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Nation Religion King

អង្គជំនុំជម្រះវិសេសវិសេសសាលាដំបូងកម្ពុជា

**Royaume du Cambodge
Nation Religion Roi**

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

**Office of the Co-Investigating Judges
Bureau des co-juges d'instruction**

Case File No: 004/07-09-2009-ECCC-OCIJ

Before: **The Co-Investigating Judges**
 Date: **9 August 2016**
 Language(s): **English/Khmer [Original in English]**
 Classification: **CONFIDENTIAL**

**DECISION ON AO AN'S REQUEST FOR TRANSLATION AND
TRANSCRIPTION OF AUDIO-RECORDINGS AND TO PLACE
CERTAIN DOCUMENTS ON THE CASE FILE**

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, and 22 January 2015.
2. On 2 December 2012, my predecessor and the National Co-Investigating Judge instructed their investigators that it was no longer compulsory to audio or video record interviews with witnesses and civil parties.¹
3. On 4 June 2015, following a request by the Im Chaem Defence, my predecessor placed on Case File 004 420 audio-recordings of written records of interviews (“WRIs”) generated in Cases 001, 002, and 003 and part of the evidence in Case 004.²
4. On 22 September 2015, I reinstated the practice of audio-recording judicial interviews of all witnesses and civil parties.³ On 29 September 2015, I issued instructions on the conduct of screening interviews⁴ with witnesses. In the same memorandum, I instructed OCIJ investigators that written records of interviews with witnesses and civil parties should, as much as possible, reproduce *verbatim* what was said during an interview.⁵
5. On 11 November 2015, the Defence filed the *Request for the Translation and Transcription of Audio Recordings and to Place Certain Documents on the Case File* (“Request”).⁶

II. SUBMISSIONS

A. Alleged defects in WRIs

6. In the Request, the Defence submit that they have identified a significant number of inaccuracies concerning the audio-recordings and the corresponding WRIs, falling within the following categories.⁷
 - i. Leading questions
7. The Defence allege that, on some instances, OCIJ investigators and interpreters asked leading questions which were not recorded as leading in the WRIs, and leading questions that provided the witnesses with the answers the investigators expected to receive.⁸
8. Further, the Defence submit that evidence has been misrepresented in the WRIs to give the appearance that witnesses were providing evidence from their own

¹ Case File No. 004-D116, *Instructions on Conduct of Witness Interviews*, 3 December 2012.

² Case File No. 004-D250, *Decision on Im Chaem’s Requests Number D247 and D249*, 4 June 2015, para. 9.

³ Case File No. 004-D266, *Instructions on the Recording of Witness and Civil Party Interviews*, 22 September 2015.

⁴ Screening interviews are preliminary conversations between an OCIJ investigator and a potential witness to determine whether that person may be possession of information relevant to the investigation.

⁵ Case File No. 004-D269, *Instructions on screenings of civil parties and other witnesses and on the format of the procès verbal*, 29 September 2015.

⁶ Case File No. 004-D274, *Request for the Translation and Transcription of Audio Recordings and to Place Certain Documents on the Case File*, 11 November 2015.

⁷ *Ibid.*, paras 2, 30.

⁸ *Ibid.*, paras 34–40.



recollection, when in fact they were affirming propositions put to them by the investigator.⁹

ii. Failure to record exculpatory evidence

9. The Defence identify instances in which a witness' actual words are not relayed by translators or not recorded in a WRI.¹⁰ As a result, the Defence aver, the WRIs exclude exculpatory evidence or information capable of undermining the witness' account.¹¹

iii. Exaggeration, inaccurate recording and misrepresentation of evidence

10. The Defence submit that the WRIs generally misrepresent evidence.¹² The misrepresentation ranges from WRIs containing information that was not said during interviews, to WRIs exaggerating certain aspects of information to make it appear more incriminatory.¹³ Further, the Defence argue that where the audio-recordings of witnesses' accounts demonstrate internal inconsistencies in the witnesses' evidence, the WRIs artificially create an impression of coherence.¹⁴

iv. Staged and 'off the record' interviews

11. The Defence argue that it is clear from certain interviews that the investigators and interpreters are referring to a conversation that took place prior to the recorded interview, for which no WRI or audio-recording exists.¹⁵ In one instance, the Defence submit that the interpreter dictated large sections of text to the witness, leading on matters of substance, while the WRI does not reference any earlier conversations nor does it record the leading nature of the questioning.¹⁶

v. Unidentified individuals

12. The Defence submit that individuals not mentioned in the WRIs are often present at interviews, and at times contribute to interviews.¹⁷ For example, the Defence identify instances in which information contributed by an unidentified person has been included in a WRI as though the information has been provided by the witness, and others in which a witness is being influenced by an unidentified person.¹⁸

B. Requested relief

13. The Defence argue that since the WRIs are inaccurate and misleading, the provision of full, professionally transcribed translations of interviews is crucial to upholding Ao An's right to adequate facilities to prepare his defence, and to ensuring the Defence is properly able to examine the evidence against Ao An.¹⁹

⁹ *Ibid.*, paras 34, 40.

¹⁰ *Ibid.*, paras 41–44.

¹¹ *Ibid.*, para. 41.

¹² *Ibid.*, paras 45–49.

¹³ *Ibid.*, paras 45, 47, 48.

¹⁴ *Ibid.*, paras 46, 49.

¹⁵ *Ibid.*, paras 50–52.

¹⁶ *Ibid.*, para. 53.

¹⁷ *Ibid.*, para. 54.

¹⁸ *Ibid.*, paras 54–55.

¹⁹ *Ibid.*, paras 56–57.



The Defence notes that it does not have the capacity or the resources to review and translate audio-recordings and create professional, full transcripts itself.²⁰

14. Further, the Defence submit that the investigative deficiencies highlighted are relevant to any assessment of whether the OCIJ has complied with its obligation under Internal Rule 55(5) to conduct an impartial investigation with the objective of ascertaining the truth.²¹
15. The Defence contend that the investigative deficiencies contravene my recent instructions to OCIJ investigators to limit their questioning, and to ensure that WRIs based on interviews shall, as much as possible, contain a verbatim reproduction of what was said during the interview.²² The Defence submit that WRIs that fail to reflect accurately the questions put by investigators or interpreters, or the answers given by the witnesses violate Article 242 of the Cambodian Code of Criminal Procedure.²³
16. The Defence argue it is necessary to address these defects at this stage given that the Closing Order cures all defects in the investigation, and given the Trial Chamber's judgement that, where WRIs are alleged to knowingly and wilfully distort the content of the statements and obstruct the investigation, the parties should seize the Pre-Trial Chamber with a request for annulment of the written records or of the whole investigation pursuant to Internal Rule 76.²⁴
17. Therefore, in order to guarantee Ao An's rights, and in the interests of justice, the Defence request that the CIJs:
 - a. order the professional verbatim translation and transcription, in full, of the audio-recordings identified by the Defence as being of key relevance to the case and listed in Annex C to the Request;
 - b. place on the case file the audio-recordings of three of the WRIs listed in Annex C; and
 - c. place all translations and transcriptions of witness and civil party interviews transferred from Cases 001, 002 and 003 into Case File 004.²⁵

III. DISCUSSION

18. I have reviewed the WRIs and corresponding transcripts and audio-recordings identified by the Defence in Annexes A and B to the Request. Before discussing the outcome of my review, I first make some general observations on the rules applying to the recording of judicial interviews at the ECCC which are relevant to the assessment of the improprieties alleged by the Defence.

A. General observations on the conduct of judicial interviews

i. Recording of judicial interviews

19. On 29 September 2015, I issued instructions to all OCIJ investigators that WRIs shall, as much as possible, contain a verbatim reproduction of what was said

²⁰ *Ibid.*, paras 3, 5, 31, 56.

²¹ *Ibid.*, para. 58.

²² *Ibid.*, para. 59.

²³ *Ibid.*, paras 59–60.

²⁴ *Ibid.*, para. 28.

²⁵ *Ibid.*, paras 5–6, 8.



during an interview.²⁶ These instructions, however, do not represent the minimum standard against which the legitimacy of WRIs is to be assessed.

