BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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NOTICE OF JOINDER TO IENG SARY'S REQUEST E-234

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I. INTRODUCTION

1. On 27 September 2012 the Ieng Sary Defence team filed 'Ieng Sary's Request that the Trial Chamber seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview.'[1] Counsel for Nuon Chea (the 'Defence') hereby submits this Notice of Joinder (the 'Notice') to the Trial Chamber in which it adopts the submissions by the Ieng Sary defence team, and seeks the same relief.

II. PROCEDURAL HISTORY

2. On 27 September the Ieng Sary defence team filed Request E-234. The Defence adopts by reference all of Ieng Sary's submissions, as contained in section I (Background), II (Law and Argument), and III (Conclusion and Relief Sought).

III. ADDITIONAL SUBMISSIONS

3. In addition to the submissions by the Ieng Sary defence team, the Defence makes the following observations, for which only the Nuon Chea Defence team (and not the Ieng Sary's Defence) is responsible.

A. The Trial Chamber's Position on Pre-Trial Irregularities is Harmful to Broader Protection of Suspects' Rights in Cambodia

4. The Trial Chamber has been keen to stress, in the past, the 'capacity building' function of the ECCC for the Cambodian legal community.[2] Recently, a legacy conference was held in Phnom Penh in which the influence of the ECCC on domestic proceedings was discussed at length.[3]

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[1] Document No. **E-234,** 'Ieng Sary's Request that the Trial Chamber seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview', 27 September 2012, ERN 00848148-00848163 [hereinafter: 'Ieng Sary Request'].
[2] Press release on 'Trial Chamber Decision on Misconduct of the Nuon Chea Defence', 29 June 2012.
[3] Press release on 'Media Alert - Conference on Hybrid Perspectives on the Legacies of Extraordinary Cambers in the Courts of Cambodia', 12 September 2012. Press release on 'Conclusion of Conference on Hybrid Perspectives on the Legacies of Extraordinary Cambers in the Courts of Cambodia', 14 September 2012.

5. It has become clear that the Trial Chamber is reluctant, to say the least, to consider the circumstances under which witnesses gave statements to the investigators of the Office of the Co-Investigative Judges ('OCIJ'), even where such circumstances would impact directly on the credibility of the witness, or where the exploration of such circumstances would elucidate his sources of knowledge. Attempts by defense teams to explore possible pressure that was exerted on witnesses during interviews, or to obtain information regarding interviews that were not recorded or summarized, are being thwarted by the Trial Chamber. [4]

6. The Defence points out that it is entirely predictable that this approach by the Trial Chamber will be fondly embraced by Cambodian domestic courts in domestic proceedings. These domestic courts will be more than happy to vigorously apply a legal fiction that any irregularities that occurred during the investigative stage should have been raised (and resolved) during the investigative stage. It will allow domestic courts to disregard inconvenient claims by defendants or witnesses in domestic proceedings that police officers pressured them into making certain statements, or that police reports are inaccurate, or that evidence has been fabricated or mishandled. Of course, in Cambodia, this is a highly relevant concern.[5]

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[4] *See*, e.g. Ieng Sary Request, and Document No. **E-1/122.1,** 'Transcript of Trial Proceedings', 05 September 2012, ERN 00846500-00846512, pp. 86:21-99:3

[5] See, e.g., the following recent reports relating to pre-trial evidence gathering in Cambodia: 'Reports collected by Human Rights Watch suggest that, from first contact with police to detention in the police station, severe beatings and other forms of violence are common. According to former detainees, police use forms of physical torture, such as the administration of electric shocks or beatings with gun butts, to force people to confess or reveal information.[48] […] They have no access to a lawyer during their period in police custody or during the subsequent period of detention in the centers.' (HRW, 'Skin on the Cable – The Illegal Arrest, Arbitrary Detention and Torture of People who Use Drugs in Cambodia', January 2010, p. 25, available at http://www.hrw.org/node/87682/section/8). 'In a very high proportion of cases the accused are convicted by courts on the basis of confessions extracted in police custody, often under duress. […] Prosecutors do not have enough funds to order proper scientific investigation of crimes. Hence, the tendency is to rely on confessions extracted from the accused by the judicial police. The judicial police themselves are not properly trained in criminal investigations, and frequently use constraint or force to obtain confessions of guilt.' (UN Document No. **A/HRC/15/46**, 'Report of the Special Rapporteur on the Situation of Human Rights in Cambodia', Human Rights Council, Fifteenth session, 16 September 2010, paras. 51 and 54, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.46_en.pdf). 'While some [suspects] are held at the police station and released without facing any paperwork or charges, in other cases, [suspects] told Human Rights Watch that police had recorded their personal details and ordered them to put their thumbprint on statements written by the police. […] It is possible police may have written down something else about the reason for the arrest before asking [suspects] to thumbprint it, but they said were never told what was written there exactly. Many [suspects] do not know what they are signing, and say they are not told why they are being detained or what offence they have supposedly committed.' (HRW, 'Off the Streets: Arbitrary detention and Other Abuses Against Sex Workers in Cambodia', July 2010, p. 35, available at http://www.hrw.org/reports/2010/07/20/streets).

