

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

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CO-PROSECUTORS' RESPONSE TO "IENG SARY'S REQUEST THAT THE TRIAL CHAMBER SEEK CLARIFICATION FROM THE OCIJ AS TO THE EXISTENCE OF ANY RECORD RELATING TO THE QUESTIONING OF WITNESS OEUN TAN ON 8 OCTOBER 2008"

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I. INTRODUCTION

1. The Co-Prosecutors respond as follows to the motion filed by the Ieng Sary Defence (the “Defence”) requesting the Trial Chamber to seek clarifications from the Office of the Co-Investigating Judges (OCIJ) regarding interactions with Witness Oeun Tan on 8 October 2008¹ (the “Request”).
2. The Co-Prosecutors do not oppose the Request insofar as it seeks further information from the OCIJ regarding any interactions with Oeun Tan on 8 October 2008. However, the Co-Prosecutors reject much of the reasoning the Defence use in support of their Request, which seeks to impugn the validity and weight of Oeun Tan’s testimony and to claim that Ieng Sary’s fair trial rights have been violated. Indeed, the outlandish and unsupported rhetoric of the Defence belies any genuine interest in obtaining the requested information.

II. ARGUMENT

A. The Co-Prosecutors Do not Oppose the Request for any Additional Information Regarding Interactions with Oeun Tan on 8 October 2008

3. On 14 June 2012, following an indication by Witness Oeun Tan that he had been interviewed by OCIJ investigators for an entire day prior to his recorded interview of 9 October 2008, the Co-Prosecutors made an oral application in the following terms: “We think it would be appropriate to, first, obtain a transcript of that interview of the 9th of October, and then perhaps consider requesting from the Office of the Co-Investigating Judges any clarifications as to a record of the 8th of October, [and] whether such a record exists as well.”² The Defence therefore misrepresent the Co-Prosecutors’ position when they state that the Co-Prosecutors considered clarifications from OCIJ *necessary*, and made an oral *request* for such clarifications.³
4. The Co-Prosecutors note that a partial transcript of the Witness’ interview of 9 October 2008 has been placed on the file.⁴ On its face, the transcript confirms that a discussion with the Witness took place on the day preceding the interview.⁵ The Co-Prosecutors’ position on the issue of clarifications remains as stated in court: it is appropriate for the Chamber to consider seeking additional clarification from the OCIJ, as it is not entirely clear what the nature of the 8 October 2008 interactions between the OCIJ and Oeun Tan were. Nevertheless, for the reasons

¹ E224 Ieng Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012 (hereinafter “Request”). Notified on 30 August 2012.

² E1/87.1 Transcript of Proceeding, 14 June 2012 at p. 53 ln. 12-16.

³ E224 Request, *supra* note 1 at pp. 1 and 3 (para 5).

⁴ D107/2.1 Partial transcription of the audio file D107/2R

⁵ Ibid, p.4.

set forth below, such clarification is not “necessary” in order to evaluate the probative value of Oeun Tan’s testimony or to protect Ieng Sary’s fair trial rights.

5. While the Defence does not seek any remedies beyond those relating to the clarification of the interactions which took place on 8 October 2008,⁶ other portions of the Request appear to allege that a procedural irregularity occurred during the investigatory stage that has implications for the fairness or integrity of the trial. The Co-Prosecutors submit that the circumstances of Oeun Tan’s interviews do not give rise to any viable claim of a procedural irregularity. The reasons why any such claim is foreclosed are further addressed below.

B. There is no Legitimate Claim of an Adverse Impact on Ieng Sary’s Fair Trial Rights

6. Whether any additional interactions took place on 8 October 2008 in no way “impacts upon Mr. IENG Sary’s ability to examine the evidence against him and mount a defence”⁷ because: 1) any “procedural defects” have been cured; 2) Oeun Tan provided testimony in court during which the Defence was able to, and did, test his evidence; and 3) the written record of the interview accurately reflects the interview and complies with ECCC Rules.

i. Any Alleged Procedural Irregularities Have Been Cured

7. Pursuant to the Internal Rules, applications concerning procedural defects in the judicial investigation can only be brought prior to the issuance of a closing order. 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.”⁸ The ECCC rules are thus crystal clear that procedural challenges to investigative acts are limited to the pre-trial phase.
8. The Trial Chamber is “not an appeal or review body in relation to decisions of [the Pre-Trial] Chamber.”⁹ Accordingly, “[a]s a general matter, objections regarding procedural steps or

⁶ E224 Request, *supra* note 1 at pp. 7-8.

⁷ E224 Request, *supra* note 1 at para. 9.

⁸ 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.

⁹ E116 Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011 (hereinafter “Fairness of Judicial Investigation Decision”), para. 18.

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."¹⁰

9. 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."¹¹ Neither of those exceptions applies here. The Defence had ample opportunity to detect the issue they are concerned with in their Request, which the Defence conceded was triggered by listening to the audio recording of the interview.¹² As this Chamber has previously noted:

*Both the audio recordings and the written records were ... placed in the Case File on a rolling basis over the course of the judicial investigation and have therefore been available to the parties (all of whom have competence in both Khmer, as well as English and/or French) for several years.*¹³

10. The Co-Prosecutors note that all three language versions of the written records of interview of Oeun Tan of 9 October 2008 were placed on the Case File by 4 November 2008. The Defence could have reviewed the audio recording of the interview during the course of the judicial investigation. There is thus no legitimate excuse for failing to have raised this issue at the appropriate time, and the Trial Chamber should not now "consider issues that should have been addressed at the investigative phase."¹⁴

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

11. Moreover, an exception to Internal Rule 76(7) is not necessary here to safeguard the fairness of trial proceedings. Even if there were procedural issues arising from the manner in which the interview of Oeun Tan was conducted, this Witness has testified in court and the Defence was given ample opportunity to cross-examine him on both the substance of his testimony and the procedure followed in his OCIJ interview.¹⁵ The fair trial rights of the Accused have thus already been adequately protected in relation to the testimony of this Witness.
12. In rejecting a 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

¹⁰ Ibid, at para. 15.

