

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S "SUBMISSION IN SUPPORT OF 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 ON 8 OCTOBER 2008"

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I. INTRODUCTION

1. On 10 September 2012, the defence for Khieu Samphan (“Defence”) filed a request¹ that the Trial Chamber take three actions (“Request”). First, the Defence requests that the Trial Chamber grant a previous request made by the defence for Ieng Sary that the Trial Chamber seek information from the Office of the Co-Investigating Judges (“OCIJ”) regarding the interview of Witness Oeun Tan². Second, the Defence request that the Trial Chamber seek “clarification from the OCIJ regarding the interview of Witness NORNG Sophang”³. Third, the Defence request that the Trial Chamber “in the future follow that same procedure for the questioning of any other witnesses whose transcribed interviews may contain similar inconsistencies.”⁴
2. The Co-Prosecutors responded to the Ieng Sary request regarding Oeun Tan in a filing notified to the parties on 10 September 2012.⁵ Because the instant Defence filing makes no further arguments in support of the previous Ieng Sary filing, the Co-Prosecutors respectfully refer the Chamber to their previous response in regards to that portion of the Defence’s Request. The Co-Prosecutors will address the remaining portions of the Request below.
3. The Co-Prosecutors submit that the Request should be rejected in full because it fails to demonstrate any legitimate grounds on which to engage the Trial Chamber in a review of the already-litigated, and long-concluded, investigatory stage of Case 002.
4. The Co-Prosecutors also note that the Defence’s filing fails in a significant way to comport with this Chamber’s Practice Directions regarding the “Contents of Documents” filed before the Chamber.⁶ Most problematically, it fails to provide “[a] summary of the relevant law, including extracts of relevant legal sources” or any “detailed legal argument”.⁷ Instead, the Defence merely mention in passing “all the legal provisions guaranteeing the accused of the right to a fair trial.”⁸ The Defence reference no jurisprudence from any of the chambers of the ECCC, or from any other court. Given the substantive nature of the Request, which

¹ E224/2 Submission in Support of Mr 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 on 8 October 2008, 10 September 2012 (hereinafter “Request”). Notified 10 September 2012.

² E224/2 Request, at para. 6.

³ E224/2 Request, at para. 6.

⁴ E224/2 Request, at para. 6.

⁵ E224/1 Co-Prosecutors’ Response to “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 on 8 October 2008”, 7 September 2012. .

⁶ Practice Direction ECCC/01/2007/Rev. 8, Article 4.

⁷ Practice Direction ECCC/01/2007/Rev. 8, Article 4.1(c)-(d).

⁸ E224/2 Request, at para. 4.

alleges irregularities in the collection of evidence by the Co-Investigating Judges and seeks action from the Trial Chamber, the Defence should have, at the very minimum, set out the relevant legal provisions on which they seek to base the Request.

5. Furthermore, rather than laying out “[a]n outline of relevant facts” as commanded by the Practice Directions, the Defence merely reference a series of transcript pages and allude to “the discrepancies between the transcriptions and the official dates of Mr NORNG Sophang’s interview, which Mr Vercken has highlighted in court.”⁹ The Defence’s filing thus leaves the parties and the Trial Chamber guessing at the exact nature of their claims and how they are ostensibly supported.

II. ARGUMENT

A. The Defence Fail to Demonstrate a Basis for Their Claim Regarding Norng Sophang

6. The Request fails to substantiate any error justifying its requested remedies in regards to Norng Sophang. As the Co-Prosecutors have explained in regards to similar claims directed at other witnesses¹⁰: 1) any procedural defects that occurred at the investigatory stage have been cured; 2) the appearance of Norng Sophang in court to provide testimony during which the Defence was able to, and did, test his evidence protects Khieu Samphan’s fair trial rights; and 3) the written record of Norng Saphong’s interview accurately reflects the interview and complies with ECCC rules.

i. Alleged Procedural Defects in the Judicial Investigation are Cured by the Closing Order

7. The Request is based entirely on alleged procedural defects in the judicial investigation – specifically, the manner in which the interview of Witness Norng Sophang was conducted by OCIJ investigators. However, as previously ruled by this Chamber, “the Internal Rules do not envisage examination by the Trial Chamber of the procedural correctness of the judicial investigation upon being seized of the case.”¹¹
8. Pursuant to those Rules, applications concerning procedural defects can only be brought during the pre-trial phase, and as this Chamber has found “[t]he ECCC legal framework concerning the judicial investigation contains sufficient procedural safeguards for the

⁹ E224/2 Request, at para. 3.

¹⁰ See E224/1 Co-Prosecutors’ Response to “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 on 8 October 2008”, 7 September 2012; E221/1 Co-Prosecutors Response to Ieng Sary’s Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuon’s Second OCIJ Interview, 4 September 2012.

¹¹ E116 Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011, para.17 (hereafter “Fairness of Judicial Investigation Decision”).