7. It should be remembered that ECCC case law is widely disseminated among the Cambodian legal community as part of well-intentioned legacy projects.[6] The current position of the Trial Chamber regarding pre-trial irregularities will result in a domestic legal landscape in which claims of transgressions during the investigative stage shall no longer be entertained by the domestic courts, which will be quick to point to the persuasive case law of the ECCC Trial Chamber for support for that position.[7]

8. Given Cambodia's atrocious record for flawed and politically biased police investigations, this is not a result that the Trial Chamber should desire or endorse in any way. In effect, blocking inquiries into circumstances surrounding the taking of statements in the pre-trial stage, even where they relate to credibility, sources of knowledge of the witness or possible pressure being exerted by investigators, will serve to shield from public scrutiny gross human rights violations as they occur in Cambodia on a daily basis. Let there be no mistake about it: a strict adherence by the Trial Chamber to its 'no inquiry into the circumstances of the investigation' would amount to an endorsement and even encouragement of unscrupulous practices by domestic police officers and courts.

B. Shirking from Responsibilities

9. Further to the Ieng Sary defence team submissions in this regard, the Defence would also share its own dismay with the Trial Chamber's obvious *lack of interest* in any investigation into substantive irregularities[8] that occurred during the investigative stage. In a system where the Trial Chamber's role is to 'ascertain the truth,' any fair-minded

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[6] See, as an illustration of efforts to spread the ECCC legacy, the following report by the OHCHR: UN Document **A/HRC/21/35**,'The Role and Achievements of the Office of the United Nations High Commissioner for Human Rights in Assisting the Government and People of Cambodia in the Promotion and Protection of Human Rights', Human Rights Council, Twenty-first session, 20 September 2012, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A.HRC.21.35_en.pdf:
'Several judicial round tables were also organized in the provinces to discuss these challenges using, where appropriate, examples from the practice of the Extraordinary Chambers in the Courts of Cambodia.' (para 46)
'The meetings were an important space for discussion of several matters of law on which the internal rules and decisions of the Extraordinary Chambers provide examples of the application of fair trial rights, in particular the provisions on pretrial detention and rules of evidence and procedure.' (para 57)

[7] *See*, also: Anne Heindel, 'Trial Debate over 'Procedural Defects' in the investigation', 28 September 2012, available at: http://www.cambodiatribunal.org/sites/default/files/commentary-pdfs/CTM%20Heindel%2012-09-28.pdf: '[T]he willingness of the Trial Chamber to hear and consider the issue would establish an important example for domestic Cambodian courts, which all too frequently undercut defense rights by rigidly emphasizing legal formalities over substantive fair trial rights.'

[8] As opposed to 'procedural defects' which the Defence understands to mean more along the line of missing signatures, translators that do not possess the proper educational credentials, etc.

judge *should* have an acute interest in any irregularity that transpired during the investigation, *especially when* these irregularities have the potential to impact on the credibility and accuracy of witness statements.

10. An exploration of such irregularities may be time consuming and cumbersome, and it must therefore be tempting for the Trial Chamber to accept the OCIJ summaries of interviews at face-value as credible and persuasive. However, it is bad practice to rely on these statements to the extent the Trial Chamber does without allowing exploration of the circumstances under which they were obtained, at least in those instances where there is reason to assume that these circumstances have impacted on the credibility or accuracy of witness statements. This is especially true considering the repeated demonstration of flaws and other concerns by the Defence surrounding these summaries.[9]

C. No Rule Banning Inquiry

11. There is no provision, not in the Internal Rules and certainly not in international case law or practice, which prohibit parties from exploring, at the trial stage, circumstances or complications that come to light as a result of listening to audio recordings; this is especially true where these circumstances have *any* bearing, however minimal, on the credibility of the witness or his sources of knowledge. Indeed, the Pre-Trial Chamber itself, agreeing with the OCIJ, instructed the parties that these issues could and should be raised *during cross-examination at trial*.[10] The Defence is doing no more and no less than following the clear rulings by the OCIJ and the PTC on this issue: according to these entities, concerns regarding credibility, reliability and sources of knowledge had

[9] *See* e.g. Document No. **E-142**, 'Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 17 November 2011, ERN 00754979-00754990; Document No. **D-318**, 'Nineteenth Request for Investigative Action', 13 January 2010, ERN 00417064-00417072; Document No. **D-171**, 'Ieng Sary's Third Request for Investigative Action', 21 May 2009, ERN 00330819-00330834; Document No. **E-221**, 'Ieng Sary's Request to Hear Evidence From the Interpreter Concerning Witness Phy Phuon's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge', 23 August 2012, ERN 00835841-00835852; Document No. **E-224**, 'Ieng Sary's Request that the Trial Chamber Seek Clarification From the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan of 8 October 2008', 29 August 2012, ERN 00839239-00839247; Document No. **E-96/7/1**, 'Objections to Witness Statements', 9 July 2009, ERN 00823896-00823899.

