

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

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S REQUEST TO HEAR
EVIDENCE FROM THE INTERPRETER CONCERNING WITNESS
PHY PHUON'S SECOND OCIJ INTERVIEW**

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:

Trial Chamber
Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Copied to:

Accused
NUON Chea
IENG Sary
KHIEU Samphan

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

I. INTRODUCTION

1. The Co-Prosecutors respond as follows to the motion filed by the Ieng Sary Defence (the “Defence”) on 23 August 2012 requesting the Trial Chamber to call and hear evidence at trial from the interpreter who was present at the second interview conducted by investigators of the Office of the Co-Investigating Judges (the “OCIJ”) of witness ROCHOEM Ton alias Phy Phuon (the “Request”).¹
2. The Defence motion should be denied for both procedural and substantive reasons. Procedurally, the ECCC rules are clear that alleged errors or irregularities in investigative acts must be raised and resolved during the pre-trial phase. The interests of judicial efficiency and an expeditious trial would be thwarted were the Trial Chamber obliged to regularly revisit procedural matters relating to the judicial investigation that the Defence were expected to raise with the Pre-Trial Chamber. Moreover, the Defence complaint regarding the failure of OCIJ investigators to record all communications with witnesses is misplaced, as this Chamber has previously ruled that ECCC rules do not require audio or video recordings of witness interviews.
3. Substantively, the fairness of trial proceedings was ensured by hearing five days of trial testimony from this witness, including over two days of cross-examination by the three Accused. The witness has repeatedly confirmed the accuracy of his OCIJ statements, both at the time they were first made and when he appeared in Court, and the Defence had ample opportunity to cross-examine him on such matters. In this situation, there is simply no reason for the Trial Chamber to hear testimony from an interpreter regarding the procedural circumstances of a four-year old interview.
4. The Co-Prosecutors also observe that the Defence violated a known core rule of this Court by engaging in direct communications with the proposed witness. At the same time as making unsubstantiated and baseless charges of “subterfuge” against OCIJ investigators, the Defence have brazenly violated a fundamental rule intended to prevent all parties from influencing or pressuring potential witnesses. They should not be rewarded for their egregious conduct.

¹ E221 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 (hereafter “Request”).

II. ARGUMENT

A. ALLEGED PROCEDURAL DEFECTS IN THE JUDICIAL INVESTIGATION CANNOT BE RAISED DURING THE TRIAL PHASE

5. The Request is based entirely on alleged procedural defects in the judicial investigation – specifically, the manner in which the second interview of witness Phy Phuon 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 seised of the case.”²
6. Pursuant to those Rules, applications concerning procedural defects can only be brought during the pre-trial phase. 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. Rule 74(b) provides that it is the Pre-Trial Chamber that has “sole jurisdiction” over such applications. 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.”³ The ECCC rules are thus crystal clear that procedural challenges to investigative acts are limited to the pre-trial phase.
7. 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.”⁴ 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.”⁵
8. 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.”⁶ Neither of those exceptions applies here. The Defence had ample opportunity to detect the issue they allege in their Request, which was triggered by “the

² **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”).

³ *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.

⁴ **E116** Fairness of Judicial Investigation Decision, para. 18.

⁵ **E116** Fairness of Judicial Investigation Decision, para. 15.

⁶ **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”).

Khmer-speaking members of the [Defence] ... review[ing] the audio recording of Phy Phuon's OCIJ interview."⁷ As this Chamber has previously noted:

*Both the audio recordings and the written records were, however, 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.*⁸

9. 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."⁹ Similarly here, the Defence could have reviewed the audio recording and written record of interview of Phy Phuon, a key witness from the Ministry of Foreign Affairs well known to Ieng Sary, during the course of the judicial investigation. There is thus no legitimate excuse for failing to have discovered and raised this procedural issue prior to the opening of trial.