Accused, including opportunities to address the CIJs on any matter and appeal to the Pre-Trial Chamber on decisions taken by the CIJs, where considered necessary.”¹² During the judicial investigation, the Accused had the right under Internal Rule 76 to make applications for annulment of written records or other investigative acts, and to appeal any adverse decision.¹³ At the notification of the close of the investigation, the parties had an additional opportunity to request further investigative actions and any rejections of such requests were also subject to appeal¹⁴. Rule 76(7) provides: “Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”¹⁵ The ECCC rules are thus crystal clear that procedural challenges to investigative acts are limited to the pre-trial phase.

9. The Defence’s requested action would contravene the division enshrined in both the Rules and general structure of the ECCC between investigative and trial stages. The Trial Chamber is “not an appeal or review body in relation to decisions of [the Pre-Trial] Chamber.”¹⁶ Accordingly, “[a]s a general matter, objections regarding procedural steps or decisions taken by the CIJ’s and the Pre-Trial Chamber during the investigative phase must be raised with the competent judicial organs before the Closing Order becomes final.”¹⁷
10. The Trial Chamber has indicated that exceptions to Rule 76(7) may be available “where the parties can demonstrate that they did not have an opportunity to detect the alleged distortion before the opening of the trial or if it appears necessary to safeguard the fairness of trial proceedings.”¹⁸ Neither of those exceptions applies here. The Defence had ample opportunity to detect the issue they allege in their Request, which they claim they were alerted of by a question put to the Witness Norng Saphong in the audio recording of his interview.¹⁹ As this Chamber has previously noted:

¹² E116 Fairness of Judicial Investigation Decision, at para. 18.

¹³ See also E71/1 Decision on Ieng Sary’s Motion for A Hearing on the Conduct of the Judicial Investigations, 8 April 2011, p. 2 (“[T]he parties were able to submit reasoned applications of any part of the proceedings they considered null and void during the judicial investigation itself, and ... any decisions concerning such applications were open to appeal before the Pre-Trial Chamber in accordance with the Internal Rules.”).

¹⁴ Internal Rule 66.

¹⁵ See also E71/1 Decision on Ieng Sary’s Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, p. 2.

¹⁶ E116 Fairness of Judicial Investigation Decision, at para. 18.

¹⁷ E116 Fairness of Judicial Investigation Decision, at para. 15.

¹⁸ E142/3 Decision on Nuon Chea’s Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, para. 7 (hereafter “Witness Interview Decision”).

¹⁹ E1/122.1 Transcript of Proceedings, 5 September 2012, p. 60.

*Both the audio recordings and the written records were ... placed in the Case File on a rolling basis over the course of the judicial investigation and have therefore been available to the parties (all of whom have competence in both Khmer, as well as English and/or French) for several years.*²⁰

11. The Trial Chamber has thus rejected a Rule 35 request by the Nuon Chea Defence based on alleged inconsistencies between the audio and written records of OCIJ interviews, finding that “[d]uring the investigation phase, all parties had access to the case file, including the audio recordings” and that the Defence failed to demonstrate that it was not possible to assess the existence of irregularities in written records “before the opening of trial.”²¹ Similarly here, the Defence could have reviewed the audio recording and written record of interview of Norng Saphong. There is thus no legitimate excuse for failing to have discovered and raised this procedural issue prior to the opening of trial.

12. Judge Cartwright recently reaffirmed these principles to the parties in court:

Therefore, the general rule is that there is a legal presumption of the integrity of the investigation, that any concerns about the methods or the subject matter traversed during the investigation must be raised during the investigation. And now, at trial, ... the investigation is treated as the starting point and can be rebutted only in exceptional circumstances.

Any such rebuttal must relate not to technical issues but to substance. And in raising an exception, [a Party] must satisfy the Trial Chamber that [a Party has] well-grounded concerns about the reliability of any part of the investigation. To use a well-known common law term, [a Party] cannot embark on a fishing ... expedition.

*... [A Party] need[s] to satisfy the Trial Chamber that there is a well-grounded reason for going back inside the investigation and investigating it.*²²

13. Indeed, as Judge Cartwright observed, the conduct of the OCIJ is entitled to a presumption of regularity that cannot be rebutted by motions that are “considered to be speculative or unsubstantiated” as are the instant ones.²³

ii. The Testimony of This Witness at Trial Remedies Any Procedural Defects in his OCIJ Interview and Protects the Fair Trial Rights of the Accused

²⁰ E142/3 Witness Interview Decision, at paras. 6, 8.

²¹ E142/3 Witness Interview Decision, at para. 8.

²² E1/123.1 Transcript of Proceedings, 6 September 2012, p. 43; see also *ibid.* at pp. 36-37 (Wherein Judge Lavergne noted “some very obvious facts”, including that “[t]he judicial investigation that preceded this trial lasted many years. During the course of the investigation, there were investigative acts that were put on the case file. They were made accessible by the defence teams and by the Accused. ... We are not discussing the investigation at this point in time. ... We are here to study and examine issues of substance. Issues relating to the judicial investigation must not be subject to redundant and repetitive questions.”).

²³ E142/3 Witness Interview Decision, at para. 10.