[10] Document No. **D-375/1/8**, 'Decision on Appeal and Further Submissions in Appeal Against OCIJ Order on Nuon Chea's Requests for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340)', 20 September 2010, ERN 00607102-00607143, para. 57.

to be addressed during cross-examination at trial. It is bewildering to the Defence to now get chastised for duly following the system that these judicial entities put in place.

12. A court that has as its task the ascertainment of the truth simply cannot hide behind a formalistic, strained and erroneous interpretation of a provision in the Internal Rules that prevents it from ascertaining this truth; the Trial Chamber (and indeed any self-respecting court) *should* care about whether or not witnesses have been fed information, have been coached, have been shown documents, have been coerced or intimidated, have been misunderstood or misquoted, or have been interviewed multiple times without audio records being prepared.[11] This is especially true considering the historical subject matter of this trial and its importance for Cambodian society as a whole. Moreover, in a case that is based to a large extent on witnesses that testify as to events that took place 30 years ago, concerns as to sources of knowledge, credibility, the failings of the human memory, and pollution of witness statements with later knowledge should be a major concern for any fair-minded judge.

D. "What have the defence lawyers been doing over the course of the many years of the judicial investigation? That is my question."[12]

13. Like Ieng Sary, the Defence takes issue with the rhetorical question posed by Judge Lavergne during the court session of 6 September 2012. Like the Ieng Sary defence team, the Nuon Chea Defence team was especially vigorous in representing the interests of their client during the investigative stage, while working with only limited resources.[13] The Defence filed no less than 26 much-needed but time-consuming Requests for Investigative Action, usually pushing for additional investigations into exculpatory theories of Nuon Chea's case. Importantly, many of these requests for investigative action had as their purpose the timely prevention and resolution of exactly the type of complications regarding the investigation that are surfacing now. The

[11] Note that the Defence is not stating that such irregularities have occurred *each and every time* that a witness was interviewed by the investigators of the co-investigating judges; what the Defence *is* stating, however, is that the approach by the Trial Chamber will prevent such transgressions from being revealed even in those instances that they *did* occur, and even where there are *prima facie* indications of certain troubling actions by the OCIJ investigators, such as in the current case; echoing the Ieng Sary team, we would call this willful blindness.
[12] Document No. **E-1/123.1**, 'Transcript of Trial Proceedings', 6 September 2012, ERN 00846635-00846745, p. 36:22-23 (emphasis added).
[13] During the investigation, the Defence consisted of one Cambodian co-lawyer, one international co-lawyer (part-time), one case manager, and one legal consultant; about halfway through the investigation a second legal consultant was added.

Defence requested already in 2007(!) permission to attend the witness interviews,[14] especially because international counsel has experienced in their domestic legal system that such attendance is necessary to safeguard the rights of the accused; and indeed, such attendance would have uncovered and resolved most of the issues that are surfacing at this juncture;[15] in 2009 raised concerns regarding the lack of transparency of the investigation and the circumstances under which statements were taken;[16] and, very relevantly, spent no less than 8 requests for investigative action on highlighting serious concerns with regard to the methodology employed by the co-investigating judges as well as deficiencies in their methods of questioning, both with regard to specific witnesses and more generally.[17] In short, the Defence was not sleeping during the investigation (the suggestion implicit in Judge Lavergne's words) nor have we been deceitfully 'sitting' on these issues, waiting for the trial stage to perfidiously raise them at the latest possible stage. To the contrary, we have always been fully aware of these issues, and have addressed them on a timely and consistent basis, within the limits of our resources (see below, paras. 21-26).[18]

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[14] Document No. **A-110**, Letter re 'Conduct of the Investigation', 20 December 2007, ERN 00157351-00157352.

[15] The Defence points out that it is common practice in The Netherlands, a civil law system based on French law, for defence lawyers and prosecutors to attend interviews of witnesses by the investigating judge; experience shows that this greatly reduces disagreements at the trial stage as to accuracy and credibility of the written records of such interviews, simply because all parties can provide input as the interview is conducted. The same experience has taught the Defence, relevantly, that even 'neutral' investigative judges will not consistently ask the relevant exculpatory questions that a defence lawyer would pose to the witness; this is remedied by providing defence lawyers the opportunity to ask questions during the investigative stage; clearly a much more equitable approach. Of course, the Internal Rules explicitly prohibit the attendance of witness interviews by the lawyers for the Charged Persons (Rule 60(2)) but that naked prohibition does nothing to address, let alone remedy, the inherent unfairness and inadequacy of that approach and the predictable complications that will arise as a result of it during the trial stage.