20. The Internal Rules provide scarce guidance on the form and content of WRIs. The rules simply state that “*a written record shall be made of every interview*”.²⁷ Article 242 of the Cambodian Code of Criminal Procedure (“CCCP”) is more detailed and states, *inter alia*, that WRIs “*shall accurately state the questions, answers and spontaneous statements*”. In Case 002, the Trial Chamber stated that “*in accordance with the practice followed under Cambodian law, [WRIs] 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*”.²⁸ The Trial Chamber, in explaining the practice under Cambodian law, neither addressed Article 242 of the CCCP explicitly, nor did it refer to any other authority. However, the presence of three professional Cambodian judges on the bench is ample evidence that the practice of the application of Article 242 of the CCCP by the Cambodian courts was a known fact to the Trial Chamber. That practice allows for a summarising approach to WRIs, as long as the summary fairly represents the exchange between the judge or investigator and the witness. This is further confirmed through advice given by my national colleague upon consultation regarding the practice of Cambodian courts in general and the textual interpretation of the Khmer original of Article 242: according to the Khmer version of the Article 242(2) of Cambodia Code of Criminal Procedure, កំណត់ហេតុស្រង់យ៉ាងត្រឹមត្រូវនូវសំណួរ ចម្លើយ និង ចម្លើយដែលឆ្លើយដោយឯកឯង means, word for word in English, that “*the written record correctly extracts the questions, answers, and spontaneous statement*”. According to the Choun Nath Dictionary published by the Buddhist Institute,²⁹ ស្រង់ in Khmer means “*to extract or to excerpt*”. The emphasis in Article 242 is thus on “*correctly*”, it does not mean a *verbatim* rendition of everything that was said. This finding is also in line with French practice on which the Cambodian system was after all modelled.³⁰
21. I am thus satisfied that as a matter of legal minimum standards, WRIs taken during judicial investigations at the ECCC as a Cambodian court need not contain verbatim answers and may be drafted in the form of reports of the relevant evidence given by a witness during an interview. However, any summary of the exchanges between an investigator and a witness must allow for a proper assessment of the reliability and probative value of the evidence contained in the WRI. This is why, as a matter of good practice, I have expressed a preference for verbatim records and instructed the investigators accordingly; this should not be confused with setting a new and higher *legal* minimum standard.

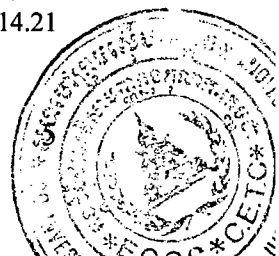
²⁶ Case File No. 004-D269, *Instructions on the screenings of civil parties and other witnesses and on the format of the procès verbale*, 29 September 2015.

²⁷ Internal Rule 55(7).

²⁸ Case File No. 002-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*, dated 13 March 2012, filed 30 May 2012, para. 11.

²⁹ Samdech Sangh Chuon Nath, *Choun Nath Khmer to Khmer Dictionary*, Buddhist Institute, 2011.

³⁰ See *Droit et Pratique de l'instruction préparatoire*, Dalloz 2010-2011, 114.11 for witnesses, 114.21 for civil parties, and 114.44 – 45 for both.



ii. Leading questions in judicial interviews

22. The ECCC is based on a civil law model in which investigations are conducted by impartial judges who, unlike the parties to adversarial criminal proceedings, have no interest in a particular outcome of the investigation. Pursuant to Internal Rule 55(5), the CIJs' duty is to ascertain the truth in relation to the facts alleged by the Co-Prosecutors.
23. There is no prohibition under the Internal Rules against the use of leading questions and ECCC Judges have taken different stances on their admissibility. While the Trial Chamber has disallowed leading questions,³¹ the Supreme Court Chamber has only prohibited them "*in contentious subject areas*" but left open the possibility of using leading questions even in such areas, subject to the judges' prior authorisation.³²
24. Based on the experience with the investigation of Cases 003 and 004, a blanket prohibition against closed or leading questions would be counterproductive to ascertaining the truth in Case 004. Due to cultural differences, witnesses' education and background, old age, or a combination of these factors, witnesses may not immediately understand what kind of information an investigator is seeking with a question. On such occasions, an investigator may be forced to elaborate further by asking a number of sub-questions to the witness or even, at times, by providing an array of possible answers. Other times, the investigator may decide to use closed or leading questions to test the credibility or reliability of a witness. Therefore, while open questions are most often preferable, leading or closed questions are sometimes necessary to obtain relevant information.

iii. Unrecorded 'off the record' interviews

25. Internal Rule 55(7) states that all interviews with witnesses shall be recorded. This is the practice followed by the CIJs and their investigators for every interview. I do not interpret Internal Rule 55(7) to also cover preliminary conversations with witnesses which are sometimes carried out to determine whether a person is in possession of relevant information and, consequently, whether resources should be allocated to conduct a formal interview with that person. While I gave precise instructions to OCIJ investigators on 29 September 2015 on the conduct and limits of such preliminary contacts,³³ those instructions were based on what I consider to be a matter a good practice; preliminary contacts with witnesses that were unrecorded do not flout Internal Rule 55(7).

iv. Presence of unidentified individuals

26. Internal Rule 56(1) enshrines the principle of confidentiality of judicial investigations. Consistently with this principle, Internal Rule 60(2) states that interviews shall be conducted in a place and manner that protects confidentiality.
27. When investigators are in rural areas, however, it is not always possible to find a closed room to interview a witness and thus to prevent family members or

³¹ See for example, Case File No. 002-E1/54.1, *Transcript on the hearing on the substance in Case 002*, 27 March 2012, p. 80; Case File No. 002-E1/61.1, *Transcript of hearing on the substance in Case 002*, 9 April 2012, p. 10.

³² Case File No. 002-F26, *Directions on the Conduct of the Hearing*, 17 June 2015, para. 1(a).

³³ Case File No. 004-D269, *Instructions on the screenings of civil parties and other witnesses and on the format of the procès verbale*, 29 September 2015.



neighbours of an interviewee from approaching the interviewing team. From the field experience of my investigators, I understand that it is practically impossible to completely eliminate such occurrences. Further, it is not always possible to prevent people who are in the vicinity of the interviewing team from making interjections or volunteering their version of the events in relation to a question asked to the witness being interviewed. OCIJ investigators, on such occasions, must promptly take necessary and reasonable measures to stop such interference and, if they determine that the interference influenced the witness, they will note that in the WRI.

B. Analysis of the defects alleged by the Defence in Annexes A and B to the Request

28. In Annexes A and B to the Request, the Defence have alleged 112 defects in relation to 26 WRIs. Upon their review, I am satisfied that the vast majority of them adhere to the rules governing judicial interviews at the ECCC, and are sufficiently accurate and reliable. I have only identified a small number of instances where the Defence's grievances are founded.

i. Leading questions and off the record interviews

29. The Defence mistakenly identify as leading questions or references to previous unrecorded interviews a number of instances where, in fact, the interpreter was reading back the WRI to a witness pursuant to Internal Rule 55(7).³⁴ Far from being improper, this is a mandatory practice followed in every judicial interview conducted by OCIJ investigators which is aimed at ensuring the accuracy of the WRI by allowing the witness to review his or her answers and, if necessary, make corrections and additions. In another instance, the investigator was referring to a prior screening conversation with the witness,³⁵ which is also not mandatory to record under the Internal Rules.

30. In several other instances, reviewed below, the Defence allege that WRIs fail to record the leading nature of a question or that the evidence given by a witness had been actually suggested by the investigator.

Interview of witness Vorng Sokun of (D107/4)

31. The Defence allege that in the interview of witness Vorng Sokun, the investigator led the witness as to the time of her father's arrest. This is not the case, as the interpreter puts the question to the witness in an open manner, "*Can you tell us in which year your father was arrested?*" which the witness answers independently, and maintains even after further questioning by the interpreter as to the time.³⁶ This is an instance of the Defence alleging a defect in communication between the investigator and interpreter, when instead the Defence must consider the way in which the communication is conveyed between the interpreter and witness.

³⁴ See Annex A: alleged defects 1.1 to 8.1 in relation to the WRI of witness Vorng Sokun (D3/19). Annex B: alleged defects 1.1 and 2.1 in relation to the WRI of witness Khek Nhe (D107/11); alleged defects 1.1 to 3.1 in relation to the WRI of witness Kien Lei (D107/12); alleged defects 1.1 to 3.1 in relation to the WRI of witness Long Sokhai (D107/13); alleged defects 1.1 to 7.1 and 9.1 to 11.1 in relation to the WRI of witness Ban Siek (D107/15).