B. THE TESTIMONY OF THIS WITNESS AT TRIAL REMEDIES ANY PROCEDURAL DEFECTS IN HIS OCIJ INTERVIEW AND PROTECTS THE FAIR TRIAL RIGHTS OF THE ACCUSED

10. 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 second interview of Phy Phuon was conducted, this witness testified in Court and the Defence had the opportunity to cross-examine him on both the substance of his testimony and the procedure followed in his OCIJ interview. The fair trial rights of the Accused have thus already been adequately protected in relation to the testimony of this witness.
11. 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."¹⁰ The Ieng Sary and other Defence teams were allowed to cross-examine Phy Phuon for 2 ¼ days (from 31 July to 2 August 2012), and cannot now credibly

⁷ E221 Request, para. 2.

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

⁹ E142/3 Witness Interview Decision, para. 8.

¹⁰ E142/3 Witness Interview Decision, para. 14; *see also* E116 Fairness of Judicial Investigation Decision, para. 19.

assert that their fair trial rights were not adequately safeguarded in relation to the testimony of this witness.

12. It should also be emphasized that, in this case, the Chamber is not being asked to rely solely on the OCIJ written record of interview of the witness. Accordingly, the Ieng Sary Defence misstate the issue when they assert that it is necessary to hear testimony from the OCIJ interpreter in order to determine the reliability or “weight, if any, that may be given to the statements made in Phy Phuon’s second interview.”¹¹ As witness Phy Phuon has now given five days of testimony before the Chamber, the alleged procedural discrepancies in his second OCIJ interview are of little or no consequence. It is his five days of court testimony that is the primary evidence now before the Chamber. In this situation, there is simply no need for the Chamber to summons an interpreter to testify to the circumstances of a four-year-old out-of-court interview that has been superceded by in-court trial testimony.
13. Contrary to the Defence arguments, the testimony given by Phy Phuon at trial was clear, compelling and consistent with his two OCIJ statements. For example, the Defence asserts that there is a contradiction between Phy Phuon’s first and second interviews because he only described Ieng Sary’s receipt of confessions in the latter interview.¹² In fact, there is no indication whatsoever that the witness was asked about confessions in his first OCIJ interview.¹³ At trial, the witness unequivocally confirmed that Ieng Sary personally told him about his receipt of confessions.¹⁴ This testimony is consistent with the documentary evidence, in which S-21 confessions are annotated with Ieng Sary’s name,¹⁵ the testimony of S-21 chairman Kaing Guek Eav that relevant confessions were sent to the head of each DK organisation,¹⁶ and the testimony of other key witnesses from the Ministry of Foreign Affairs (“MFA”) who have confirmed Ieng Sary’s knowledge and receipt of such confessions.¹⁷ Also, contrary to the Defence assertion that the witness concealed his

¹¹ E221 Request, para. 17.

¹² E221 Request, para. 16.

¹³ Moreover, contrary to the Defence’s characterisation, the witness recalled in his first OCIJ interview a meeting in which Ieng Sary explained that the reason for Koy Thuon’s arrest was his sexual immorality. E3/24 Written Record of Interview of Witness Phy Phuon, 5 December 2007, at ENG 00223585, FRE 00503926, KHM 00204072.

¹⁴ E1/98.1 Transcript of Trial Proceedings, 30 July 2012, at ENG 00831010-12 (“He instructed to me that certain confession indicated the implication of KGB or CIA or other aggressive forces”).

¹⁵ D43/IV-Annex 41 S-21 Confession of Meak Touch, at KHM 00174100, ENG 00771346; D43/IV-Annex 47 S-21 Confession of San Pau, at KHM 00174132, ENG 00767463; E1/56.1 Transcript of Trial Proceedings, 29 March 2012, at ENG 00796924-26, 00796957.

¹⁶ E1/56.1 Transcript of Trial Proceedings, 29 March 2012, at ENG 00796948-53.

¹⁷ E1/67.1 Transcript of Trial Proceedings, 24 April 2012, at ENG 00804051-52 (So Hong); E1/102.1 Transcript of Trial Proceedings, 6 August 2012, at ENG 00833279-81, 00833289-90 (Suong Sikoeun); E1/105.1 Transcript of Trial Proceedings, 9 August 2012, at ENG 00835375-76 (Ong Thong Hoeung).

involvement in security matters, Phy Phuon acknowledged his role in the arrests of MFA cadres when first asked about the subject at trial.¹⁸

14. There can thus be no question, after his detailed trial testimony, that this witness spoke truthfully of his own personal knowledge, both at trial and in his OCIJ statements. There is simply no reason to conduct a trial within a trial to determine the circumstances of the witness' second OCIJ statement.