¹¹ 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").

¹² E224 Request, *supra* note 1 at paras. 1 & 10.

¹³ E142/3 Witness Interview Decision, *supra* note 12 at paras. 6, 8.

¹⁴ E142/3 Witness Interview Decision, *supra* note 12 at para. 7.

¹⁵ E1/87.1 Transcript of Proceedings pp. 26-35; pp. 45-51.

“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.”¹⁶ The Ieng Sary and other Defence teams were allowed to cross-examine Oeun Tan for a third of the Witness’s time on the stand, and cannot now credibly assert that their fair trial rights were not adequately safeguarded in relation to his testimony.

13. Furthermore, as Witness Oeun Tan has now given one-and-a-half days of testimony before the Chamber, the alleged procedural discrepancies in his OCIJ interview are of little or no consequence. It is his one-and-a-half days of court testimony that is the primary evidence now before the Chamber.

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

14. 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.”¹⁷ 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.¹⁸
15. Accordingly, the Defence’s complaints regarding the failure of investigators to record all communications with each witness are not procedural violations of ECCC rules that warrant any action by the Chamber.¹⁹ 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.”²⁰ In the present case, also inconsistent with any deliberate attempt to obstruct the investigation is the fact that, during the *recorded interview* on 9 October 2008, the investigators *confirmed* the fact

¹⁶ E142/3 Witness Interview Decision, para. 14; *see also* E116 Fairness of Judicial Investigation Decision, *supra* note 10 at para. 19.

¹⁷ E142/3 Witness Interview Decision, *supra* note 10 at para. 11.

¹⁸ E142/3 Witness Interview Decision, *supra* note 10 at para. 6, footnote 13.

¹⁹ The Defence cite Rule 25 to support their claim. E224 Request, *supra* note 1 at fn. 2. The Co-Prosecutors note that Rule 25 applies to any “Suspect or Charged Person.” Oeun Tan is a witness.

²⁰ E142/3 Witness Interview Decision, *supra* note 12 at para. 14.

of the earlier conversation with the Witness, and indicated that that conversation was *not recorded*.²¹

16. Furthermore, irrespective of whether the investigators had had an earlier unrecorded discussion with Oeun Tan, their written record of the interview of 9 October 2008 fairly and accurately summarizes the knowledge and testimony of the witness. Oeun Tan confirmed the accuracy of that statement both at the time it was made (by placing his thumbprint on every page of the record), *and* when he appeared in Court to testify.²² There is thus no basis for the Defence to contend 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.
17. The procedural irregularities alleged by the Defence do not establish any substantive inconsistency in the evidence given by the Witness. Any 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 concerned, and a more accurate and comprehensive written record.

C. The Defence Attempt to Support their Claim with Wild and Unfounded Speculation

18. Large portions of the Defence’s Request is based on unfounded, and overwrought, speculation. Despite admitting that it “*does not and cannot* know whether the investigators used any documents or made any statement to refresh or prompt Oeun Tan’s memory,”²³ the Defence nonetheless claims, without a shred of evidence, that:

*[I]t is likely that documents were shown and / or information was given to [Oeun Tan] to refresh his memory or facilitate new memories which would then be elicited as ‘fresh’ memories. Put differently, by conducting a surreptitious unrecorded question-and-answer session, the OCIJ investigators deliberately set out to control, and if necessary create, Oeun Tan’s testimony.*²⁴

19. This untethered fantasy continues by claiming that “[t]he 8 October 2008 session was, for all intents and purposes, a practice session designed and carried out to influence / manipulate Oeun

²¹ **D107/2.1** Partial transcription of the audio file D107/2R, p.4.

²² **E3/33** Written Record of Interview, 9 October 2008, *passim*; E1/86.1 Transcript p. 10 ln. 4-7; p. 51 ln. 16-20.

²³ **E224** Request, *supra* note 1 at para. 14 (emphasis in original).

²⁴ **E224** Request, *supra* note 1 at para. 7.



Tan's recorded statement ... there can be no other reasonable explanation...²⁵ Such bald fabrications have no place before this Chamber. It is therefore not surprising that the Defence have become so self-conscious of their unfounded and captious claims that they feel the need to proactively assert that their filing is not "a deflection tactic of a *rupture* defence strategy"²⁶.

20. Not only do the Defence fail to provide any support for allegations of deliberate malfeasance, but in fact the actions of the OCIJ are entitled to a presumption of regularity not rebutted here.²⁷ This presumption has been upheld where, as in the instant filing, a motion is "considered to be speculative or unsubstantiated."²⁸

III. CONCLUSION

21. For the reasons set forth above, the Co-Prosecutors are not opposed to the Trial Chamber seeking additional information that it considers useful and reasonable from the OCIJ regarding interactions on 8 October 2008 with Witness Oeun Tan, but oppose all additional claims and argument contained within the Request.

Respectfully submitted,

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

²⁵ E224 Request, *supra* note 1 at para. 8.

²⁶ E224 Request, *supra* note 1 at para. 11.

²⁷ E142/3 Witness Interview Decision, *supra* note 12 at para. 10 ("where the propriety of the conduct of OCIJ investigators is challenged or allegations of evidence manipulation or tampering made, the applicant will bear the burden of showing that the presumption of regularity attached to the OCIJ's acts in question should no longer apply.").

²⁸ E142/3 Witness Interview Decision, *supra* note 12 at para. 10.