³⁵ Annex B, alleged defect 1.1 in relation to the WRI of witness Phlong San (D3/16).

³⁶ Annex A, alleged defect 10.2 in relation to the WRI of witness Vorng Sokun (D107/4).



Interview of witness Suon Kanil of (D29)

32. The Defence allege that former International Co-Investigating Judge Blunk led the witness on the fact that Ao An was Secretary of Sector 1 and Deputy Secretary of the Central Zone.³⁷ In fact, Judge Blunk was simply asking the witness to confirm evidence he had given in a previous interview.³⁸ Similarly, the Defence allege that Judge Blunk led the witness as to the date of arrival of Ao An by asking “[c]ould it have been in late 1977 or early 1978?”, but the WRI records this as an open question, “[w]hen did you get to know him?”.³⁹ Judge Blunk, however, was not suggesting the time of Ao An’s arrival to the witness; rather, he was recalling the witness’ evidence given in an earlier interview in which the witness stated that the Southwest Zone group had arrived “in around late 1977 or early 1978”.⁴⁰

Interview of witness Nhim Kol of (D107/7)

33. The Defence complain that the WRI fails to record the leading nature of a question and the fact that there was a previously unrecorded interview with the same witness.⁴¹ On the first day of the witness’ interview, which started at 14:20 on 19 February 2012,⁴² in translating a question of the investigator, the interpreter made a reference to “this morning’s” testimony.⁴³ The investigator, however, had said nothing about a morning’s interview, so it is not clear what the interpreter was referring to.⁴⁴ After discussing the matter with the investigator and analyst who conducted the interview, the most likely explanation is that the interpreter may have referred to a preliminary screening conversation that took place in the morning with the witness, from which the investigator gleaned that the Southwest Zone army arrived before the administrators. While I have instructed investigators to limit the questions asked during these screenings and to note any such preliminary interview in reports of investigative action,⁴⁵ at the time this interview was carried out, investigators were not under any such instructions.

34. In that same interview, the Defence allege that the WRI “fails to record that the investigator is seeking to tell the witness how to answer the question.”⁴⁶ Specifically, the Defence point out that in the transcription of the audio-recording of the interview, the investigator is recorded as saying: “So, next question was: Does she participate actively to the arrest, the purges? So now you will answer: Yes, from the moment she arrived she started to arrest people every night.”⁴⁷

³⁷ Annex A, alleged defect 2.1 in relation to the WRI of witness Suon Kanil (D29).

³⁸ See Case File No. 004-D6.1.697, *Written Record of Interview of Witness Suon Kanil*, 18 August 2009, ERN00384427-00384428, where the witness states that Ao An was Sector 41 Secretary and was also appointed as Deputy Secretary of the Central Zone.

³⁹ Annex A, alleged defect 3.1 in relation to the WRI of witness Suon Kanil (D29).

⁴⁰ Case File No. 004-D6.1.707, *Written Record of Interview of SUON Kanil*, 19 August 2009, ERN 00390076.

⁴¹ Annex A, alleged defects 2.1 and 2.2 in relation to the WRI of witness Nhim Kol (D107/7).

⁴² Case File No. 004-D107/8R, *Audio recording of the interview of witness Nhim Kol*, 01:29:00-01:29:16.

⁴³ Case File No. 004-D219/422.4, *Transcription of Nhim Khol’s audio-recorded interview*, ERN01136832.

⁴⁴ *Ibid.* See also Case File No. 004-D107/8R, *Audio recording of the interview of witness Nhim Kol*, 01:52:50-01:53:15.

⁴⁵ Case File No. 004-D269, *Instructions on screenings of civil parties and other witnesses and on the format of the procès verbal*, 29 September 2015, p. 1.

⁴⁶ Annex A, alleged defect 6.1 in relation to the WRI of witness Nhim Kol (D107/7).

⁴⁷ Case File No. 004-D219/422.5, *Transcription of Nhim Khol’s audio-recorded interview*, ERN01136880-01136881.



However, the two pages of the transcript preceding this statement very clearly establish that the investigator was, in fact, summarising the substance of the answers just given by the witness in a lengthy exchange with the interpreter.⁴⁸ The Defence's allegation of serious misconduct against the investigator is therefore unfounded.

Interview of witness Nhim Kol on (D107/8)

35. The Defence complain that while the investigator asked: "So, that means that the district received orders from the Sector to arrest people?"⁴⁹ the question is recorded in the WRI as follows: "Did the district ever receive orders from the Sector echelon?"⁵⁰ Considering the exchanges between the witness and the investigator which preceded this question, as explained below, I do not share the Defence's concerns about the way the question appears in the WRI. The investigator asked a leading question in an attempt to clarify internal inconsistencies in the witness' evidence. The investigator's question came after the witness had stated that the Sector never sent people to make arrests.⁵¹ However, shortly before making this statement, the witness had told the investigator that the Sector had its own security office and that cadres holding certain positions, when arrested, were brought to the Sector.⁵² It was therefore appropriate, and in line with the CIJs' duty to seek the truth, for the investigator to seek clarification as to the role played by the Sector in relation to arrests.

Interview of witness Niv Sun of (D3/10)

36. The Defence complain that the WRI of the interview of witness Niv Sun fails to record the leading nature of questions on two occasions. In both instances, the investigator asked a number of questions aimed at clarifying the original question put to the witness.

37. In the first instance, the investigator was explaining to the interpreter the information he was seeking with his question, i.e. the type of work performed in the children unit.⁵³ I am satisfied that the way the question is transcribed in the WRI provides a reliable summary of the exchange between an investigator and a witness.

38. In the second instance, the investigator tried to clarify the information he was seeking by giving the witness a temporal reference. The WRI provides a reliable summary of the exchange between the investigator and the witness.⁵⁴

Interview of witness Nai Seu of (D3/11)

39. Two similar allegations are made in relation to the interview of Nai Seu.

⁴⁸ See Case File No. 004-D219/422.5, *Transcription of Nhim Khol's audio-recorded interview*, ERN01136880-01136881.

⁴⁹ Annex A, alleged defect 10.1 in relation to the WRI of witness Nhim Kol (D107/8).

⁵⁰ Case File No. 004-D107/8, *Written Record of Interview of Witness Nhim Khol*, 20 February 2012, ERN00787219.

⁵¹ Case File No. 004-D219/422.4, *Transcription of Nhim Khol's audio-recorded interview*, ERN01136789-01136790.

⁵² Case File No. 004-D219/422.4, *Transcription of Nhim Khol's audio-recorded interview*, ERN01136784-01136787.

⁵³ Annex B, alleged defect 1.1 in relation to the WRI of witness Niv Sun (D3/10).

⁵⁴ Annex B, alleged defect 2.1 in relation to the WRI of witness Niv Sun (D3/10).



40. In the first instance, the investigator was seeking clarification about a date. Further, the date stated by the investigator is not transcribed in the WRI.⁵⁵
41. The Defence is also incorrect in alleging that an unrecorded interview was conducted the day before the WRI was taken.⁵⁶ The investigator, rather than referring to an unrecorded interview, confronted the witness with a statement given to investigators of the Office of the Co-Prosecutors (“OCP”) on 11 November 2006. While the OCP interview should have been referenced in the WRI for ease of reference, in the section of the interview transcribed by the Defence the investigator makes explicit reference to a “report”.⁵⁷ A Zylab search for “Nai Seu” immediately reveals the existence of this previous interview.⁵⁸

Interview of witness Duong Sim of (D3/15)

42. With regard to the alleged impropriety in the interview of Duong Sim, the investigator was merely providing some possible examples to the witness to clarify the kind of information that he was seeking.⁵⁹

Interview of witness Chea Maly of (D36)

43. The alleged leading question asked by Judge Blunk appears in fact to be a remark made by the Judge, the content of which was not even transcribed in the WRI.⁶⁰

Interview of witness Seng Srun of (D76)

44. The Defence raises two complaints in relation to the interview of Seng Srun.
45. According to the Defence, Judge Blunk led Seng Srun by asking him if he had noticed a pattern or a common design in relation to certain killings.⁶¹ Considering the allegations in Case 004, I find this to be a legitimate question, aimed at ascertaining the nature of the killings testified to by the witness.
46. In the second instance, Judge Blunk first asked who had replaced a person named Sreng as sector secretary, to which the witness replied that it was “An”.⁶² Then the Judge asked if the witness knew whether Ao An held any other position, to which the witness answered that he only knew that he was “the Sector’s committee”.⁶³ At this point, Judge Blunk asked the witness “Would you say that [Ao An’s] influence was big or small or... did he appear in full control?”⁶⁴ This, too, is a legitimate question aimed at ascertaining the level of authority of Ao An. The question was then transcribed in the WRI as “How was [Ao An’s] influence?” I see no impropriety in the way the question was transcribed. I also note that the

⁵⁵ Annex B, alleged defect 2.1 in relation to the WRI of witness Nai Seu (D3/11).