C. OCIJ'S WRITTEN RECORD OF INTERVIEW ACCURATELY REFLECTED THE TESTIMONY OF THE WITNESS AND COMPLIED WITH ECCC RULES

15. 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."¹⁹ The Chamber has also concluded that the ECCC Internal Rules do not mandate that OCIJ investigators record the exact duration of witness interviews or the breaks between interview periods, nor do they require audio or video recordings of witness interviews.²⁰
16. Accordingly, the Defence's complaints regarding (a) the failure of OCIJ investigators to precisely record the duration of each interview, (b) the failure of investigators to record all communications with each witness and (c) the existence of 12 written statements on the Case File that do not have audio recordings²¹ are not procedural violations of ECCC rules that warrant any action by the Chamber. 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."²²
17. The Co-Prosecutors further observe that, irrespective of whether the written record of Phy Phuon's second interview was based in part on a "prior unrecorded interview" of the witness, as alleged by the Defence,²³ that written record fairly and accurately summarized the knowledge and testimony of the witness. Phy Phuon confirmed the accuracy of that statement both at the time it was made (by signing and placing his thumbprint on the record) and when he appeared in Court to testify. There is thus no basis for the Defence to contend

¹⁸ E1/98.1 Transcript of Trial Proceedings, 30 July 2012, at ENG 00831013-15.

¹⁹ E142/3 Witness Interview Decision, para. 11.

²⁰ E142/3 Witness Interview Decision, para. 6, footnote 13.

²¹ E221 Request, para. 6, 15, 18 and footnote 52.

²² E142/3 Witness Interview Decision, para. 14.

²³ E221 Request, para. 15.

that the written record is not an “accurate reflection” of the prior interview conducted by OCIJ investigators. There is simply no indication that this witness was coached, fed information or encouraged to provide false testimony. In short, the allegations by the Defence of fraud and “subterfuge” are utterly baseless.

18. The procedural irregularities alleged by the Defence do not establish any substantive problem in the written records of OCIJ interviews. As noted above, the practice of some OCIJ investigators to have preliminary discussions or meetings with witnesses before commencing their formal interview on the record is not a violation of ECCC rules, and likely serves to ensure better communications with the witness and a more accurate written record. The differences between the start and end times in the written record and the total length of audio recordings are explained by (a) breaks in the interview during which the tape recording is paused, and (b) the need for the written record prepared by the on-site transcriber to be completed, printed, reviewed with the witness and signed, before the interview can be officially completed.
19. The Co-Prosecutors further observe that, despite the concerted efforts of the Defence teams at trial to meticulously examine and compare each OCIJ written record of interview to the corresponding audio recording, the inconsistencies discovered by the Defence have been relatively minor, and the witnesses have repeatedly and consistently confirmed the substantive accuracy of their statements. For example, during the examination of Sao Sarun, the Khieu Samphan Defence did not challenge the accuracy of the substantive statements about their client in the OCIJ statements of the witness, but instead complained that OCIJ investigators added Khieu Samphan’s alias “Hem” when referring to him in the written record.²⁴ The Nuon Chea Defence’s cross-examination of witness Kim Vun focused on why OCIJ investigators had not included information on their client’s presentation of agricultural policy during periods he took over for Yun Yat at the Ministry of Propaganda, despite the witness’ uncertainty as to whether that subject had even been discussed during his interview.²⁵ The Defence’s repeated resort to trifling, inconsequential attacks on the OCIJ written records serves only to confirm the overall reliability and accuracy of the substantive information contained in those statements.

²⁴ **E1/83.1** Transcript of Trial Proceedings, 7 June 2012, at ENG 00815607-09.