[16] Document No. **D-171/2**, 'Notice of Joinder to Ieng Sary's Third Request for Investigative Action', 9 June 2009, ERN 00337488-00337489.

[17] Document No. **D-318**, 'Nineteenth Request for Investigative Action', 13 January 2010, ERN 00417064-00147072; Document No. **D-319**, 'Twentieth Request for Investigative Action', 13 January 2010, ERN 00432928-00432937; Document No. **D-320**, 'Twenty-First Request for Investigative Action', 15 January 2010, ERN 00432979-00431987; Document No. **D-336**, 'Twenty-Second Request for Investigative Action', 26 January 2010, ERN 00436437-00436445; Document No. **D-338**, 'Twenty-Third Request for Investigative Action', 27 January 2010, ERN 00438961-00438970; Document No. **D-339**, 'Twenty-Fourth Request for Investigative Action', 2 February 2010, ERN 00446888-00446896; Document No. **D-340**, 'Twenty-Fifth Request for Investigative Action', 3 February 2010, ERN 00446969-00446976; Document No. **D-356**, 'Twenty-Sixth Request for Investigative Action', 12 February 2010, ERN 00453569-00453581. One such RIA is attached, for illustrative purposes. Note that some of the questions in the annex see to how investigators approached witnesses, and inquire into whether or not all statements were recorded.

[18] The Defence could pose a similar question to the Trial Chamber: has the Trial Chamber, in preparation for trial, reviewed the entire case file, and if not, why not? Has the Trial Chamber, in preparation for trial, reviewed *all* the audio records of witness interviews, and if not, why not? And if so, why has it not alerted the parties to the issues the Defence is now raising?

E. Reasonable expectations

14. The Ieng Sary filing reads: 'Under the ECCC's procedural system, the Defence *should* be able to rely upon the OCIJ's *neutral* investigation and should not be tasked with policing whether the OCIJ has ethically and accurately performed its tasks. The Defence is entitled to the *reasonable expectation* that the OCIJ's investigation was conducted in an appropriate and systematic manner.' The Defence fully concurs with these observations.

15. In further support of Ieng Sary's remarks as to the 'reasonable expectations' regarding the adequate manner in which the OCIJ was conducting its investigation, the Defence points to the Order on its 14th Request for Investigative action, in which the CIJs stated: "This is the context in which to interpret Rule 25(4) of the Internal Rules, which provides that the Co-Investigating Judges may choose to follow the procedure in Rule 25(1) for recording of interviews of charged persons. *In practice, the Co-Investigating Judges have chosen to follow this Rule systematically.* This choice is given concrete effect in the rogatory letters relating to the questioning of witnesses, *and the OCIJ investigators comply with it, except where exceptional circumstances prevent them from doing so."*[19] We know now that these forceful statements are simply not true; accordingly, they show either that the Co-Investigating judges were actively trying to deceive the parties (which we consider unlikely), or that they were *themselves* unaware of the more troubling methods of their investigators, which indicates a lack of adequate supervision on their part. Either way, it should not be held *against the Defence* that it relied on clear and unreserved statements by professional judges.

16. Note that the Nuon Chea Defence is not claiming that the Internal Rules stipulate that each and every witness interview *must* be audio-recorded; Rule 25(4) is clear on this issue, we think. What the Defence *is* saying is that the non-recording of certain interactions or interviews by investigators, while (virtually) all other interviews *were* recorded, raises questions as to what was discussed with the witness in those interviews, and what information was exchanged, why these interviews were not recorded, and why this non-recording was (most often) not verbalized in the written report. After all, according to the OCIJ itself, this non-recording only happened in '*exceptional*

[19] Document No. **D-194/2**, 'Order on Request for Transcription', 5 November 2009, ERN 00402985-00402988, paras 8, 9 (emphasis added).

circumstances'; [20] it is only logical that the Defence (and the Trial Chamber, for that matter) should be interested to find out what, then, these exceptional circumstances consisted of.

17. It should also be noted that the OCIJ *itself* stated that it has chosen to follow the procedure as envisaged in Rule 25 'systematically.' This logically means that the investigators should also have followed the provisions of Rule 25(2), which stipulates that the reasons for not recording the questioning 'shall' be stated in writing; the investigators simply have not done so.

18. Moreover, it should be remembered that the investigators of the OCIJ were bound by Rule 51(8)(g), which obliges the investigators to record '[t]he duration of *any* interview and the duration of *any* breaks between interview periods.'[21] They clearly did not do so in the case of Norng Sophang, and in many other cases.