⁵⁶ Annex B, alleged defects 1.1 and 3.2 in relation to the WRI of witness Nai Seu (D3/11).

⁵⁷ Annex B, alleged defect 3.1 in relation to the WRI of witness Nai Seu (D3/11).

⁵⁸ Case File No. 004-D1.3.11.32, *OCP Interview of Nai Seu*, 11 November 2006.

⁵⁹ Annex B, alleged defects 2.1 and 3.1 in relation to the WRI of witness Duong Sim (D3/15).

⁶⁰ Annex B, alleged defect 2.1 in relation to the WRI of witness Chea Maly (D36).

⁶¹ Annex B, alleged defect 1.1 in relation to the WRI of witness Seng Srun (D76).

⁶² Case File No. 004-D76R, *Audio-recording of the interview of witness Seng Srun*, 25 August 2011, 00:07:52-00:08:20.

⁶³ Case File No. 004-D76R, *Audio-recording of the interview of witness Seng Srun*, 25 August 2011, 00:09:33-00:09:52.

⁶⁴ Annex B, alleged defect 2.1 in relation to the WRI of witness Seng Srun (D76).



witness answered that he did not know what influence Ao An had, thus it is clear that the witness was not unduly influenced by Judge Blunk's question.⁶⁵

Interview of witness Chin Sinal of (D78)

47. The Defence complains that after the witness stated that Ao An was "Sector 41's Committee", Judge Blunk followed up by asking if Ao An was the chairman or the committee or just a member, to which the witness replied that he was the chairman.⁶⁶ This question is not leading: the Judge asked the witness to clarify Ao An's position in the Sector Committee without leading the witness to any specific answer. It is also worth noting that such requests for clarification are often necessary, as witnesses tend to say that a person was "the Sector Committee" to mean that that person chaired the committee: in other words, witnesses tend to identify the chair of the committee with the committee itself. This has been a common occurrence in the evidence obtained in the Case 004 investigation.⁶⁷

Interview of witness Khun Saret of (D93)

48. The Defence make three allegations in relation to the interview of witness Khun Saret.

49. Regarding the first allegation, Judge Blunk simply asked clarification of the witness' statement that living conditions were "difficult". While the Judge did provide the witness with possible examples of what may have made such conditions difficult, this is sometimes necessary for the witness to correctly understand the question.⁶⁸

50. The second allegation is also unfounded. After the witness had stated that Ao An had been chief of Sector 41 until late 1977, Judge Blunk asked if the witness was sure of these dates, to which the witness answered that he was.⁶⁹ I find nothing improper with that question.

51. With regard to the third allegation, Judge Blunk was trying to ascertain if Ao An had arrived together with other Southwest cadres. I do not consider the question to be leading. In any event, the witness did not understand the question and appeared tired at this point of the interview. The interview was thus concluded and Judge Blunk's unanswered question is not recorded in the WRI.⁷⁰

Interview of witness Soeng Lim of (D95)

52. The Defence allege that leading questions were not properly recorded as such in relation to the interview of witness Soeng Lim.⁷¹ Judge Blunk first asked the

⁶⁵ Case File 004-D76, *Written Record of Interview of Witness Seng Srun*, 25 August 2011, ERN00740714, Q8.

⁶⁶ Annex B, alleged defect 1.1 in relation to the WRI of witness Chin Sinal (D78).

⁶⁷ For example: in Case File No. 004-D219/37, *Written Record of Interview of Suon Mot*, 16 October 2014, at ERN 01053614 the witness states, "[...] Yeay Chaem was a member of the Sector Committee [...]" and, "I knew and saw her because she came to chair meetings [...]"; in Case File No. 004-D118/77, *Written Record of Witness Interview – Nang Ny*, 23 June 2013, at ERN 00970455 the witness states, "[...] I recognized Sector Committee Ta Tith [...]" and in answer to the question, "How did you know that Ta Tit was Sector Committee?", the witness replies, "Because Ta Tit held the microphone and made announcements when he held a meeting with the people in Baydamram".

⁶⁸ Annex B, alleged defect 4.1 in relation to the WRI of witness Khun Saret (D93).

⁶⁹ Annex B, alleged defect 5.1 in relation to the WRI of witness Khun Saret (D93).

⁷⁰ Annex B, alleged defect 6.1 in relation to the WRI of witness Khun Saret (D93); Case File No. 004-D93R, *Audio-recording of the interview of witness Khun Saret*, 16 September 2011, 00:31:57-00:33:45.

⁷¹ Annex B, alleged defect 1.1 in relation to the WRI of witness Soeng Lim (D95).



witness if he knew where the guards of a certain security centre were from. When the witness replied that he did not know, the Judge asked him if they were locals or from the Southwest Zone, to which again the witness replied that he did not know. The WRI records Judge Blunk as asking “*Where were the security centre guards from?*”⁷² While I have a preference for a more verbatim transcription, the way the question was transcribed in the WRI is sufficiently accurate.

Interview of witness Seng Run of (D97)

53. With respect to the interview of witness Seng Run, the Defence allege two instances of the WRIs failing to record the leading nature of the question.
54. In the first, Judge Blunk asked a number of questions to the witness with the evident aim of ascertaining with precision the conditions to which detainees were subjected in an alleged crime site.⁷³ I do not find the questions asked by the Judge to be suggestive or to be otherwise improper and I am satisfied that the question as recorded in the WRI is a fair summary of the series of questions asked by Judge Blunk.
55. In the second instance, the Judge was trying to clarify the number of detainees who had been killed. The Defence take issue with the fact that Judge Blunk, after asking the question, stated “*Like if you remember this other witness who heard that more than 5000 were killed?*”⁷⁴ However, Judge Blunk made this last remark to the interpreter, in English. The interpreter then simply asked to the witness, in Khmer, how many of the killed prisoners were from the East Zone, without making references to the evidence of other witnesses or translating anything else of Judge Blunk’s remark.⁷⁵ Again, this is an instance in which the Defence wrongly focus on the communication from the investigator to the interpreter, rather than the interpreter to the witness.

Interview of witness Sann Son of (D107/2)

56. With regard to the WRI of witness Sann Son, I am satisfied that the WRI provides a fair, accurate summary of the exchange between the investigator and the witness.⁷⁶

Interview of witness Orn Kim Eng of (D107/5)

57. With regard to the WRI of witness Orn Kim Eng, the Defence identifies two alleged instances in which, in fact, the investigator was not speaking to the witness but to the interpreter, in an attempt to clarify the type of information he was seeking from the witness.⁷⁷

Interview of witness Mean Savuth of (D107/9)

58. I also find no basis for the following allegations made by the Defence in relation to the WRI of witness Mean Savuth. With regard to the alleged failure to record the leading nature of a question, I have ascertained that the interpreter was simply

⁷² Case File No. 004-D95, *Written Record of Interview of Witness Soeng Lim*, 16 September 2011, ERN00746992.

⁷³ Annex B, alleged defect 1.1 in relation to the WRI of witness Seng Run (D97).

⁷⁴ Annex B, alleged defect 2.1 in relation to the WRI of witness Seng Run (D97).

⁷⁵ Case File No. 004-D97R, *Audio-recording of the interview of witness Seng Run*, 16 September 2011, 00:12:30-00:14:00.

