

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 29 August 2012**CLASSIFICATION****Classification of the document
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**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**

Filed by:

The Co-Lawyers:
ANG Udom
Michael G. KARNAVAS

Distribution to:

The Trial Chamber Judges:
Judge NIL Nonn
Judge YOU Ottara
Judge YA Sokhan
Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge THOU Mony
Reserve Judge Claudia FENZ

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 93 and 21 of the ECCC Internal Rules (“Rules”), hereby requests the Trial Chamber to seek clarification from the Office of Co-Investigating Judges (“OCIJ”) as to the existence of any record of questioning of Witness Oeun Tan by OCIJ investigators on 8 October 2008. This Request is made necessary because Oeun Tan testified that a full-day unrecorded question-and-answer session with OCIJ investigators took place the day before a recorded interview with those same investigators.¹ Accordingly, the Defence specifically requests that the Trial Chamber seek clarification from the OCIJ as to: **a.** whether any audio, video and / or written record exists of a session between Oeun Tan and OCIJ investigators on 8 October 2008; **b.** the length of the session; **c.** the individuals who were present; **d.** the documents and other materials, if any, that were shown to Oeun Tan; and **e.** if no record of the session exists, the reasons for the lack of any record and for questioning Oeun Tan for an entire day without recording the session, before a recorded statement was taken.² This submission is made in good faith and in the interests of justice. The Prosecution conceded that clarification from the OCIJ on this matter is necessary³ and the Trial Chamber invited the parties to make submissions.⁴

I. BACKGROUND

1. Prior to questioning Oeun Tan on 14 June 2012, the Defence listened to the audio recording of his 9 October 2008 interview, which had not yet been transcribed for the parties. On the recording, Oeun Tan reminded the OCIJ investigators that he had already answered questions, in response to which one of the investigators said: “But I want you to enumerate [your answers] again because yesterday I did not make any audio recording.”⁵ As there was no record on the Case File of an OCIJ interview with

¹ Transcript, 14 June 2012, E1/87.1, p. 46-48.

² See Rule 25, which provides:

1. Whenever possible, *when the Co-Prosecutors or Co-Investigating Judges question a Suspect or Charged Person, in addition to the written record of the interview, it shall be audio or video-recorded* ... 2. A person may be questioned without being audio or video-recorded where the circumstances prevent such recording taking place. *In this case, the reasons for not recording the questioning shall be stated in writing* and the person questioned shall be provided with a copy of his or her statement. *Such a statement shall be set out in a written record of interview* and shall be signed or finger-printed by the person being interviewed. (Emphasis added).

³ Transcript, 14 June 2012, E1/87.1, p. 53.

⁴ *Id.*, p. 54.

⁵ Partial Transcript of Oeun Tan Interview, 21 August 2012, D107/2.1, p. 4. See also Transcript, 14 June 2012, E1/87.1, p. 48.

Oeun Tan on 8 October 2008, for the sake of clarity and transparency, the Defence elected to question him on this matter.

2. On 14 June 2012, while being examined by the Defence, Oeun Tan revealed for the first time that he was questioned by OCIJ investigators on 8 October 2008, for the entire day, before he completed a recorded interview on 9 October 2008 with those same investigators.⁶ Unlike the second session, the first question-and-answer session was not recorded.⁷
3. The OCIJ investigators prepared a summary based on the recorded interview of 9 October 2008 and filed this summary as the written record of interview.⁸ The OCIJ investigators also submitted a report to the OCIJ summarizing their interview with Oeun Tan.⁹ Neither the written record of interview nor the investigators' report to the OCIJ indicates that Oeun Tan was questioned or shown documents prior to the recorded interview of 9 October 2008.
4. On 14 June 2012, upon examination by the Defence as to what the OCIJ investigators asked him in the unrecorded session on 8 October 2008, Oeun Tan stated that he could not remember.¹⁰ Oeun Tan indicated that he was "confused"¹¹ and "forgetful"¹² when he met with the OCIJ investigators on 8 October 2008. He could not recall the topics that were discussed on 8 October 2008, stating: "[a]t the time, as I said, I was not remembering everything. I was confused as well when I was answering the questions."¹³ He could not recollect whether the investigators had shown or read any documents to him to refresh his memory.¹⁴ When asked by the Defence whether the investigators tried to assist his memory by giving him information that might be helpful for the next day's recorded interview, Oeun Tan stated: "It is hard for me to answer this question."¹⁵

⁶ Transcript, 14 June 2012, E1/87.1, p. 46-48.