19. We stress that the purpose of the Defence submissions is not to complain about the investigators' failure to record certain interviews or portion of interviews *as such*; nor does it complain about the investigators' failure to record the duration of certain interviews *as such*. In other words, the Defence is certainly not complaining about a 'procedural' defect at this stage. This overview of violated procedural rules and broken promises is simply meant to illustrate *how* the inadequate OCIJ reporting practice, which consisted of leaving out relevant information that should have been included under the Rules, led to numerous instances of *mistaken beliefs* by the Defence, who were entitled to rely on *prima facie* accurate information as supplied by an office of learned judges. Importantly, the information that was left out *would have led* to the uncovering of relevant circumstances that impact directly on the credibility and sources of knowledge of the witness. The Defence cannot now be blamed for not discovering what the OCIJ (consciously or unconsciously, that is irrelevant at this stage) failed to mention in the all-important written records. And it is exactly this type of information that the Defence is now trying to elicit during cross-examination at trial, and by filing requests such as Request E-234.

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[20] Document No. **D-194/2**, 'Order on Request for Transcription', 5 November 2009, ERN 00402985-00402988, paras 8, 9 (emphasis added).
[21] Pursuant to Rule 51(8)(g) in conjunction with Rule 62(3)(a) (emphasis added).

F. Primacy of Written Summaries Within the System of the ECCC

20. The Trial Chamber's position seems to be that the Defence *should* have listened to each and every audio recording of witness interview, at the peril of forfeiting the right to raise during trial any issues that could have been revealed by listening to these audio recordings. However, this approach misconstrues the system in place at the ECCC, which relies (at the investigative stage) on *OCIJ-prepared written summaries*; it was *these summaries* that the Defence was not only entitled to rely upon, but *expected* to rely upon (again: at the investigative stage). In the words of the OCIJ: "The procedure applied before the ECCC at the investigation stage is written […]." As to audio recordings the OCIJ opined: '[S]uch a recording is not intended to take the place of the written record, which is placed in the case file, and thereby give the proceedings an oral character.'[22] Indeed, the CIJs were not even required to produce audio recordings for every single interview.[23] In other words, the written summaries by the OCIJ were key within the system of the ECCC; and *these* were thus the pieces of evidence the Defence could and should have been expected to focus on during its due diligence examination of the evidence produced by witnesses, together with other documentary evidence. The Defence has fulfilled that duty.

G. Insurmountable Time Commitment for Review of Audio Recordings

21. The Ieng Sary filing points out that the case file contains 'approximately **1,767** hours of tape. If the Defence were free to do *nothing* but listen to these recordings for eight hours per day, it would take the Defence **221** days to review all the recordings.' The Defence would like to put those numbers into some further perspective, as eight hours of taped audio equals much more than 8 hours of work.

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[22] *See also* Document No. **D-194/2**, 'Order on Request for Transcription', 5 November 2009, ERN 00402985-00402988, paras 7 ('[T]he procedure applied before the ECCC at the investigation stage is written: each interview must be recorded in writing under the conditions described in Rule 55(7). […] Such records, presumed to be an accurate account of the interviewee's statement unless proven otherwise, are placed on the investigation case file, which forms the basis of the oral proceedings before the Trial Chamber in the event of indictment.'), 10 ('Nonetheless, such a recording is not intended to take the place of the written record, which is placed in the case file, and thereby give the proceedings an oral character.').
[23] *See* section E, *supra*.

22. Experience shows that 'simply' listening to audio recordings while cross-referencing them with the OCIJ-summaries takes about two to three times as much time as merely playing the audiotape as such. This is partly due to the fact that the recordings are often unclear, and parts must be replayed several times before a full understanding is gained; more importantly, it is caused by the fact that the summaries by the OCIJ often do not follow a linear temporal approach: the OCIJ investigators have often summarized multiple different answers given by a witness, provided at different moments in the interview (and sometimes even on different days[24]), in response to multiple questions, into single and brief question-and-answer segments which are difficult to reconstruct (which exercise is therefore time-consuming).[25] However, such 'reconstruction' is indispensable if one wants to assess whether the OCIJ summary is correct and fair.

23. This time-commitment increases even further if the audio recording needs to be transcribed into Khmer (which is the case when discrepancies or omissions are found), and yet further if these transcriptions need to be translated into English (which is crucial for effective cooperation in a dual-language team.)