14. Moreover, an exception to Internal Rule 76(7) is not necessary here to safeguard the fairness of trial proceedings. Even if there were procedural defects in the manner in which the interview of Norng Saphong was conducted, this witness testified in Court and the Defence had the opportunity to, and did, cross-examine him on both the substance of his testimony and the procedure followed in his OCIJ interview.²⁴ The fair trial rights of the Accused have thus already been adequately protected in relation to the testimony of this witness.
15. In rejecting the Nuon Chea Defence Rule 35 request based on alleged discrepancies between written records of interviews and audio recordings, the Trial Chamber ruled that the Defence “will in any event have the further safeguard of being able to question any witness at trial on these alleged discrepancies, where these alleged inconsistencies are demonstrably relevant either to assessing the probative value of the evidence or necessary to safeguard the fairness of trial proceedings.”²⁵ The Khieu Samphan and other defence teams were allowed to cross-examine Norng Saphong and cannot now credibly assert that their fair trial rights were not adequately safeguarded in relation to the testimony of this witness.
16. It should also be emphasized that Norng Saphong has now given three-and-a-half aggregate days of testimony before the Chamber²⁶, and therefore the alleged procedural discrepancies in his OCIJ interview are of little or no consequence. It is his three-and-a-half days of court testimony that is the primary evidence now before the Chamber.

*iii. OCIJ's Written Record of Interview Accurately Reflected The Testimony of
The Witness and Complied with ECCC Rules*

17. The Trial Chamber has previously noted that “in accordance with the practice followed under Cambodian law, interviews before the OCIJ are not verbatim records but a report made by the Co-Investigating Judges of the relevant statements made by a witness, a Civil Party or Accused.”²⁷ Irrespective of whether an additional discussion took place the written record fairly and accurately summarized the knowledge and testimony of the witness. Norng Saphong confirmed the accuracy of that statement both at the time it was made (by signing and placing his thumbprint on the record)²⁸ and when he appeared in Court to testify²⁹.

²⁴ E1/122.1 Transcript of Proceeding, 5 September 2012, at pp. 60-65.

²⁵ E142/3 Witness Interview Decision, at para. 14; *see also* E116 Fairness of Judicial Investigation Decision, at para. 19.

²⁶ See E1/117.1 Transcript of Proceeding, 29 August 2012; E1/120.1 Transcript of Proceeding, 3 September 2012; E1/121.1 Transcript of Proceeding, 4 September 2012; E1/122.1 Transcript of Proceeding, 5 September 2012; E1/123.1 Transcript of Proceedings, 6 September 2012.

²⁷ E142/3 Witness Interview Decision, at para. 11.

²⁸ E3/64 Written Record of Interview of Witness Norng Saphang, 18 February 2009.

²⁹ E1/117.1 Transcript of Proceeding, 29 August 2012, at p. 34.

18. Notwithstanding that they were not required to do so, most OCIJ interviews were recorded by audio-tape, and those recordings were placed on the Case File and made available for review by the Defence and other parties. As the Chamber has noted, this practice of OCIJ is “inconsistent with a deliberate practice of obstructing the investigation.”³⁰
19. In addition, the lack of particularity in the Defence’s filing of both a factual and legal nature fails to satisfy the standard laid down by this Chamber to consider entertaining “allegations of inconsistency between the audio recording and written records of interview only where these are identified with sufficient particularity and pertain to alleged discrepancies on the substance which have clear relevance to the trial.”³¹ The Defence have not established, whether in a generalized or particular fashion, any substantive problem in the written records of OCIJ interviews. Nor have they complied with the Trial Chamber’s procedural directive that “[a]ny party raising such a challenge further bears the burden of clearly identifying the alleged inconsistency *and giv[ing] timely advance notice to the Chamber and the other parties of these allegations and the documents relevant to them.*”³² Indeed, the Defence provided no notice, timely or otherwise, to the parties or Trial Chamber that they sought to challenge a witness based on alleged inconsistencies between his prior statement and the audio recording of his interview. Instead, they raised the claim for the first time as they were examining the witness, and *after* the Co-Prosecutors and Civil Parties had concluded their examination of the witness.

**B. The Defence Has Not Justified the Extraordinary Actions
It Seeks in Regards to Future Witnesses**

20. The Defence has not substantiated its Request in regards to Oeun Tan, Norng Sophang, or any other witness, and therefore cannot justify similar requested measures for the generic category of future, unidentified witnesses “whose transcribed interviews may contain similar inconsistencies.”³³

³⁰ E142/3 Witness Interview Decision, at para. 14.

³¹ E142/3 Witness Interview Decision, at para. 12.



³² E142/3 Witness Interview Decision, at para. 12 (emphasis added).

³³ E224/2 Request, at para. 6.

III. CONCLUSION

21. For the reasons set out above, the Co-Prosecutors respectfully request the Chamber to dismiss the Request in full.

Respectfully submitted,

| Date | Name | Place | Signature |
|-------------------|--------------------------------|------------|---|
| 18 September 2012 | CHEA Leang Co-Prosecutor | Phnom Penh |  |
| | Andrew CAYLEY Co-Prosecutor | |  |