⁷⁶ Annex B, alleged defect 1.1 in relation to the WRI of witness Sann Son (D107/2)

⁷⁷ Annex B, alleged defects 1.1 and 2.1 in relation to the WRI of witness Orn Kim Eng (D107/5).



trying to clarify the full name of a location already testified to by the witness.⁷⁸ With respect to the allegation that there was an earlier interview for which no WRI was made,⁷⁹ I have ascertained that the investigator's reference, rather than to an unrecorded interview, was to a site visit made with the witness to the location of the Chamkar Svay Chanty Security Centre. This visit, as well as a summary of the witness' statements and explanations during the visit, is recorded in a Site Identification Report available to the Defence.⁸⁰

Interview of witness Chuong Srim of (D107/10)

59. Finally, with respect to the interview of Chuong Srim, the investigator did not lead the witness. Rather, he duly confronted the witness with an inconsistency between the answer just given and the information provided by the witness in a prior interview to OCP investigators.⁸¹ The witness had confirmed the accuracy of the record of the OCP interview at the beginning of the interview with the OCIJ investigator.⁸²
60. In all the above instances, therefore, I am satisfied that the WRIs reliably report the nature of the questions and substance of the evidence provided in Case 004 and adhere to the rules governing the redaction of WRIs at the ECCC.
61. I only identified two instances where the WRIs do not accurately reflect the exchanges between the investigator and the witness.

Interview of witness Nai Kimsan of (D3/14)

62. In the first instance, the Defence complain that during the interview of witness Nai Kimsan, the investigator led the witness as to who replaced a person named Tang, by asking “[a]t that period, did Ta An replace Tang?”⁸³ The question was one of a series aimed at clarifying the witness' answers in relation to the administrative structure of Sector 41 between 1975 and 1979. While there was some confusion between the names “Ta An” and “Tang” during the interview, the investigator should have simply asked, at least as a first attempt, if the witness knew who had replaced Tang. Considering however the witness' answer that he did not know, but that he had just heard of “An”, the witness does not appear to have been unduly influenced by the question. That said, in this instance information provided by the investigator is recorded in the WRI as having been provided by the witness.
63. The Defence also argue that the WRI of witness Nai Kimsan exaggerates the evidence because the witness never stated that Ao An had replaced Tang, but only that he had heard of Ao An.⁸⁴ I disagree with this contention as it is clear, from the full exchange between the witness and the investigator, that when stating “I heard of An”, the witness was referring to the replacement of Tang.

⁷⁸ Annex B, alleged defect 1.1 in relation to the WRI of witness Mean Savuth (D107/9).

⁷⁹ Annex B, alleged defect 2.1 in relation to the WRI of witness Mean Savuth (D107/9).

⁸⁰ Case File No. 004-D107/17, *Site Identification Report*, 1 March 2012, p. 3.

⁸¹ Annex B, alleged defect 1.1 in relation to the WRI of witness Chuong Srim (D107/10). See Case File No. 004-D1.3.11.13, *OCP Interview with Chuong Srim*, 4 August 2008, ERN00210446.

⁸² Case File No. 004-D107/10, *Written Record of Interview of Witness Chuong Srim*, 23 February 2012, ERN00787198.

⁸³ Annex B, alleged defect 1.1 in relation to the WRI of witness Nai Kimsan (D3/14).

⁸⁴ Annex B, alleged defect 1.2 in relation to the WRI of witness Nai Kimsan (D3/14).



Interview of witness Duong Sim of (D3/15)

64. In the second instance, concerning the interview of Duong Sim, the Defence allege that the WRI fails to record that the witness was asked a leading question in relation to the date of the arrival of the Southwest cadres and their role in the arrests and replacement of local cadres.⁸⁵ The Defence is correct. The investigator provided the witness with the information about the arrival of the Southwest cadres and their role in the arrests, which the witness confirmed. However, the wording of the WRI suggests the witness provided this information autonomously.⁸⁶

ii. Failure to record the presence of unidentified individuals

65. The Defence allege the presence of an unidentified individual in a number of interviews conducted by Judge Blunk.⁸⁷ However, in these instances the “unidentified person” was very likely the Greffier Som Ratana, as noted on the WRIs, who went on missions with Judge Blunk and occasionally clarified for him some details of answers given by a witness.⁸⁸

66. The Defence also allege the same issue with regard to interviews conducted by an OCIJ investigator. As discussed above, it is not always possible, when in the field, to prevent relatives and neighbours from being close to where the interview is conducted. In the examples identified by the Defence, the recorded interferences, while unfortunate, did not vitiate the substance of the evidence recorded in the WRI.⁸⁹

iii. Misrepresentation of the evidence and failure to record exculpatory evidence

67. Upon review of the alleged misrepresentations and omissions alleged by the Defence, I have found that on several occasions they were minor and did not affect the substance of the evidence given by a witness.

Interview of witness Vorng Sokun of (D107/4)

68. In the audio-recording of the interview of witness Vorng Sokun, it is apparent that the witness was shown a photograph of an individual and asked to identify him. The witness was not able to identify the person in the photograph, nor was the witness told at this point who the individual was; rather, the investigator only advised the transcriber in English that the individual in the photograph was Ao

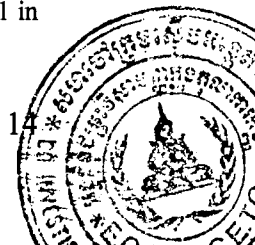
⁸⁵ Annex B, alleged defect 1.1 in relation to the WRI of witness Duong Sim (D3/15).

⁸⁶ Case File No. 004-D3/15, *Written Record of Interview of Witness Duong Sim*, 21 October 2010, ERN00622273-00622274.

⁸⁷ Annex A, alleged defects 1.1 and 4.1, 5.1, 6.1, and 8.2 in relation to the WRI of witness Suon Kanil (D29); Annex B, alleged defect 1.1 in relation to the WRI of witness Chea Maly (D36); alleged defect 2.1 in relation to the WRI of witness Roth Peou (D74); alleged defect 3.1 in relation to the WRI of witness Khun Saret (D93).

⁸⁸ OCIJ staff Osman Ysa and Socheata Neuv were asked to listen to the audio-recordings to verify whether the voice was of Som Ratana, however both advised that they were not able to remember Mr Som's voice. OCIJ Greffier, Chanlyda Chhay, who had worked with Mr Som the longest in OCIJ stated she would be able to recognize his voice, however she could not confirm whether or not it was him on listening to the audio-recordings, as the individual speaks very softly in the recordings.

⁸⁹ Annex A, alleged defects 3.1, 3.2, and 4.3 in relation to the WRI of witness Nhim Kol (D107/7); Annex B, alleged defects 3.2 and 4.3 in relation to the WRI of witness Orn Kim Eng (D107/5); alleged defects 1.2, 3.1, and 4.1 in relation to the WRI of witness Mean Savuth (D107/9); alleged defect 1.1 in relation to the WRI of witness Chhun La (D107/14).



An. In spite of this, the WRI records the witness as stating, “*I did not know the name of the person in this photo [...] You told me that this person is named Ta An, the secretary of Sector 41.*”⁹⁰ While this exchange should have been more properly recorded in the WRI as an ‘investigator’s note’, the wording of the WRI does not purport to contain any confirmation from the witness as to whether the person in the photograph is or is not Ta An. The discrepancy, therefore, has does neither distort the witness’ evidence nor does it prejudice the Defence.

Interview of witness Suon Kanil of (D29)

69. In relation to witness Suon Kanil, the Defence allege the WRI fails to include potentially exculpatory statements by the witness in three instances. In the first, the witness gives evidence to the effect that he never saw the content of telegram messages.⁹¹ Relevantly, the WRI records the witness saying he could not decode telegrams and did not know the content of a particular letter shown to him in the interview.⁹² While there is a difference in the meaning between the words spoken in the interview and the words recorded in the WRI, the fact that the witness had no knowledge of the content of the telegrams is correctly reflected in the WRI. Second, Suon Kanil is later recorded as saying that “*the order of arrest came from the Centre*”.⁹³ This is consistent with the evidence given by the witness in the audio-recording.⁹⁴ In the final instance, the Defence allege that the exclusion from the WRI of the witness’ statement that the ‘Security organ’ which gave orders for arrest was “*not easy to understand*” was an exclusion of relevant, exculpatory evidence.⁹⁵ The fact that this statement was excluded from the WRI is inconsequential as the witness went on to confirm that he knew about the ‘Security organ’, thanks to his work.

