

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

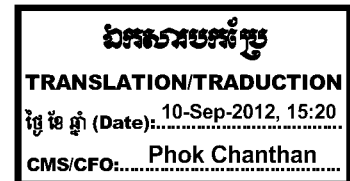
Case No: 002/19-09-2007-ECCC/TC

Party filing: Mr KHIEU Samphân

Filed to: The Trial Chamber

Original Language: French

Date of Document: 29 August 2012



CLASSIFICATION

Classification of the document suggested by the filing party: Public

Classification by the Trial Chamber: Public

Classification Status:

Review of Interim Classification:

Records Officer's Name:

Signature:

SUBMISSION IN SUPPORT OF MR IENG SARY'S REQUEST E221, AND REQUEST FOR THE TRIAL CHAMBER TO ORDER THE CO-PROSECUTORS TO REVISE THE LIST OF WRITTEN STATEMENTS THEY ARE SEEKING TO PUT BEFORE THE CHAMBER IN LIEU OF ORAL TESTIMONY

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To:

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Judge YOU Ottara

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Co-Prosecutors

CHEA Leang

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All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER

1. On 23 August 2012, Mr IENG Sary's Defence filed a submission requesting the Trial Chamber to hear evidence from the interpreter who attended Witness PHY PHUON's second OCIJ interview, in which irregularities allegedly occurred amounting to subterfuge.¹
2. By the present submission, Mr KHIEU Samphân supports Mr IENG Sary's request to hear evidence from the abovementioned individual about the circumstances of the interview, as well as the methods employed by the OCIJ Investigators in interviewing Mr PHY PHUON.²
3. Mr KHIEU Samphân supports all the arguments put forward by Mr IENG Sary's Defence and submits that the request is both warranted and necessary in light of the national and international provisions applicable to the conduct of Trial 002/01 before the ECCC Trial Chamber.
4. Mr KHIEU Samphân shares Mr IENG Sary's view that the likelihood that irregularities occurred during the interview warrants further investigations. In this regard, Mr KHIEU Samphân also requests the Trial Chamber to exercise its powers under Internal Rule 93.
5. Further, Mr KHIEU Samphân submits that the appearance of fraud as to the circumstances of the interview of Mr PHY PHUON ought to raise flags for the Trial Chamber. The Co-Prosecutors' and the Civil Party Lead Co-Lawyers' requests to put before the Chamber written witness statements in lieu of oral testimony ought to be treated with extra caution in this regard.
6. Mr KHIEU Samphân's Defence Team has identified 228 written witness statements among the requests to admit statements relating to population movement phases 1 and

¹ 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, **E221**.

² *Idem*; subject to the translation into French.

2 alone.³ On 27 July 2012, the Co-Prosecutors filed a further request to put written statements and transcripts before the Chamber (“Further Request”).⁴ The Further Request seeks to put before the Chamber 2,188 written statements and other documents concerning 1,291 witnesses.

7. In total, besides the written statements that the Civil Party Lead Co-Lawyers will put before the Trial Chamber,⁵ the Co-Prosecutors are seeking to put **2,416** documents before the Chamber. Mr KHIEU Samphân submits that putting such a large number of documents before the Chamber is irreconcilable with the caution that must be exercised in regard to written statements by individuals that have not been called to give evidence at trial.
8. The Trial Chamber has asserted that the statements taken during the judicial investigation are entitled to a presumption of relevance and reliability. It has also indicated that it will examine alleged disparities between the audio recordings and the written records of the OCIJ statements only if they are identified with sufficient particularity and have clear relevance to the trial.⁶
9. Now, considering, *inter alia*,⁷ the doubt concerning the circumstances of the interview of Mr PHY Phuon, Mr KHIEU Samphân is understandably somewhat sceptical about the integrity of the procedures followed by the OCIJ investigators. Accordingly, the reliability of the written statements must be carefully assessed. As a

³ Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement, 15 June 2012, **E208**; Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues With Confidential Annexes I, II, III and Public Annex IV, 5 July 2012, **E208/2**.

⁴ Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16, 27 July 2012, **E96/8**.