⁷ *Id.*, p. 48.

⁸ Written Record of Interview, 9 October 2008, E3/33.

⁹ Report of the Execution of Rogatory Letter, 16 October 2008, D107/1.

¹⁰ Transcript, 14 June 2012, E1/87.1, p. 49.

¹¹ *Id.*, p. 51.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, p. 49-51.

¹⁵ *Id.*, p. 51.

5. At the conclusion of Oeun Tan's testimony, the Prosecution acknowledged that clarification about Oeun Tan's interactions with the OCIJ investigators "would assist in ascertaining the truth, because there is a degree of – of doubt, now, as to just what – what was placed on the record and what interviews took place."¹⁶ The Prosecution made an oral request to the Trial Chamber for a transcript of the 9 October 2008 interview and for clarification from the OCIJ as to the existence of a record of the 8 October 2008 session.¹⁷ The Defence concurred with this request¹⁸ and President Nil Nonn invited the parties to make written submissions on the matter.¹⁹

II. LAW AND ARGUMENT

6. The OCIJ summary interview of Oeun Tan is nothing short of subterfuge: it deliberately misleads the Trial Chamber and parties into thinking that the information provided by Oeun Tan was based on his independent and unaided memory of events. The circumstances of the recorded interview suggest that it was staged and contrived.
7. The interview occurred subsequent to an all-day unrecorded session where, given Oeun Tan's admission that he was confused and forgetful during the session,²⁰ it is likely that documents were shown and / or information was given to him 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.
8. The 8 October 2008 session was, for all intents and purposes, a practice session designed and carried out to influence / manipulate Oeun Tan's recorded statement, to which he would be expected to affix his signature under oath as being a true and accurate reflection of his memory. There can be no other reasonable explanation as to why the OCIJ investigators would conduct a day-long question-and-answer session, which was neither recorded nor disclosed by them, prior to taking a recorded statement.

¹⁶ Transcript, 14 June 2012, E1/87.1, p. 53.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, p. 54.

²⁰ *Id.*, p. 51.

9. The Trial Chamber must seek clarification from the OCIJ regarding the 8 October 2008 session. The integrity and reliability of the OCIJ's written record of interview impacts upon Mr. IENG Sary's ability to examine the evidence against him and mount a defence. Knowing that the written record of interview would be relied upon by the Trial Chamber and the parties, particularly since the witness signed it without objection,²¹ the OCIJ investigators presented an incomplete, inaccurate and misleading record of their interview with Oeun Tan.
10. Were it not for Oeun Tan's pithy though revealing remark on tape that he had *already* answered a question being posed to him,²² and had the Defence not performed its due diligence and listened to the recording of the 9 October 2008 interview – as opposed to simply relying upon the summary statement prepared by the OCIJ – the Defence (and indeed the Trial Chamber and the parties) would never have known of this prior unrecorded interview / preparatory session.
11. It bears underscoring that this is no light matter to be dismissed as a deflective tactic of a *rupture* defence strategy. As the record reveals, on several occasions the Prosecution asked Oeun Tan – when troubled by memory loss or accuracy with his OCIJ statement – to verify whether he stood by the statement he had made to the OCIJ investigators as being truthful and accurate.²³
12. It is beyond cavil that Oeun Tan's written statement is tainted and that his in-court testimony – much of which was based on this statement – is suspect. This calls into question the value of his testimony, especially in the instances where he stood by the content of his written statement as controlling evidence, as opposed to his in-court testimony.²⁴
13. The Constitution,²⁵ the Agreement,²⁶ the Establishment Law,²⁷ Rule 21, and Article 14 of the International Covenant on Civil and Political Rights²⁸ guarantee Mr. IENG

²¹ Written Record of Interview, 9 October 2008, E3/33, p. 12. See also Transcript, 15 December 2011, E1/23.1, p. 21-23, where Judge Lavergne questioned Witness Long Norin about his written record of interview, on which Long Norin had placed his signature and thumbprint (p. 22-23), and which Judge Lavergne sought to treat as a "faithful and accurate" reflection of his statements to the OCIJ investigators (p. 23).