24. Moreover, merely 'listening' to an interview and cross-referencing it with the OCIJ summary does not suffice; the audio records then need to be analyzed *substantively* in order for the exercise to be useful. This analysis is of course time consuming.[26] The recorded statements need to be assessed with regard to their probative value; an assessment needs to be made, for instance, as to whether discovered mistakes or misrepresentations are serious or harmless, whether or not they are incriminatory or

[24] See Document No. **E-142**, 'Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Statements', 17 November 2011, ERN 00754979-00754990, para. 6(b).
[25] Such reconstruction is time-consuming even in the best of circumstances, in which the OCIJ summaries are accurate, but they become even more time-consuming when the OCIJ-summaries are off, incomplete or incorrect.
[26] It should also be noted that verifying audio-recordings 'works in two directions': on the one hand, the Defence needs to ascertain whether or not what is written in the OCIJ statement is in fact an accurate reflection of what the witness actually said; for that, the Defence must use the *OCIJ written summary* as a basis, and try to identify the underlying statements by the witness (which are often, as stated, scattered in time over the course of the interview). On the other hand the Defence needs to establish whether all relevant remarks by the witness that can be identified in the audio-reports are in fact reflected in the OCIJ summary. For that assessment the Defence needs to use the *audio recording* as a basis, and cross-reference it with the OCIJ written statement. Experience shows that it is usually impossible to conduct these two different tasks simultaneously, because of the two distinct purposes of the exercises. This reality makes the review of statements an incredibly time-consuming activity.

exculpatory,[27] or whether there is information contained in the interview that should lead to further inquiry (such as mentions of earlier interviews that were not summarized, or the presence of other individuals at the interview who should not have been there, or whether certain individuals are mentioned that could corroborate or disprove the statement).[28]

25. This review must of course be done by a Khmer native speaker, and considering the complexity and diversity of the issues, that person must furthermore be legally trained; in our Defence team, we have exactly *one* such person, national co-counsel Mr. Son Arun. Considering his many other important responsibilities within the team, of which contact with the client and the review of documents in Khmer are most time consuming, Mr. Son Arun would never have been able to devote himself even remotely full-time to the enterprise of reviewing the audio-records on file.

26. Analyzing information contained on the audio tapes is therefore *much* more time consuming than the already daunting 1,767 hours of audio tape (or 220 working days) mentioned in the Ieng Sary filing suggests.[29] Our estimate is that that a full and comprehensive analysis of the audio records would have required *at least* four or five times the number of full working days that is identified in the Ieng Sary filing (220), amounting to roughly 4 years of full time work. It is *prima facie* absurd to conclude that the Defence was under an obligation to ensure, on pain of waiving its right ever to raise these issues again, that its single Khmer-speaking attorney spend a period of time longer than the entire judicial investigation listening to audio recordings. That project could never have been completed, even if the Defence had chosen to ignore all of its

[27] Which assessment then needs to be cross-referenced with the OCIJ interview, to establish whether or not said inculpatory or exculpatory character is accurately reflected in the summary.
[28] Moreover, certain omissions or misrepresentations that seem entirely irrelevant at the time that one first listens to an interview, may become extremely important based on later-acquired insight or knowledge, or when one discovers a pattern; those interviews then need to be revisited. In order to understand the relevance of certain omissions, additions or misrepresentations, one needs to have a thorough understanding of the case and the case file; this knowledge was simply lacking when many these audio recordings were made available.
[29] By way of illustration: these days, while preparing for witnesses that appear in court, Khmer speakers on our team can *easily* spend more than an hour trying to piece together the underlying audio-recorded segments for only one paragraph in a witness statement; similarly, it may *easily* take more than an hour to listen to, accurately transcribe and accurately translate a mere 5 to 10 minutes of audio recording; all this depends heavily on what it is, exactly, that the Defence is trying to establish or uncover by listening to that particular audio record.

other duties[30] and focus exclusively on this evidence that was of *secondary* importance only,[31] though indispensable when preparing for cross-examination during trial.[32]

H. Reversal of Anger

27. The Defence cannot help but discern a troubling pattern in the Trial Chamber's decisions: on numerous occasions now, the Defence has endeavored to bring to the Chamber's attention the failure of other entities at the ECCC (usually the OCIJ, and less often, the OCP) to properly execute their duties in such a way that has a real effect on the reliability of the evidence before the Chamber or even the integrity of the proceedings. More often than not, the Chamber's only reaction has been to berate *the Defence* for not having raised the issue sooner while leaving the actual substandard conduct entirely unaddressed, let alone resolved.[33]

28. For example, when the Defence objected to the absence of adequate information regarding the chain of custody and provenance of documents relied on by the OCP and the OCIJ, the Trial Chamber complained about the alleged untimeliness of the objection while ignoring both the Defence's *repeated, timely* efforts to obtain such information *and* the failure of the OCP and OCIJ to fulfill their duty to provide such information about their *own evidence*.[34] A second example can be found in the instance where the

[30] Of course, even the straightforward review of the multitude of Khmer documents that were placed on the case file was incredibly time-consuming in and of itself. It should be noted that *in addition* to these activities, the Trial Chamber has incorrectly assumed that it would have been possible for the Defence to collect and analyze, during the investigating phase, *any and all* writing (scholarly and otherwise) that exists outside of the case file that might be relevant when questioning witnesses during trial (incidentally even before it was announced which witnesses would be heard), as evinced by its persistent refusal to let the Defence rely on writings that it did not notify in by April 2011. In short, the Trial Chamber's demands on the Defence verge on the absurd; the Defence simply did not have unlimited time and resources.

