Press Release by the IENG Sary Defence

"What have the defence lawyers been doing over the course of the many years of the judicial investigation?"

Last Thursday, 6 September 2012, Judge Lavergne asked International Co-Lawyer Michael G. Karnavas the above question in the course of an attempt to uncover irregularities in the OCIJ's interview of Witness Norng Sophang. Judge Lavergne's question may have left the impression with all those following the proceedings in Case 002 that the Defence teams – individually and collectively – were careless and inept in representing their respective clients during the judicial investigation phase. Judge Lavergne's insinuations cast a dark shadow over the IENG Sary Defence, deserving a public and transparent retort.

The acts charged in the Closing Order are alleged to have occurred between 1975 and 1979, a period of time for which the status of international law is not as readily identifiable or settled as it is today. Several urgent and complex legal issues arose in Case 002 which, due to the unique structure of the ECCC, needed to be raised before the OCIJ and Pre-Trial Chamber (and thereafter before the Trial Chamber and the Supreme Court Chamber). The failure to raise such challenges in a timely manner would have meant waiving these issues on appeal, not acting with due diligence and not providing competent legal representation to Mr. IENG Sary.

During the judicial investigation, the IENG Sary Defence filed at least 213 submissions, not including other necessary and reasonable correspondence and memoranda. The submissions concerned issues such as the applicability of the form of liability known as the extended form of joint criminal enterprise and whether prosecution could proceed against Mr. IENG Sary at all since the former King had granted him a Royal amnesty and pardon at the express request of Prime Ministers Hun Sen and Prince Ranariddh. The Defence also submitted twelve requests for investigation to the OCIJ. Unsatisfied with the lack of transparency that permeated the OCIJ's investigative process, as well as with the OCIJ's practice of putting only *summaries* of witness interviews on the Case File (rather than complete transcripts), the Defence filed a Third Investigative Request with the OCIJ. In this Request, the Defence requested, among other information, that the OCIJ explain its planning and overall strategy for the judicial investigation, and the qualifications and experience of its Investigators and their Standard Operating Procedures. Had the OCIJ provided this information, the IENG Sary Defence would have been in a position to show that the investigation was being carried out in a haphazard and substandard manner.

In diligently preparing Mr. IENG Sary's defence, the Defence reviewed material as it was placed on the Case File. Due to the sheer number of documents placed/dumped on the Case File and the modest resources of the Defence, however, it was impossible to review thoroughly *every* piece of evidence. As of September 2010, there were roughly **31,627** English-language documents on the Case File (including submissions by the parties and supporting material but not including Khmer and French documents), consisting of roughly **150,939** pages of material. If the IENG Sary Defence were to review *only* the English language documents, it would have taken approximately **755** days, reading **200** pages per day, to review all of this material.

In addition to documentary evidence, there were approximately **846** audio recordings of witness interviews prepared by the OCIJ on the Case File (not including audio and video recordings prepared by outside researchers which the OCIJ placed on the Case File), consisting of approximately **1,767** hours of tape. If the IENG Sary Defence were free to do *nothing* but listen to these recordings for eight hours per day, it would take the IENG Sary Defence **221** days to review all the recordings.

To suggest that the Defence and Office of the Co-Prosecutors ("OCP") have had equality of arms is absurd. During most of the judicial investigation, the IENG Sary Defence team consisted only of two Co-Lawyers, two legal consultants, one case manager, and a part-time expert. The IENG Sary Defence team was formed approximately 1½ years *after* the OCP had already begun investigating Case 002 and approximately half a year after the judicial investigation began on 18 July 2007. In contrast to the Defence, the OCP had the assistance of several full-time analysts in addition to its team of lawyers, legal consultants and interns. There were roughly 675 working days from the formation of the IENG Sary Defence team until the end of the judicial investigation. Considering the significant legal issues the IENG Sary Defence was required to address, the team was not free to devote 755 days to read 150,939 pages of material, or 221 days to listen to more than 1,767 hours of audio recordings. Further, there were only two Khmer-speaking members of the IENG Sary Defence team who could review the recordings.

As part of its obligation to seek the truth, the Trial Chamber should be determining whether there are flaws in the investigation and to what extent it can rely on the OCIJ-prepared witness summaries and the testimony elicited by referring to them. Based on the Cambodian legal system (which the ECCC applies and which is modeled on the French civil law system), the Trial Chamber is obligated to read and analyze the entire Case File prior to the start of trial, since it is the Trial Chamber who decides which witnesses it will hear and upon which evidence it will rely. Irregularities, such as those the Defence pointed out in Phy Phuon's, Oeun Tan's and Norng Sophang's OCIJ interviews, reveal systemic weaknesses in the investigative process that the Trial

Chamber would have been able to uncover by reading the entire Case File. It is also worth noting that the Judges have the inherent obligation to take the initiative in any instance where it appears that irregularities have occurred at the investigative stage; in particular, concerning the manner in which the investigators took witness statements.

The IENG Sary Defence's purpose in raising these irregularities in the questioning of witnesses Phy Phuon, Oeun Tan and Norng Sophang during trial is not to embarrass the OCIJ or to seek to terminate the proceedings. The purpose is to show and thus make a the record why the Trial Chamber cannot rely upon the OCIJ summaries as accurate and complete witness statements, and that it cannot totally rely upon the witnesses' testimony, particularly when memories are "refreshed" or even substituted by referring to these summaries taken under dubious conditions. If a record is not made, the Supreme Court Chamber cannot then examine and hopefully cure any inequities or failures by the Trial Chamber.

The efforts by the IENG Sary Defence in revealing the weaknesses and irregularities in the OCIJ's summary statements is to assist the Trial Chamber to get as close to the truth as possible, which is the whole purpose of having this trial and an obligation which the Judges must pursue. To pretend that irregularities such as the ones being exposed by the IENG Sary Defence do not exist, or to attempt to shield the exposure of such irregularities, only undermines the integrity of the proceedings and deprives Mr. IENG Sary and the other Accused of their rights to a fair trial.