²² Partial Transcript of Oeun Tan Interview, 21 August 2012, D107/2.1, p. 4.

²³ Transcript, 13 June 2012, E1/86.1, p. 49-52, 60-61.

²⁴ See *Id.*, p. 60-61.

²⁵ Constitution, Art. 31: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related

Sary the right to a fair and transparent trial, which includes the right to examine the evidence against him and to mount a defence. Mr. IENG Sary cannot receive a fair trial, and the judicial process is far from transparent, if the evidence presented to the Trial Chamber is unreliable and incomplete.

14. The OCIJ investigators' deliberate failure to acknowledge the existence of an unrecorded question-and-answer session with Oeun Tan casts serious doubt upon the reliability of the written record of interview. Without a record of the 8 October 2008 question-and-answer session, the Defence *does not and cannot* know the questions that Oeun Tan was asked on that day, or his answers to those questions. The Defence *does not and cannot* know whether the investigators used any documents or made any statements to refresh or prompt Oeun Tan's memory. The Defence *does not and cannot* know whether there are any material differences or discrepancies between his statements in the first session and the recorded interview that took place the next day. These issues impact upon Mr. IENG Sary's ability to examine the evidence against him and present a defence; the weight to be accorded to Oeun Tan's statements and, indeed, all written records of interview; and the Trial Chamber's ability to ascertain the truth in Case 002/01.

to human rights, women's and children's rights"; *Id.*, Art. 128 new, which provides that the Judiciary "shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens."

²⁶ Agreement, Art. 12(2), which provides that the Extraordinary Chambers "shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights ["ICCPR"]], to which Cambodia is a party"; *Id.*, Art. 13(1): "The rights of the accused enshrined in Articles 14 and 15 of the [ICCPR] shall be respected throughout the trial process. Such rights shall, in particular, include the right: ... to examine or have examined the witnesses against him or her."

²⁷ Establishment Law, Art. 33 new: "The Extraordinary Chambers of the trial court shall ensure that trials are fair and ... conducted in accordance with existing procedures in force, with full respect for the rights of the accused ... [and] shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the [ICCPR]"; *Id.*, Art. 35 new, which incorporates Article 14 of the ICCPR, and provides: "In determining the charges against the accused, the accused shall be equally entitled to the following minimum guarantees: ... e. to examine the evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them."

²⁸ ICCPR, Arts. 14(1), 14(3)(d)-(e), incorporated into the Constitution and ECCC law and procedure, provides: (1) In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.... (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) To ... defend himself in person or through legal assistance of his own choosing ...; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

15. The Prosecution initiated the request for clarification from the OCIJ on this matter.²⁹ It did so after hearing Oeun Tan's testimony, and recognizing that the resolution of doubt as to what took place on 8 October 2008 and what was placed on the record would assist the Trial Chamber in its ascertainment of the truth.³⁰ The Defence echoed this request.³¹ The Trial Chamber invited the parties to make submissions,³² fully recognizing that Rule 76(7) provides that the Closing Order purportedly cures procedural defects in the investigative process.
16. This is not the first time the Trial Chamber has invited the parties to make submissions on this issue.³³ Nor is this the first time that the Defence has raised concerns about material differences and discrepancies between OCIJ witness statements and the audio recordings of the interviews. In addition to the submissions set out in this Request, the Defence incorporates and supplements the bases, reasons and background information from all previous submissions relating to material differences and discrepancies between OCIJ witness statements and the audio recordings of the interviews.³⁴
17. The Trial Chamber has in the past sought clarification from the OCIJ in response to a request from the OCP regarding the existence of a document. For example, the OCP recently made a request to the Trial Chamber to obtain clarification from the OCIJ about a witness's autobiography.³⁵ The Trial Chamber should do the same here. Such authority is envisaged by Rule 93.

²⁹ Transcript, 14 June 2012, E1/87.1, p. 53.

³⁰ *Id.*, p. 53.

