to the parties;
- (ii) the OCIJ case map – assuming one exists – relevant to its investigation, including all internal memoranda, investigative notes, analysis and work product generated by the OCIJ in relation to its investigation of Case 002.

1. Access to the Entire Dossier

Access to the entire dossier, including all documents in your possession not available to the parties, is necessary and relevant to the Defence in order to ascertain whether, and to what extent, any further action is warranted to ensure the proper and thorough investigation of the case. Aside from the fact the Defence is entitled to all the information requested herein, it bears highlighting that the Defence has lost confidence in the OCIJ to conduct an impartial and independent investigation. This lack of confidence in the OCIJ is due, in part, for the following reasons:

- The bias concerning investigators and legal officers within the OCIJ;² a matter which was not adjudicated upon as it was declared inadmissible.³
- The bias of Co-Investigating Judge Lemonde brought to light by the former Chief of the Intelligence and Analysis Unit of the OCIJ, Mr. Wayne Bastin.⁴

¹ ECCC Internal Rule 55(11).
² *Case of IENG Sary*, 002/08-07-2009-ECCC-PTC, IENG Sary’s Application for the Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges, 8 July 2009, 1, ERN: 00348412-00348440.
³ *Case of IENG Sary*, 002/08-07-2009-ECCC-PTC, Decision on the Charged Person’s Application for the Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, 3, ERN: 00378097-00378103.
⁴ *Case of IENG Sary*, 002/09-10-2009-ECCC-PTC (01), Ieng Sary’s Application to Disqualify Co-Investigating Judge Lemonde and Request for a Public Hearing, 9 October 2009, 1, ERN: 00386956-00386968. *Case of IENG*

- The lack of co-operation of Co-Investigating Judge Lemonde to work with Co-Investigating Judge You Bunleng, in violation of the Agreement and Establishment Law.⁵
- Co-Investigating Judge Lemonde violating the confidentiality of the investigation.⁶
- Co-Investigating Judge Lemonde threatening witness safety.⁷
- The insistence of the OCIJ to accept evidence obtained by torture.⁸
- The refusal to explain the OCIJ's specific investigation methodology, including the collection and analysis of any exculpatory evidence.⁹
- Failing to be transparent over the qualifications and experience of your investigators.¹⁰
- The OCIJ's open suggestion of following the principle of "sufficiency".¹¹
- The OCIJ's indication that their duty of impartiality does not impose a positive obligation to seek out exculpatory materials.¹²
- The OCIJ's treatment of Investigative Requests has not been competently actioned. For example the OCIJ's demand that Norodom Sihanouk present himself at the ECCC premises as opposed to proposing to hear his testimony at the Royal Palace appeared deliberately designed to ensure a negative result.
- The OCIJ's *ex parte* communication with the OCP.¹³
- The inability of the OCIJ to verify the accuracy of written records of interviews.¹⁴
- The use of datacoders/analysts to summarize written records of interviews without translation or legal qualifications.¹⁵
- The lack of competence and impartiality in appointed Demographics Expert;¹⁶ an issue which was dismissed by the OCIJ.¹⁷

Sary, 002/11-12-2009-ECCC-PTC07, IENG Sary's Second Rule 34 Application to Disqualify Judge Marcel LEMONDE and Joinder to the IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing, 11 December 2009, 1, ERN: 00414160-00414179.

⁵ *Case of IENG Sary*, 002/07-12-2009-ECCC-PTC (06), Ieng Sary's Rule 35 Application for Judge Marcel Lemonde's Disqualification, 7 December 2009, 1, ERN: 00411800-00411815.

⁶ *Id.*

⁷ *Id.*

⁸ *Case of IENG Thirith*, 002/19-09-2007-ECCC-OCIJ, Order on Use of Statements which were or may have been obtained by Torture, 28 July 2009, D130/8, ERN: 00355926-00355933.

⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ-D171, D130/7 & D130/7/2, Office of the Co-Investigating Judges, Your "Request for Investigative Action", concerning, *inter alia*, the strategy of the Co-Investigating Judges in regard to the Judicial Investigation ("Response"), 11 December 2009, D171/5, ERN: 00414038-00414049.

¹⁰ *Id.*

¹¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Request for Investigative Action to seek exculpatory evidence on the SMD, 19 June 2009, D164/2, ERN: 00355530-00355539, para. 6.

¹² *Id.*, para. 15.

¹³ *Case of IENG Sary*, 002/11-12-2009-ECCC/PTC(PTC 07), IENG Sary's Second Rule 34 Application to Disqualify Judge Marcel Lemonde and Joinder to IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and request for a public hearing, 11 December 2009, 1, ERN: 00414160-00414179, para. 1

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Request for Additional Demographics Expert, 22 July 2009, D140/2, ERN: 00355530-00355539.

¹⁷ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Order on Request for Additional Expert, 18 August 2009, D140/3, ERN: 00364629-00364633.

Request access to the entire dossier, including all documents in your possession not available to the parties and, if one is prepared, access to the casemap

The OCIJ is designed to function as an impartial body, investigating objectively the facts set out in the Introductory Submission.¹⁸ Effectively, the OCIJ is an agent of the parties: carrying out the investigation on behalf of all parties. Logically, therefore, the OCIJ's entire work-product belongs to the parties.