²⁵ **E1/113.1** Transcript of Trial Proceedings, 23 August 2012, at ENG 00841889-93 (“Q: Do you know why the fact that the education by Nuon Chea focused on agriculture is not mentioned in the statements that we have of you by the Co-Investigating Judges? A: I do not recall it. They did not ask me about that, so I did not answer to that effect ... Q: And just to be clear and simply to avoid confusion, do you remember whether or not you mentioned agriculture in your testimony before the Co-Investigating Judges? A: I do not really recall that”).

D. THE DEFENCE HAS KNOWINGLY VIOLATED COURT RULES PROHIBITING DIRECT COMMUNICATIONS BETWEEN PARTIES AND PROPOSED WITNESSES

20. Both the Internal Rules²⁶ and the Law on the Establishment of the ECCC²⁷ assign to the Co-Investigating Judges (“CIJs”) the power to conduct investigations following the filing of the Introductory Submission.²⁸ During the judicial investigation phase, any party seeking information must make a “request [to] the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation.”²⁹ The CIJs have affirmed that “the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties,” and that “[t]here is no provision which authorises the parties to accomplish investigative action ..., as may be the case in other procedural systems.”³⁰ After the completion of the judicial investigation, the power to conduct additional investigatory actions passes to the Trial Chamber.³¹ This Chamber has also confirmed that the “ECCC legal framework precludes investigations carried out by the parties.”³²
21. The Rules not only assign exclusively to the Chambers the investigatory functions of the ECCC, but also prohibit any interference with witnesses by the parties. Rule 35(1)(d) provides for sanctions against any individual who “interferes with a witness, or potential witness, who ... may give evidence in proceedings before ... a Chamber,” and Rule 38 authorises sanctions against lawyers whose conduct obstructs the proceedings or amounts to an abuse of process. In response to a request by the Nuon Chea Defence to conduct its own interviews of witnesses, the CIJs previously warned the Defence of the provisions of Rules

²⁶ See Internal Rule 55 (describing investigative authority of OCIJ) and Rule 60(2) (providing that “the Co-Investigating Judges or their delegates shall interview witnesses in the absence of the Charged Person, any other party, or their lawyers”).

²⁷ Article 23new of the ECCC Law: “All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force.”

²⁸ Pursuant to Rules 50 and 53, the Co-Prosecutors are authorized to conduct preliminary investigations, which terminate on sending an Introductory Submission to the CIJs. See **D164/2** Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, para. 14 (“The filing of an Introductory Submission not only seizes the Co-Investigating Judges of a case, but it simultaneously terminates the Co-Prosecutors’ authority to accomplish investigations into the same facts”).

²⁹ Internal Rule 55(10).

³⁰ **A110/II** OCIJ Response to Letter from the lawyers for NUON Chea on the conduct of the judicial investigation, 10 January 2008, para. 3.

³¹ Internal Rule 93(1): “Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation.”

³² **E211/2** Trial Chamber Memorandum re Nuon Chea Defence Notice to the Trial Chamber Regarding Research at DC-Cam, 13 August 2012, para. 2.


35 and 38, as well as Cambodian law making it a misdemeanor to “bring pressure to bear upon a witness in a judicial proceeding.”³³

22. It is therefore quite disconcerting that the Ieng Sary Defence has taken it upon itself to speak directly to the interpreter they seek to summons as a witness.³⁴ In a motion in which they are vociferously complaining of procedural mistakes by OCIJ investigators, the Ieng Sary Defence has purposefully violated one of the core rules of this Court by engaging in direct communications with a proposed witness. The Defence’s illegal contact with and attempt to procure or influence the testimony of this individual is yet another reason for denying the Defence request to summons the interpreter for testimony at trial.

III. CONCLUSION

23. For the reasons set forth above, the Co-Prosecutors submit that the Request by the Defence should be dismissed, and that the Defence should be warned not to have direct communications with proposed witnesses.

Respectfully submitted,

| Date | Name | Place | Signature |
|------------------|---------------------------------------|------------|---|
| 4 September 2012 | YET Chakriya Deputy Co-Prosecutor | Phnom Penh |  |
| | William SMITH Deputy Co-Prosecutor | |  |

³³ **A110/II** OCIJ Response to Letter from the lawyers for NUON Chea on the conduct of the judicial investigation, 10 January 2008, para. 3.

³⁴ **E221** Request, para. 8.