Interview of witness Nhim Kol of (D107/7)

70. The Defence allege the WRI excludes details of the witness’ evidence regarding Ao An visiting Yeay Yut and the witness’ own sighting of Ao An.⁹⁶ I am satisfied however that the WRI provides an accurate summary of the relevant evidence of the witness on those matters.⁹⁷ Further, the Defence allege that the WRI fails to acknowledge information provided by an unidentified individual during the interview.⁹⁸ It is unfortunate that the individual was present during the interview and that her identity was not recorded in the WRI, however, it is clear throughout the audio-recording that there is no indication of any impact of the individual’s comments on the witness’ evidence; the witness gave independent and detailed evidence of the matters commented on by the unidentified individual.

71. The Defence allege that the WRI of witness Nhim Kol also exaggerates his evidence to say that “*all*” people who carried out arrests ordered by Yeay Yut were from the Southwest Zone, when in the interview the witness said “*they were*

⁹⁰ Annex A, alleged defect 11.1 in relation to the WRI of witness Vorng Sokun (D107/4).

⁹¹ Annex A, alleged defect 5.2 in relation to the WRI of witness Suon Kanil (D29).

⁹² Case File No. 004-D29, *Written Record of Interview of witness Suon Kanil*, 11 June 2011, ERN 00716228.

⁹³ *Ibid.*, ERN 00716230.

⁹⁴ Annex A, alleged defect 7.1 in relation to the WRI of witness Suon Kanil (D29).

⁹⁵ Annex A, alleged defect 8.2 in relation to the WRI of witness Suon Kanil (D29).

⁹⁶ Annex A, alleged defect 4.1 in relation to the WRI of witness Nhim Kol (D107/7).

⁹⁷ Case File No. 004-D107/7, *Written Record of Interview of NHIM Kol*, 19 February 2012, ERN 00787214.

⁹⁸ Annex A, alleged defect 4.3 in relation to the WRI of witness Nhim Kol (D107/7).



often from the Southwest Zone."⁹⁹ I am satisfied the WRI is materially consistent with the witness' evidence, given he also stated earlier in the interview that, "*If she wanted to arrest someone, she would give such an order. Her henchmen were all from the Southwest Zone. She did not yet trust us so much. So, she had her henchmen do that for her.*"¹⁰⁰

72. The WRI of a subsequent interview with Nhim Kol contains a statement to the effect that the Sector did not conduct arrests itself; arrests were carried out by the District and communes who then sent the arrestees to the Sector.¹⁰¹ The Defence allege such evidence is inconsistent with the audio-recording, in which the witness stated that the sector did not do anything in the context of arrests.¹⁰² This is not correct, as the witness stated during the interview that the District, after arresting people, sent the arrestees to the Sector, which implies that the Sector had, at the very least, a role in processing the detainees brought by the District. The witness also stated that he did not know if the Sector issued orders in relation to arrests, which is not the same as to say, as suggested by the Defence, that the sector had nothing to do with arrests.¹⁰³

Interview of witness Nhim Kol of (D107/8)

73. Two further allegations of misrepresentations regarding Nhim Kol's subsequent interview are unsubstantiated. In relation to the first, the WRI accurately conveys that the witness did not know much about Phnom Bros.¹⁰⁴ In relation to the second, the WRI fairly summarises the witness' evidence about the establishment of the sector security office on Ao An's arrival.¹⁰⁵

Interview of witness Niv Sun of (D3/10)

74. The Defence allege that witness Niv Sun's WRI fails to include his statement that he did not recall the structure of authority very well as he was so young at the time. The Defence aver that the omitted information is relevant to the assessment of the witness'.¹⁰⁶ While it is not ideal that such a statement was excluded from the WRI, the witness' date of birth is noted on the WRI; the fact that he was five years of age in 1975 is thus immediately apparent and informs the reader's assessment of the credibility of the evidence.¹⁰⁷ The omission therefore does not prejudice the CIJs' ability to give the appropriate weight to the evidence of this witness.

Interview of witness Roth Peou of (D74)

75. In relation to the evidence of witness Roth Peou, the WRI's omission that the Southwest Zone people "*maybe arrived in late June 1977*" is irrelevant as the

⁹⁹ Annex A, alleged defect 6.2 in relation to the WRI of witness Nhim Kol (D107/7).

¹⁰⁰ Case File No. 004-D219/422.5, *Transcript of interview of Nhim Kol dated 19 Feb 2012*, 4 September 2015, ERN 01136881.

¹⁰¹ Case File No. 004-D107/8, *Written Record of Interview of Witness Nhim Kol*, 20 February 2012, ERN 07787219.

¹⁰² Annex A, alleged defect 9.1 in relation to the WRI of witness Nhim Kol (D107/8).

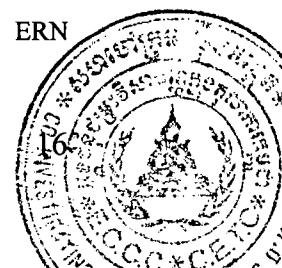
¹⁰³ See Case File No. 004-D219/422.4, *Transcript of interview of Nhim Kol dated 20 Feb 2012*, 4 September 2015, ERN 01136789.

¹⁰⁴ Annex A, alleged defect 11.1 in relation to the WRI of witness Nhim Kol (D107/8).

¹⁰⁵ Annex A, alleged defect 12.1 in relation to the WRI of witness Nhim Kol (D107/8).

¹⁰⁶ Annex B, alleged defect 2.2 in relation to the WRI of witness Niv Sun (D3/10).

¹⁰⁷ Case File No. 004-D3/10, *Written Record of Interview of Niv Sun*, 19 October 2010, ERN 00623577.



witness went on to state that he was only speculating.¹⁰⁸ The WRI accurately conveys the witness' doubt in this regard.¹⁰⁹

Interview of witness Chin Sinal of (D78)

76. As to the WRI of witness Chin Sinal, the Defence's concern that the WRI exaggerates the evidence is unfounded as the WRI is consistent with the witness' evidence as to Ao An's position in the Sector and his attendance at a Sector dam for a monthly meeting.¹¹⁰ I am also satisfied that the WRI provides an accurate summary of the witness' evidence, and does not unduly attempt to render it more coherent.¹¹¹

Interview of witness Khun Saret of (D93)

77. Regarding witness Khun Saret, the witness' evidence that Ta An was on the Sector committee from "1976... 1977" was recorded in the WRI as "from late 1976 to 1977", which the Defence allege is an exaggeration of the evidence to make it appear more incriminating.¹¹² I find the discrepancy immaterial as the witness' answer in both the audio-recording and the WRI are broad estimates.¹¹³

Interview of witness Orn Kim Eng of (D107/5)

78. The Defence complain that the WRI does not use the witness' language in the audio-recording that Prak Yut was in charge of "purges", and instead records the witness as saying that she was responsible for "arresting people".¹¹⁴ By reading the WRI in its entirety, it is clear that the purge spoken to by the witness concerned arrests and other coercive measures (for instance, the witness states that *security forces* were in charge of the purge, and that two individuals had escaped arrest by Prak Yut).¹¹⁵ The wording used in the WRI therefore capture with sufficient accuracy the nature of the evidence given by the witness.

79. Further, the Defence allege that potentially exculpatory evidence about the witness' knowledge of Ao An was excluded from the WRI, including that "*Ta An was husband of Yeay Yut*", and on being shown a photograph of Ao An, "*I never saw [him]*".¹¹⁶ Having reviewed the WRI against the audio recording, I am satisfied that the WRI accurately summarises the relevant information given by the witness in relation to his knowledge of Ao An. With regard to the interpreter's remark to the witness that Yeay Yuth was not Ao An's husband, while unideal, it is, in that context, a harmless remark that creates no prejudice to the reliability of the WRI.¹¹⁷

Interview of witness Mean Savuth of (D107/9)

80. The Defence allege the WRI overstates the witness' confidence in respect of a matter, by failing to note the witness' statement in the audio-recording that he was

¹⁰⁸ Annex B, alleged defect 1.1 in relation to the WRI of witness Roth Peou (D74).

¹⁰⁹ See Case File No. 004-D74, *Written Record of Interview of Roth Peou*, 25 August 2011, ERN 00740800.

¹¹⁰ Annex B, alleged defect 1.2 in relation to the WRI of witness Chin Sinal (D78).