³¹ *Id.*

³² *Id.*, p. 54.

³³ See Transcript, 1 August 2012, E1/100.1, p. 86, in which President Nil Nonn recognized that irregularities in the taking of Witness Phy Phuong's written statement presented a "very critical issue" and invited the Defence to make a written submission.

³⁴ IENG Sary's Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuong's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221; Letter from IENG Sary Defence Team to Trial Chamber's Senior Legal Officer entitled "Objections to Witness Statement," 9 July 2012, E96/7/1; Letter from IENG Sary Defence to Trial Chamber's Senior Legal Officer entitled "Mixed up / missing audio files on the Case File," 3 May 2012; Letter from IENG Sary Defence to Trial Chamber's Senior Legal Officer entitled "Request for audio/video recordings of certain OCIJ witness interviews," 9 March 2012.

³⁵ See Co-Prosecutors' Rule 87(4) Request to Admit Three Documents Written by TCW-694, 5 July 2012, E216, paras. 9-12. The Trial Chamber granted the OCP's request and sent a memorandum to the OCIJ requesting that a copy of the document be placed on the Case File. See Memorandum from Trial Chamber entitled "Request to Co-Investigating Judges for document sought at trial by the Co-Prosecutors" (E216), 23 July 2012, E216/1. The OCIJ complied with the Trial Chamber's request and placed the document on the Case

18. The OCIJ investigators deliberately provided a half-truth to the Trial Chamber and the parties. The Trial Chamber cannot ascertain the truth in Case 002/01, and a fair trial cannot occur, if the Trial Chamber and the parties possess incomplete and inaccurate information as to the circumstances in which a witness's statement was taken. While obtaining clarification from the OCIJ may be discomfoting and may cast a dark shadow over the OCIJ and the investigators involved, it is *necessary and reasonable* for the fair and just determination of these proceedings. To this extent, it merits recalling, yet again, that as U.S. Supreme Court Justice Louis D. Brandeis so aptly observed, "sunlight is said to be the best of disinfectants."³⁶

III. CONCLUSION AND RELIEF SOUGHT

19. Continued reliance by the Trial Chamber on written records of interview as "faithful and accurate" reflections of the witnesses' statements,³⁷ in the face of repeated demonstration by the Defence of irregularities in the taking of statements, raises serious questions as to the integrity of the trial. By taking concrete action in this matter, the Trial Chamber will demonstrate to the parties and the public (which is especially important for legacy purposes) that it is committed to procedural and substantive justice for all parties, and to safeguarding the fair trial rights of the accused and fostering transparency.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a. Seek clarification from the OCIJ as to:
 - i. Whether an audio, video and / or written record of the 8 October 2008 session exists;
 - ii. The length of the session;

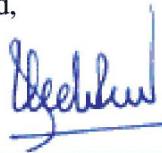
File. See Letter from National Co-Investigating Judge to Trial Chamber entitled "Request for the thesis of Mr. SUONG Sikeoun, entitled 'Itineraire d'un intellectuel Khmer Rouge,'" 24 July 2012, E216/2.

³⁶ See Letter from IENG Sary Defence to the Trial Chamber's Senior Legal Officer entitled "Upcoming Trial Management Meeting," 10 August 2012, quoting U.S. Supreme Court Justice Louis D. Brandeis, *Other People's Money*, Harper's Weekly, 20 December 1913, available at: <http://www.law.louisville.edu/library/collections/brandeis/node/191> (last accessed 25 August 2012).

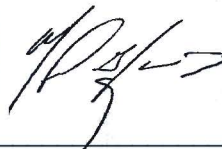
³⁷ See, e.g., Transcript, 15 December 2011, E1/23.1, p. 21-24.

- iii. The individuals who were present during the session;
 - iv. The documents and other materials, if any, that were shown to Oeun Tan by the OCIJ investigators;
 - v. If there is no audio or video recording, the reasons for the lack of any record and for questioning Oeun Tan for an entire day without recording the session, before a recorded statement was taken; and
- b. If an audio, video and / or written record does exist of an 8 October 2008 session, place it on the Case File for review and use by the parties.

Respectfully submitted,



ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **29** day of **August, 2012**