⁵ Civil Party Lead Co-Lawyers’ Response to the Decision on the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Statements and Other Documents Before the Trial Chamber (E96/7), and to Memorandum E208/3, Including Confidential Annexes 1 And 2, 27 July 2012, **E208/4**.

⁶ Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, **E96/7**, (“Decision of 20 June 2012”), para. 26.

⁷ As rightly pointed out by the Defence Team of Mr IENG Sary in its 23 August 2012 Request, the practice of the OCIJ investigators consisting in interviewing a witness before recording the interview does not concern only Mr PHY Phuon, **E221**, para. 18. See, *inter alia*, testimony of Mr OEUN Tan at the hearing of 14 June 2012 (**E1/87.1**, p. 47-48).

consequence, the Defence will have to devote a considerable amount of time vetting the written and audio versions of **each** of the 2,416 documents. Putting these documents before the Chamber will also compel the Trial Chamber to devote precious time to scheduling trial days for the parties to raise their objections.

10. Seen from this perspective, the Co-Prosecutors' requests seem excessive and contrary to the Trial Chamber's efforts towards efficient proceedings and judicial economy, as well as safeguarding the right of the Accused to an expeditious trial.
11. In particular, in their Further Request dated 27 July 2012, the Co-Prosecutors considerably expand the number, nature and scope of the written statements that they are seeking to put before the Chamber in Trial 002/01. In fact, their request comprises 16 annexes, a number of which relate to matters that fall squarely outside the scope of the trial.⁸
12. Yet, ironically, it is the annexes relating to matters extraneous to Trial 002/01 which contain the largest number of witnesses whose statements the Co-Prosecutors are seeking to put before the Chamber. While Annexes 3 to 9,⁹ which relate to the matters covered by the on-going trial, refer to 406 testimonies, Annexes 10 to 16 refer to 1,387 testimonies.

⁸ Further Request (**E96/8**), in particular Annexes 10 (*Cooperatives and worksites policy & widespread or systematic attack against the civilian population corroborative evidence*), 11 (*Security centres and execution sites policy & widespread or systematic attack against the civilian population corroborative evidence*), 12 (*JCE-Treatment of targeted groups policy and widespread or systematic attack against the civilian population corroborative evidence*), 13 (*Treatment of Buddhist policy & widespread or systematic attack against the civilian population corroborative evidence*), 14 (*Treatment of Cham policy & widespread or systematic attack against the civilian population corroborative evidence*), 15 (*Treatment of Vietnamese policy & widespread or systematic attack against the civilian population corroborative evidence*), 16 (*Regulation of marriage policy & widespread and systematic attack against the civilian population corroborative evidence*).

⁹ Annexes 3 to 9 of the Further Request (**E96/8**) relate to the following subject matter : Annex 3 (*Historical background corroborative evidence*), annexe 4 (*Administrative structures (centre) corroborative evidence*), Annex 5 (*Administrative structures (national) corroborative evidence*), Annex 6 (*Communications structure corroborative evidence*), Annex 7 (*Military structure corroborative evidence*), Annex 8 (*Armed conflict corroborative evidence*), Annex 9 (*Movement of the population policy & widespread or systematic attack against the civilian population corroborative evidence*).

13. The Co-Prosecutors contend that it is unlikely that much time will be required for the parties to raise objections about the documents that they are seeking to put before the Chamber. According to them, “experience shows that debates on documents have largely resulted in general objections that applied to all, rather than specific documents and often related to arguments of weight to be assigned to the documents rather than admissibility”.¹⁰
14. Now, it is precisely the wish of the Defence not to be compelled, owing to the large volume of documents and the time limits imposed, to raise only general objections. In fact, that would be contrary to the Chamber’s directives, by which it has put the parties on notice that objections must be precise, relevant and to the point.¹¹
15. In its Decision of 20 June 2012, the Trial Chamber laid out the admissibility criteria for written witness statements or transcripts.¹² Mr KHIEU Samphân submits that the Co-Prosecutors have not followed the Trial Chamber’s directives.
16. The witness statements cited in Annexes 10 to 16 of the Further Request relate to matters that are extraneous to the facts covered by Trial 002/01. For that reason, those statements and any related documents are entirely irrelevant and are excluded under the relevance criteria laid out in Internal Rule 87(3)(a).¹³
17. Further, while the Trial Chamber has indicated that civil party applications and statements recorded by entities outside the ECCC may, in some instances, be proposed to be put before the Chamber, it recalled that they did not enjoy any presumption of relevance or reliability.¹⁴
18. In light of the doubt about the reliability of statements recorded by OCIJ investigators and of the time that would be required to hear the parties’ objections to putting such

¹⁰ Further Request (E96/8), para. 36.