¹¹¹ Annex B, alleged defect 2.1 in relation to the WRI of witness Chin Sinal (D78).

¹¹² Annex B, alleged defect 2.1 in relation to the WRI of witness Khun Saret (D93).

¹¹³ Annex B, alleged defect 2.1 in relation to the WRI of witness Khun Saret (D93).

¹¹⁴ Annex B, alleged defect 3.1 in relation to the WRI of witness Orn Kim Eng (D107/5).

¹¹⁵ Case File No. 004-D107/5, *Written Record of Interview of Witness Orn Kim Eng*, 18 February 2012.

¹¹⁶ Annex B, alleged defect 4.1 in relation to the WRI of witness Orn Kim Eng (D107/5).

¹¹⁷ Annex B, alleged defect 4.2 in relation to the WRI of witness Orn Kim Eng (D107/5).



not clear about that matter.¹¹⁸ The answer in the WRI begins with the words, “*To my knowledge, I think [...]*”, which sufficiently conveys the witness’ level of uncertainty regarding the matter on which he was questioned.

Interview of witness Ban Siek of (D107/15)

81. Witness Ban Siek gives evidence that when Ke Pauk was absent or on mission outside his zone, his deputies like Sim, Oeun and Ao An did not replace him as they were in charge of the district. This aspect of the statement is not included in the WRI, which only repeats the witness’ evidence that Kep Pauk’s office chief was the only one who could replace him in his absence; there is no substantive difference between this statement in the WRI and audio-recording as the Defence allege.¹¹⁹

iv. Omissions and discrepancies of a more serious nature

82. My analysis of the alleged misrepresentations and omissions has, however, identified some instances where omissions and discrepancies were of such nature as to affect the witness’ evidence, albeit to different degrees. I will address each of these instances below.

Interview of witness Vorng Sokun of 2 December 2010 (D13/19)

83. According to the transcript of the audio-recording, Vorng Sokun stated that Ke Pauk was the only member of the (Central) Zone Committee. However, in the WRI it is stated that Ke Pauk was “*the secretary of the Zone*”, a formulation which fails to capture that, according to the witness, Ke Pauk was the *only* member of the Zone Committee.¹²⁰

Interview of witness Vorng Sokun of 17 February 2012 (D107/4)

84. In this interview, Vorng Sokun stated that his father was arrested on 1976. The WRI, however, reads that the witness’ father was arrested in 1977.¹²¹ This is a material mistake which misrepresents the evidence of Vorng Sokun.

85. However, if considered in the context of the entire interview, this error has little impact on reliability of the WRI: during the interview, the witness provided further and more reliable temporal markers in relation to the arrest of his father, such as the fact that it happened after the arrival of the Southwest cadres and Yeay Yuth in Sector 41 of the Central Zone.¹²²

Interview of witness Nhim Kol of 19 February 2012 (D107/7)

86. In this interview, Nhim Kol stated that he had only seen Ao An once in a worksite. The witness also stated on that occasion he saw Ao An from the back, a detail which is relevant to the reliability of the witness’ identification. However, the WRI does not contain this detail.¹²³

¹¹⁸ Annex B, alleged defect 5.1 in relation to the WRI of witness Mean Savuth (D107/9).

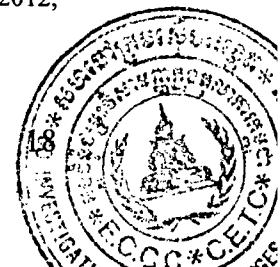
¹¹⁹ Annex B, alleged defect 8.1 in relation to the WRI of witness Ban Siek (D107/15).

¹²⁰ Annex A, alleged defect 9.1 in relation to the WRI of witness Vorng Sokun (D3/19).

¹²¹ Annex A, alleged defect 10.1 in relation to the WRI of witness Vorng Sokun (D107/4).

¹²² Case File No. 004-D107/4, *Written Record of Interview of Witness Vorng Sokun*, 17 February 2012, ERN00787236.

¹²³ Annex A, alleged defect 4.2 in relation to the WRI of witness Nhim Kol (D107/7).



87. In the same interview the witness, after stating that Yeay Yuth had “full power” to arrest people, stated that “[w]e learned from one another that if someone was arrested, she did not report to the upper echelon. She did so on her own.” Nevertheless, the WRI only records that Yeay Yuth had full power “to control the entire district and to decide who would die and who would live”. While the fact that she had autonomy in deciding on the arrests is faithfully recorded,¹²⁴ the witness’ statement that information on the arrests was not reported to the upper echelon is absent from the WRI.¹²⁵
88. However, the witness also stated that certain arrested cadres were sent to the Sector, and were not killed at the district level.¹²⁶ Further, the witness stated that while he never saw people report to Ao An in person, he did not know whether Ao An received written reports.¹²⁷ These two statements are relevant to and qualify the witness’ earlier statement that arrests were not reported to the higher echelon: first, if certain arrested cadres were sent to the Sector, the Sector was aware of at least some of the arrests; second, if the witness could not exclude that arrests were reported in writing to Ao An, he was not in a position to state, as he did, that Yeay Yuth did not report arrests to the higher levels. Therefore, while the omitted information should have been recorded in the WRI, I do not find that this omission substantively mischaracterised his evidence.
89. In the same interview, the witness stated, in relation to arrests, that “the Khmer Rouge during that time did not appear to receive orders from the upper level.” This information is not transcribed in the WRI.¹²⁸ However, after this remark by the witness, the investigator dutifully explored the topic by asking whether Yeay Yuth arrested people out of her own initiative or pursuant to orders from the Sector or the Zone. The witness replied that there was no order from the upper level and that Yeay Yuth could make her own decisions.¹²⁹ The WRI correctly records this information by stating that the witness thought Yeay Yuth “personally made the decisions on the arrests.”¹³⁰ With regard to this last sentence, the Defence complain that the witness was not equivocal in his response, and yet the WRI records the witness as stating “I think she personally made the decisions on the arrests.”¹³¹ While ideally the level of certainty expressed by a witness in answering a question should be reflected in the WRI, in assessing the weight and probative value of this evidence – and of any other evidence - I will consider the witness’ foundational knowledge based on the entirety of the information provided during any interview given by that witness.

¹²⁴ See also ERN00787216 of D107/7.

¹²⁵ Annex A, alleged defect 5.1 in relation to the WRI of witness Nhim Kol (D107/7). See Case File No. 004-D107/7, *Written Record of Interview of Witness Nhim Khol*, 19 February 2012, ERN00787216.

¹²⁶ Case File No. 004-D219/422.5, *Transcription of Nhim Khol's audio-recorded interview*, ERN01136883.

¹²⁷ Case File No. 004-D219/422.4, *Transcription of Nhim Khol's audio-recorded interview*, ERN01136790.

¹²⁸ Annex A, alleged defect 7.1 in relation to the WRI of witness Nhim Kol (D107/7).

¹²⁹ Case File No. 004-D219/422.5, *Transcription of Nhim Khol's audio-recorded interview*, ERN01136884-01136885.

¹³⁰ See ERN00787216 of D107/7.

¹³¹ Annex A, alleged defect 8.1 in relation to the WRI of witness Nhim Kol (D107/7).



Interview of witness Nhim Kol of 20 February 2012 (D107/8)

90. In relation to this interview, the Defence take issue, *inter alia*, with the alleged omission from the WRI of evidence that the Sector did not order the District level to carry out arrests and that the witness had never seen Ao An at Sector meetings or anyone reporting to Ao An in person in relation to arrests.¹³² As noted above in relation to D107/7, however, the witness also stated that he was unaware as to whether Ao An received written reports.¹³³ The WRI records the exchange as follows:

Q: *Did the district echelon ever receive orders from the Sector echelon?*

A: *I didn't know, but the district may have received certain written orders from the Sector, about which I could not know.*¹³⁴

91. The fact that the witness did not see Ao An receiving reports in relation to arrests does not exclude the possibility that he did receive them. Further, the witness stated that he was not in a position to know about written reports. Therefore, while the evidence may have been summarised overly succinctly in the WRI, I am satisfied that the WRI correctly reflects the fact that the witness was not in a position to know if Ao An received written reports on the issue of arrests.