[31] Because of the focus during the investigative stage on written pieces of evidence, rather than audio recordings. *See* para. 20, *supra*.

[32] It should be pointed out once and for all that it is misleading to portray the OCP as 'roughly the same size' as the Defence. The 3 defence teams have very distinct purposes, take different instructions from their clients, and are able to cooperate to only a very limited extent. To put it simply: the Nuon Chea Defence team will listen to an audio recording of an interview with a very different angle than the Ieng Sary or the Khieu Samphan defence team, and is even professionally obliged to do so; accordingly, all three defence teams need to listen to the same audio recording, while in the OCP one 'listener' would suffice. One cannot simply heap together the professionals working on the side of the Defence, much like the Defence would not claim that the multitude of civil party lawyers should be counted towards the resources of the OCP.

[33] This has been the case even in situations where there existed a *duty* for *all* parties (OCP, Civil Parties and Defence) as well as the Trial Chamber itself to raise certain problematic issues, but these other parties, unlike the Defence, failed to do so.

[34] *See* Document No. **A-110**, Letter re 'Conduct of the Judicial Investigation', 20 December 2007, ERN 00157351-00157352; Document No. **E-1/39.1/1**, 'Further Submissions Relating to Request for Clarification of Provenance/Chain of Custody of DC-Cam Documents', 9 February 2012, ERN 00777270-00777276 ('Further

Defence filed a Rule 35 request demonstrating that a witness had been plainly interfered with, after which the Chamber accused *the Defence* of a lack of due diligence, even though *none* of the other parties or judicial entities had deemed it necessary to address the important issue, an issue of which they had been *fully aware* for a long time.[35] A third example can be found in the Trial Chamber's dismay at the Defence raising the problem posed by the possibility of a witness incriminating himself during testimony before the Chamber, while in fact *all* parties had a clear legal duty to do exactly this pursuant to Rule 28(8), but neglected to do so.[36] In a fourth example, the Defence

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Submissions'), paras 10-13 (describing Defence requests to the OCIJ throughout the investigation, including in the 2009 Seventeenth Request for Investigation, to 'identify, with precision, the source of each specific item of [...] documentary material' that it was intending to rely on in the Closing Order' and to '[e]stablish, with precision, the chain-of-custody---from inception to receipt by the OCIJ---for each specific item of said documentary material').

In short, after both the OCIJ and the OCP failed to provide an adequate chain of custody and overview of provenance of the documents that *they* wanted to rely on as evidence, it was held against the Defence that it had not gone to DC Cam (the supplier of the documents) directly, thus inexplicably reversing the burden on the parties (which burden should logically be that the tendering party submits adequate information as to chain of custody and provenance). Document No. **E-185**, 'Decision on Objections to Documents to be Put Before the Chamber on the Co-Prosecutors' Annexes AI-AS and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01', 9 April 2012, ERN 00798257-00798273, para 27. An important parallel with the current application is that the Defence, in fact, stressed the importance of such background information *eminently timely* (already in 2007), but still ended up being criticized by the Trial Chamber, while it had been the other entities (OCP and OCIJ) that failed to adequately perform their duties. Similarly, the Defence raised numerous concerns relating to the conduct of the investigation since the very start of the proceedings (*see* para. 13), but still gets chastised by the Trial Chamber, which conveniently overlooks that it is *the OCIJ* that has been negligent, not the Defence.

[35] Document No. **E-92**, 'Second Request for Investigation Pursuant to Rule 35', 3 June 2011, ERN 00702209-00702216. The Chamber stressed that the 'Nuon Chea Defence failed to raise this allegation of interference with the administration of justice until more than two years later, reflecting a lack of due diligence and casting doubt on the urgency of the request.' (Document No. **E-116**, 'Decision on Nuon Chea's Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 & E92)', 9 September 2009 ERN00729330-00729339, para. 23). Importantly, the comments by the Trial Chamber improperly chastise the Defence ('a lack of due diligence'), while failing to entertain the blatant disregard by the OCIJ *itself* for the provisions of Rule 35: clearly there was ample 'reason to believe' that someone had interfered with the administration of justice, simply because the witness himself told the OCIJ investigators that such had happened. Still, the OCIJ did nothing, even after we alerted them to the issue with our 22nd request. Neither did the *OCP* undertake any action, even though they agreed with our conclusion that there was a 'reason to believe' someone had interfered with this witness (Document No. **E-92/1**, 'Co-Prosecutors' Response to Nuon Chea's Second Request for Investigation Pursuant to Rule 35', 13 June 2011, ERN 00705481-00705483); nor did the *PTC*, who became aware of the issue via our Appeal of the OCIJ decision on our 22nd Request. (Document No. **D-375/1/8**, 'Decision on Appeal and Further Submissions in Appeal Against OCIJ Order on Nuon Chea's Request for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340)', 20 September 2010, ERN 00607102-00607143). Still, it is the Defence that gets chastised for doing the job that should have been done by (in the first place) the OCIJ, and (later) the PTC and OCP. (Ironic in this whole affair is the Trial Chamber's apparent lack of due diligence in discovering that the Defence *had* in fact raised exactly this same issue before, as part of its 22nd Defence Request for Investigative Action, which included no less than 18 specific questions (Questions 127-149) concerning the issue of interference.)