In denying a previous request for access to relevant information¹⁹ the OCIJ relied upon Rule 70 (A) of the ICTY Rules of Procedure and Evidence:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure or notification under these Rules.²⁰

The ECCC, however, has an inquisitorial system. The ECCC, as a Cambodian court, does not have the same procedure as the ICTY. The system at the ICTY is adversarial, with the Prosecution and Defence conducting their own separate investigations. The purpose of Rule 70 (A) at the ICTY is to protect each party's confidentiality when preparing its respective case. Conversely, the investigation at the ECCC – for all parties concerned – is conducted by the OCIJ. There should be no issue of confidentiality. Thus, ICTY Rule 70 (A) is not only inapplicable but also redundant at the ECCC.

The OCIJ has relied in the past on language from a non-authoritative text (*Traité de l'instruction criminelle*, Faustin Hélie, Chapter 4 'Attributions générales du Juge d'instruction') as a basis for conducting an opaque investigation.²¹ It is respectfully submitted that this too is not credible authority applicable before the ECCC. The rules for procedure and evidence at the ECCC come from the Cambodian Code of Criminal Procedure or the Internal Rules.²² Article 319 of the Cambodian Code of Criminal Procedure allows the Defence to "examine the case file".²³ Internal Rule 55(11) allows the Defence the "right to

¹⁸ ECCC Internal Rule 55(2).

¹⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Third Request for Investigative Action ("3RD IR"), 21 May 2009, D171, ERN: 00330819-00330834; *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, NUON Chea's Twenty-Third Request for Investigative Action ("23RD IR"), 27 January 2010, D338, ERN: 00438961-00438970.

²⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ-D171, D130/7 & D130/7/2, Office of the Co-Investigating Judges, Your "Request for Investigative Action", concerning, *inter alia*, the strategy of the Co-Investigating Judges in regard to the Judicial Investigation, D171/5, 11 December 2009, *Id.*, para. 23, fn. 12 "see, for example: [Rule 70] and ITCY Trial Chamber, *Prosecutor v. Blagojević and Jokić, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolic and Request for an Expedited Open Session Hearing*, 13 June 2003: "Rule 70(A) aims to protect work product from disclosure, as it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party."

²¹ "That the law gives [investigating judges] all the necessary authority (...) in order to guarantee their freedom of action, and thereby enable them to perform their work", as an authority explaining why neither your standard operating procedures nor your internal discussions are part of the Case File, and why they are not subject to disclosure to the parties. *Id.*, para 40, fn. 22 "*Traité de l'instruction criminelle*, Faustin Hélie, Chapter 4 'Attributions générales du Juge d'instruction', p. 158".

²² *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, D55/I/8, ERN: 00219322-00219333, paras. 14-15.

²³ Cambodian Code of Criminal Procedure, Article 319.

Request access to the entire dossier, including all documents in your possession not available to the parties and, if one is prepared, access to the casemap

consult the original case file.”²⁴ Thus, this requested material should be made accessible to the parties by the OCIJ.

2. Production and Access to the casemap and all related work-product

Assuming the OCIJ has developed a casemap, we respectfully submit that it must be disclosed to the parties in an expeditious manner. We further submit that part and parcel of the casemap are all internal memoranda and other in-house generated work-product of the OCIJ used in or prepared for the development of the casemap.

Access to the casemap and relevant internal workings is necessary in order for the Defence to carry out, *inter alia*, the following activities in protecting Mr. IENG Sary’s fair trial rights:²⁵

- To see whether any further Investigative Requests need to be made to the OCIJ;
- To see whether the investigation has been conducted in an impartial manner;²⁶
- To see to what extent evidence obtained by torture has been relied upon;²⁷ and
- For judicial economy and equality of arms. The earlier the Defence is aware of the case against Mr. IENG Sary, the fairer the proceedings will be.

In *Duch*, the Pre-Trial Chamber found that the OCIJ had not set out the material facts in enough detail.²⁸ The production of, and access to the casemap and relevant internal memoranda and other in-house generated work product, may assist in avoiding the sort of problems that ocured in *Duch*.

Further to our request, it bears highlighting that the objective of non-ambiguity in the material facts was also set out by the ICC Trial Chamber in *Prosecutor v. Katanga*, where the Trial Chamber stated that there is a “[t]wo-fold purpose of presenting all the incriminating evidence on which the Prosecution intends to rely at trial in a table format. First, the table is necessary to ensure that there is no ambiguity whatsoever in the alleged facts underpinning the charges confirmed by the Pre-Trial Chamber. Second, the table is necessary for a fair and effective presentation of the evidence on which the Prosecution intends to rely at trial.”²⁹

For all the reasons stated above, we respectfully request that you promptly reply to this request in the interests of transparency, protection of Mr. IENG Sary’s rights and non-ambiguity.

It is imperative the public, as well as the Defence, are aware of the correct procedure by which a criminal trial must be held. As such, this request is being filed as a public document and should be notified to the public accordingly.

²⁴ ECCC Internal Rule 55(11).

²⁵ ECCC Internal Rule 21.

²⁶ ECCC Internal Rule 55(5).

²⁷ *Case of IENG Thirith*, 002/19-09-2007-ECCC-OCIJ, Order on Use of Statements which were or may have been obtained by Torture, 28 July 2009, D130/8, ERN: 00355926-00355933.

²⁸ *Case of KAING Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal against the Closing Order Indicting KAING Guek Eav alias “Duch”, 5 December 2008, D99/3/42, ERN: 00249846-00249887, paras. 56-57.

²⁹ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-956, Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol, Trial Chamber II, 13 March 2009, para. 5.

Request access to the entire dossier, including all documents in your possession not available to the parties and, if one is prepared, access to the casemap

Respectfully submitted,




ANG Udom Michael G. KARNAVAS
Co-Lawyers for Mr. IENG Sary