92. The Defence also point out that in the WRI, the witness is recorded as stating that Phnom Bros was a Sector level security office, when in fact the witness stated that it was a Zone security office.¹³⁵ The Defence is correct. The WRI contains a material error in the original Khmer version.¹³⁶ However, I note that in a subsequent answer the witness is correctly reported as having said that "Choeun" was the Zone security chairman at Phnom Bros.¹³⁷ The qualification of Phnom Bros as a Sector security office must therefore have been the result of an unfortunate clerical error.

Interview of witness Duong Sim of 21 October 2010 (D3/15)

93. The Defence complain that, while the witness stated that he was not sure about the position held by Ao An, this information is not recorded in the WRI.¹³⁸ The WRI records the witness as stating that he "*heard the name Comrade An, the chief of the sector committee*", but that he never met Ao An.¹³⁹ I agree with the Defence that the witness' remark that he was not sure about Ao An's position should have been more clearly recorded. However, I also note that the WRI does record that the witness "*heard*" about Ao An and that he never met him.¹⁴⁰ I am therefore satisfied that the reliability of the witness' evidence in relation to Ao An's position can be properly assessed on the basis of the WRI.

¹³² Annex A, alleged defect 10.2 in relation to the WRI of witness Nhim Kol (D107/8).

¹³³ Case File No. 004-D219/422.4, *Transcription of Nhim Khol's audio-recorded interview*, ERN01136790.

¹³⁴ Case File No. 004-D107/8, *Written Record of Interview of Witness Nhim Khol*, 20 February 2012, ERN00787219.

¹³⁵ Annex A, alleged defect 11.2 in relation to the WRI of witness Nhim Kol (D107/8).

¹³⁶ Case File No. 004-D107/8, *Written Record of Interview of Witness Nhim Khol*, 20 February 2012, ERN00787219.

¹³⁷ *Ibid.*, ERN00787221.

¹³⁸ Annex B, alleged defect 1.2 in relation to the WRI of witness Duong Sim (D3/15).

¹³⁹ Case File No. 004-D3/15, *Written Record of Interview of Witness Duong Sim*, 21 October 2010, ERN00622273-00622274.

¹⁴⁰ *Id.*



94. The Defence also complain that the WRI exaggerates the witness' evidence by recording that the witness heard that Ao An was the "chief of the sector committee"¹⁴¹ while the witness stated that "Ta An was likely the sector committee."¹⁴² This is a common issue in interviews conducted by OCIJ investigators, as highlighted above.¹⁴³ Interpreters assisting OCIJ investigators, as well as Khmer staff of the OCIJ, have explained that witnesses commonly refer to the chief of a sector committee as "the sector committee". In other words, many witnesses identify persons chairing a certain administrative level with the administrative level itself. On this basis, I am satisfied that in this instance the witness' evidence is faithfully reported in the WRI.

Interview of witness Seng Srun of 25 August 2011 (D76)

95. In this interview, the witness stated that he did not know the identity of people who attended a meeting where Ao An was present because they came from other areas of Democratic Kampuchea. However, as correctly pointed out by the Defence, according to the WRI the witness stated that he did not know their identities because "they were in very high ranks".¹⁴⁴ This mistake is relevant to the substance of the interview because the presence of Ao An in a meeting with very high ranking cadres may be relevant to assess his authority, influence, and position in the administrative structure of the Central Zone of Democratic Kampuchea.

Interview of witness Khun Saret of 16 September 2011 (D93)

96. In this interview, the witness stated that Ao An was "at Sector 41."¹⁴⁵ However, the WRI records that Ao An "controlled the so-called Sector 41", thereby drawing a conclusion that goes beyond the witness' evidence.¹⁴⁶

C. Conclusion on the Analysis of the Alleged Defenctcs

97. While on 29 September 2015 I issued instructions to investigators to generate WRIs that reflect verbatim, as much as possible, the content of interviews,¹⁴⁷ WRIs need not, by law, be verbatim records of witnesses' evidence. It is sufficient that they are accurate summaries of an interview. A certain amount of difference between audio-recordings and WRIs generated before that date is therefore to be expected. Such differences, however, only become problematic when they depart from the actual words spoken during the interview to an extent that the evidence provided by a witness is substantively mischaracterised, or in circumstances that are relevant to the reliability or credibility of a witness are omitted or misrepresented.

98. Upon my review of the defects alleged by the Defence, I have only identified a small number of instances where the evidence of a witness was either

¹⁴¹ Case File No. 004-D3/15, *Written Record of Interview of Witness Duong Sim*, 21 October 2010, ERN00622274.

¹⁴² Annex B, alleged defect 1.3 in relation to the WRI of witness Duong Sim (D3/15).

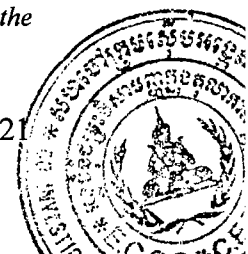
¹⁴³ *See supra*, para. 47.

¹⁴⁴ Annex B, alleged defect 3.1 in relation to the WRI of witness Seng Srun (D76).

¹⁴⁵ Case File No. 004-D93R, *Audio-recording of the interview of witness Khun Saret*, 16 September 2011, 00:06:50-00:07:15.

¹⁴⁶ Annex B, alleged defect 1.1 in relation to the WRI of witness Khun Saret (D93).

¹⁴⁷ Case File No. 004-D269, *Instructions on screenings of civil parties and other witnesses and on the format of the procès verbal*, 29 September 2015.



misrepresented or where relevant evidence was not included in a WRI. However, even in such instances, read in the context of the entire WRI the misrepresentations and omissions were often not of a grave or material nature.¹⁴⁸ Further, with regard to misrepresentation of a witness' evidence,¹⁴⁹ due consideration is to be given to the fact that witnesses review the WRI in full before being given the chance to make any correction and, eventually, signing each page of the WRI, thereby acknowledging its accuracy.

99. The Internal Rules do not require the CIJs to transcribe and translate audio-recordings of interviews.¹⁵⁰ It is for the CIJs to determine, on a case-by-case basis, whether it is necessary to order transcription and translation of an audio-recording in whole or in part.¹⁵¹ Transcribing audio-recordings is therefore an exceptional measure.
100. On the basis of my analysis of the defects alleged in Annexes A and B to the Request, I am not satisfied that the Defence have demonstrated the existence of “*numerous and egregious*” examples of “*investigative malpractice*”.¹⁵² From my analysis, I find the WRIs listed in Annexes A and B to be generally accurate, complete, reliable, and adherent to the rules governing WRIs at the ECCC. Accordingly, I am not satisfied that the Defence have demonstrated that there exists “*a genuine need*”¹⁵³ to fully transcribe and translate the WRIs listed by the Defence in Annex C to the Request.
101. The Defence have requested translation and transcription of 21 audio-recordings of interviews.¹⁵⁴ The Defence can review the recordings with their own resources. Should they identify substantive discrepancies, they can inform the CIJs who will assess the Defence's allegations and, if necessary, order the transcription of the relevant sections of the audio-recordings.

D. Request to place certain audio recordings on the Case File

102. With regard to the Defence's request to place on the Case File the audio-recordings of D3/12, D3/13, and D519/511.1.1, while these WRIs indicate that the interviews were audio-recorded, the audio-recordings could not be found.

E. Request to place on Case File 004 transcripts and translations of interviews transferred from other case files

103. I have no objection, in principle, to place on Case File 004 the transcriptions of audio-recordings and any related translations that already exist. I have identified in Annex A to this decision a number of transcripts and translations of interviews relating to WRIs transferred from other cases onto Case File 004, that

¹⁴⁸ See Section III(B)(iii) above.

¹⁴⁹ The following reasoning does not equally apply to omissions, as the witness is less likely to notice that something is missing from the WRI than he or she is likely to notice that his or her answers have been inaccurately or wrongly recorded.

¹⁵⁰ See Case File No. 002-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*, 30 May 2012, para. 6.

¹⁵¹ Case File No. 002-D194/2, *Order on Request for Transcription*, 5 November 2009, para. 11; Case File No. 002-D194/3/2, *Decision on Nuon Chea's Appeal against OCIJ Order on Request for Transcription*, 20 April 2010.

¹⁵² See Request, para. 4.

¹⁵³ Request, para. 33.

¹⁵⁴ See Annex C to the Request.



