

Press Release in response to the Co-Investigating Judges' Order on Breach of Confidentiality dated 3 March 2009

It is with deep regret that we, the Co-Lawyers representing Mr. IENG Sary before the Extraordinary Chambers, feel compelled to respond to the allegations set out by the Co-Investigating Judges (“OCIJ”) in yesterday’s Order. A full, transparent and public response to this Order will be filed in due course but pending the filing of this response, we believe it is necessary to clarify some of the misconceptions, factual errors and the flawed legal reasoning of the OCIJ. However, in order to promptly comply with the OCIJ’s Order the Defence has temporarily removed from the website the allegedly “confidential” documents pending the confirmation by the OCIJ or Pre-Trial Chamber that these submissions are, in fact, public. Despite the removal of these documents, the website will remain active and continue to provide access to those following proceedings at the ECCC to public documents filed by the Defence. The specific documents removed are:

- 1) The appeal of Mr. IENG Sary against the refusal of the OCIJ to appoint a psychiatric expert dated 2 July 2008
- 2) The request for information regarding OCIJ Legal Officer David Boyle, dated 4 March 2008; and
- 3) The request for information regarding Stephen Heder, dated 30 January 2009.

As Mr. IENG Sary’s Co-Lawyers we will continue to act diligently to protect his interests throughout the continuing judicial investigation and possible future trial. It is extremely unfortunate that the OCIJ decided to wait until the Foreign Co-Lawyer for Mr. IENG Sary, Michael G. Karnavas, had just left Phnom Penh where he had been working for the preceding 8 days, rather than file the Order – or even discuss the matter – at a time when he was present and could effectively respond to these allegations. By filing this submission at the precise time that Mr. Karnavas was on a plane back to The Netherlands suggests that this timing was a tactical decision by the OCIJ. The IENG Sary Defence will not shy away from making a small but important contribution to public and transparent judicial proceedings at the ECCC: something which has not to date been the case. Nor will we give in to attempts, deliberate or inadvertent, to limit our right to speak out publicly to protect our client’s interests.

As a preliminary matter, the OCIJ appears to have taken exception to the Defence's letter to the Deputy Director of Administration dated 18 December 2008 which the Defence had copied to the OCIJ. It should be noted at the outset that this letter was prompted not by any action of the OCIJ itself but by the Pre-Trial Chamber's refusal to allow the Defence to make a judicial record in the Duch case of its objections to the application of joint criminal enterprise liability at the ECCC. By contrast, the OCIJ had accepted and admitted to the case file supplementary observations on this issue filed by the Defence several weeks prior to the letter, albeit after a considerable delay.

As to the filings posted by the Defence on its website which the OCIJ claimed had breached "the confidentiality of the investigation", only one has actually been declared to be confidential by either the Pre-Trial Chamber or OCIJ. This document concerned a Defence Appeal of the OCIJ's constructive dismissal – caused by its abject failure to respond – of a Defence request for Mr. IENG Sary to be examined by a psychiatric expert. It has seemingly been deemed confidential by the Pre-Trial Chamber because it concerned health issues affecting Mr. IENG Sary. Yet, this is notwithstanding the fact that Mr. IENG Sary provided a waiver allowing this Appeal to be made public and that this very issue was debated extensively in *public session* before the Pre-Trial Chamber on 30 June 2008. It appears, therefore, that a decision made by the Pre-Trial Chamber to protect the rights of Mr. IENG Sary is being manipulated by the OCIJ in order to sanction his very Co-Lawyers who are trying to protect these rights.

The remaining two filings involving potential conflicts of interest on the part of OCIJ investigators were filed as public documents and appear to have been notified as public by the Court Management Section. No decision by the OCIJ changing this status has been filed. Furthermore, the appeal of the OCIJ's decision relating to "Legal Officer" David Boyle appears on the ECCC website and contains exactly the same information and arguments as the submission which was filed before the OCIJ. Finally, it is ironic that the OCIJ's Order sanctioning the Co-Lawyers for Mr. IENG Sary was considered to be public even though it made *extensive* reference to elements of the investigation which were allegedly confidential. This contradictory standard clearly undermines the position of the OCIJ that the entire investigation is confidential and strongly implies that the OCIJ's Order is based more on the fear of being unable to control the submissions of the Defence than any alleged fear of breaches of confidentiality.

Indeed it is telling that in its press release yesterday the OCIJ confirmed that “the Co-Investigating Judges will communicate more systematically about their activities in future, and will publish an increased number of documents with regard to the judicial investigation.” This is a clear admission of the lack of transparency in the OCIJ’s investigation thus far.

**Ang Udom & Michael G. Karnavas
Co-Lawyers for Mr. IENG Sary
Phnom Penh, 4 March 2009**