¹¹ Decision of 20 June 2012, paras. 26 to 28.

¹² *Ibid.*, para. 24.

¹³ *Ibid.*, para. 29: the Chamber stresses that and complaints unrelated to the subject-matter of the trial in Case 002/01 may additionally fail to satisfy the criteria of relevance pursuant to Internal Rule 87(3)(a).

¹⁴ *Ibid.*, para. 29.

statements before the Chamber, it seems inappropriate for the Co-Prosecutors to seek to put before the Chamber hundreds of documents recorded by their Office,¹⁵ the Witness Support Section or independent entities.¹⁶ This is particularly applies to statements that have no direct bearing on the matters covered by Trial 002/01.

19. In addition, as the Trial Chamber quite rightly pointed out in its Decision of 20 June 2012, “[w]hile the Chamber has indicated that much of this material is likely to be afforded only very limited probative weight, the trial management impact of these requests (in view of the need for the translation of large quantities of this material, as well as the potential for substantial in-court time to be allocated to the hearing of objections to it is nonetheless substantial, particularly should the parties maintain blanket requests to place voluminous quantities of written statements or other evidence before the Chamber.”¹⁷

20. The Co-Prosecutors’ arguments in this regard are unpersuasive. The Co-Prosecutors argue that minimal resources and time are required to translate those documents.¹⁸ Yet, virtually none of the 420 complaints that the Co-Prosecutors are seeking to put before the Chamber have been translated into French, and neither are the one hundred or so other statements recorded by DC-Cam or the School of Oriental and African Studies (SOAS). Moreover, most of the “translations” into English are simply **summaries**, whose reliability is therefore more questionable than that of original documents.¹⁹

21. Finally, among the written statements recorded by OCIJ investigators as contained in the requests dated 15 June, 5 July and 27 July 2012, the Defence team of Mr KHIEU

¹⁵ Further Request (**E96/8**), para. 26. In this regard, the Co-Prosecutors indicate that “[c]ertain statements were recorded by investigators working for the OCP, and although OCP does not claim the same investigative neutrality as the OCIJ, the statements that it recorded merit admission within the context of this submission.”

¹⁶ The Co-Prosecutors are seeking admission of 409 written civil party statements (or 1,222 documents), as well as 320 statements recorded by DC-Cam and the School of Oriental and African Studies (or 420 documents).

¹⁷ Decision of 20 June 2012, para. 34.

¹⁸ Further Request (**E96/8**), para. 35.

¹⁹ *Ibid.* paras. 25 and 35.

Samphân has identified 79 that have no matching audio recordings. Yet, the Trial Chamber had indicated that it will reverse the presumption of reliability of such written statements only where significant deficiencies between these statements and their audio recordings have been credibly alleged and identified.²⁰ Accordingly, admitting written statements with no matching audio recordings amounts to depriving the Defence of any opportunity to raise objections.

22. For all the foregoing reasons, the Defence submits that the Co-Prosecutors have not followed the Trial Chamber's directives about ensuring efficiency of the proceedings and respect for the right of the Accused to a fair and expeditious trial. The Co-Prosecutors have not exercised due diligence by failing to vet their lists. Unless remedied, this will result in undue delay of the proceedings and in a breach of Mr KHIEU Samphân's rights.

23. **FOR THESE REASONS**, Mr KHIEU Samphân requests the Trial Chamber to:

- **GRANT** Mr IENG Sary's Request by calling the interpreter who attended the interview of Witness PHY Phoun to give evidence, and
- **ORDER** the Co-Prosecutors to revise their requests of 15 June, 5 July and 27 July 2012 in light of the Chamber's directives on achieving greater efficiency in the proceedings and to enable the Defence to be in a position to raise any objections in accordance with the Chamber's instructions.

²⁰ Decision of 20 June 2012, para. 27.

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