[36] Document No. **E-1/63.1,** Transcript of Trial Proceedings, 18 April 2012, ERN 00801869-00801963, pp. 15:5-23:14, 33:6-38:6 and 41:14-42:24. The Defence rightly pointed out that witness Saut Toeung might be incriminating himself and could be liable to prosecution, drawing heavy criticism from the Trial Chamber for being untimely. Although the possibility of self-incrimination was evident from the earlier testimony of the

objected to the in-court use of evidence derived from confessions obtained through torture, and was chastised for failing to do so in a timely manner, while, again, every other party failed in its duty to raise the issue *at all*.[37]

29. The Trial Chamber's attitude in these cases is both short-sighted and unfair in light of the real issue at hand: flaws *in the conduct of the OCIJ* for which the Defence is in no way responsible, but which the Defence has tried at every available opportunity to bring to the attention of the Chamber. Yet the Chamber's reaction is to kill the messenger: no matter which other ECCC entity failed to perform its duties, such failures are held against the Defence, seemingly for daring to interrupt the flow of proceedings.

30. A fair-minded Trial Chamber -- one that is actually interested in establishing the truth -- would *always* be interested in the credibility and reliability of witness testimony, sources of knowledge of the witness, flaws in investigative methods that may bear on that credibility, and the overall appearance of impartiality and independence of the proceedings. This Trial Chamber, on the other hand, appears more concerned with the speed with which they can complete this trial than with its underlying fairness, or whether the 'facts' it discovers bear any resemblance to the truth.

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witness before the OCIJ, neither the OCP, nor the Civil Parties, nor the Chamber itself found it necessary to address it (even after the witness had indicated during the general introductory questioning by the President that he was not clear on the issue of self-incrimination!). While all these entities (OCP, Civil Parties and, arguably, the Trial Chamber) were under a specific duty to raise this issue *before* the testimony of the witness, only the Nuon Chea Defence did, and was consequently chastised for it. Ironically, the outcome of the Defence intervention was that the witness was assigned a duty counsel; a commendable decision, but one that would not have been taken had it not been for the Defence's intervention.

[37] Document no. **E-1/129.1**, 'Transcript of Trial Proceedings', 3 October 2012, ERN 00852584-00852700, pp. 67:17-74:25. The Nuon Chea defence raised, before witness Meas Voeun appeared in court to testify, the important point that information that has been obtained (directly or indirectly) as a result of torture should not be used in court, and should not be used as a basis for questioning by the investigators of the OCIJ. Rather than addressing the substance of the submission, the Trial Chamber insisted on first stressing its untimeliness (before going into the substance), even though that witness had been confirmed to appear for testimony only the day before. In addition, the President erroneously labeled this issue a 'procedural defect' that should have been raised during the investigative stage. It should be stressed once again, however, that *all* of the parties (the OCP, Civil Parties and Defence) as well as the Trial Chamber are under a blanket obligation to avoid the use of information that has (possibly) been obtained under torture, the Defence was the only party that noted this issue of major importance, yet got chastised for it, even though its timing was beyond reasonable (*after* the confirmation of the witness, but *before* his testimony, naturally in open court, where issues of this importance should be addressed).

I. Search for the Truth

31. What this issue is really about, and what seems to get lost in the Trial Chamber's approach, is the truth. The Defence is not setting out on any 'fishing expedition.'[38] Rather, it has uncovered *prima facie* problematic circumstances surrounding the interview of Norng Sophang (and numerous other witnesses) that deserve to be explored further. If the Trial Chamber indeed believes its task to be the ascertainment of the truth, rather than rubberstamping the conclusions in the Closing Order and the underlying OCIJ statements, it should allow exploration of relevant concerns regarding the OCIJ-investigation in instances where these concerns have the potential to impact on the credibility, reliability and sources of knowledge of the witnesses that appear before the Chamber.

IV. CONCLUSION

32. The Nuon Chea Defence team supports the arguments and relief sought by the Ieng Sary Defence team in its Request E234 in their entirety.

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[38] Document No. **E-1/123.1**, 'Transcript of Trial Proceedings', 6 September 2012, ERN 00846635-00846745, pp. 42:17-43:15.