

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

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA NOTICE OF JOINDER
TO IENG SARY'S REQUEST E-234**

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. Over five weeks after the Ieng Sary Defence filed a motion relating to the questioning of witness Norng Sophang by OCIJ investigators¹ and 25 days after the Co-Prosecutors filed their opposition to that motion,² the Nuon Chea Defence (the “Defence”) has filed a 15-page joinder to Ieng Sary’s motion.³ The Co-Prosecutors object to the timeliness of the Nuon Chea filing. Nonetheless, because the Defence joinder was filed as a public document and makes numerous inaccurate and misleading statements about the proceedings before this Court, the Co-Prosecutors submit the following response. To avoid repetitive filings, the Co-Prosecutors incorporate by reference the arguments made in their prior oppositions to the recent barrage of defence motions regarding OCIJ interview practices.⁴

II. ARGUMENT

A. The Legacy of this Court is Best Ensured by the Trial Chamber Following, and the Parties Respecting, the Rule of Law

2. The Defence first argue that the Trial Chamber should be guided by concerns for the future legacy of the ECCC and its influence on domestic proceedings. The Co-Prosecutors submit that the primary focus of the Chamber has been, and should continue to be, the proper conduct of the ongoing trial proceedings in accordance with the rules and law that govern this Court.
3. The primary complaint that has been raised by the Ieng Sary Defence in its recent motions is that OCIJ investigators sometimes met and communicated with witnesses prior to the commencement of formal recorded interviews. In their Joinder, the Defence seek to analogize this relatively minor procedural issue to claims of torture in domestic police investigations.⁵ This is an egregious and offensive analogy that both trivializes legitimate

¹ **E234** Ieng Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview, 27 September 2012.

² **E234/1** Co-Prosecutors’ Response to “Ieng Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview,” 8 October 2012.

³ **E234/2** Notice of Joinder to Ieng Sary’s Request E-234, 2 November 2012 (hereinafter “Notice of Joinder”).

⁴ **E221/1** Co-Prosecutors’ Response to Ieng Sary’s Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuong’s Second OCIJ Interview, 4 September 2012; **E224/1** Co-Prosecutors’ Response to “Ieng Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008,” 7 September 2012; **E234/1** Co-Prosecutors’ Response to “Ieng Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview,” 8 October 2012; **E241/2** Co-Prosecutors’ Response to “Ieng Sary’s Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ’s Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses,” 15 November 2012.

⁵ **E234/2** Notice of Joinder, para. 6 (fn. 5).

human rights concerns and unfairly disparages the investigators of this Court. There is not a scintilla of evidence that would support any assertion that OCIJ investigators have threatened, pressured or used force or coercion against the witnesses they have interviewed. The Defence assertion that the Trial Chamber's application of ECCC rules and procedures would "amount to an endorsement and even encouragement of unscrupulous practices by domestic police officers and courts"⁶ is a sad and desperate statement by a legal team that is willing to say anything, however far from the truth, to undermine this Court.

4. Based on their conduct to date, it is rather doubtful that the Nuon Chea Defence has any genuine interest in the legacy of this Court. To the extent they do, they should be assured that if judicial interviews in future Cambodian legal proceedings are conducted with the procedural integrity and substantive accuracy of the OCIJ interviews in this case, the legacy of the ECCC will be well fulfilled. That legacy will also be advanced if parties respect the rule of law and comply with the rules of this Court, by acting with diligence and filing their submissions in a timely manner. A defence team that brazenly disregards Court rules, and fails to respect or follow the orders of this Chamber, cannot be regarded with credibility when it seeks to invoke the legacy of this Court.

B. Defence Challenges to Interview Procedures Have Failed to Establish Substantive Problems in the Accuracy or Reliability of OCIJ's Written Records

5. The Defence further asserts that the Trial Chamber is disregarding its role to "ascertain the truth," by limiting inquiry into purported irregularities in interview procedures.⁷ To the contrary, the Defence have been given the opportunity to cross-examine witnesses on both the substance of their testimony and the procedure followed in OCIJ interviews. The Trial Chamber has simply asked the Defence, when questioning witnesses on the latter issues, to have "well-grounded concerns about the reliability" of the investigation procedure, to avoid "redundant and repetitive questions" and to elicit information that helps the Chamber to "study and examine issues of substance."⁸ The Chamber has thus allowed reasonable questioning of witnesses regarding the procedure of their OCIJ interview, where such examinations assist in ascertaining the truth of the substantive issues of Case 002/01.
6. The principal "truth" that the Trial Chamber is tasked with ascertaining, however, is the truth of the allegations of the Closing Order with which the Accused are charged. The truth of those allegations will not turn on whether a particular witness interview lasted 2 hours or

⁶ E234/2 Notice of Joinder, para. 8.

⁷ E234/2 Notice of Joinder, para. 9-12, 30-31.

⁸ E1/123.1 Transcript of Proceedings, 6 September 2012, pp. 36-37, 43.

half a day, whether there were unrecorded breaks in an interview during which the witness went to the bathroom, and whether OCIJ investigators met with and talked to witnesses prior to their formal recorded interview. 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 pointed to by the Defence have been relatively minor, and the witnesses have repeatedly and consistently confirmed the substantive accuracy of their statements.

7. If, as has been the case to date, Defence challenges to the procedure of OCIJ interviews fail to demonstrate meaningful errors in the substantive information provided by witnesses, the Trial Chamber will have no reason to question the reliability and accuracy of OCIJ witness statements. Moreover, for witnesses who have appeared and given testimony in Court, there is even less reason to dwell on the procedure of their past out-of-court interview, as the parties are able to test the veracity of their testimony during examinations directly observed by the trial bench. The assertions of the Defence that the Trial Chamber is “rubberstamping the conclusions in the Closing Order” and not concerned “whether the ‘facts’ it discovers bear any resemblance to the truth” are reckless and unwarranted. In reality, the Chamber has simply asked that Defence questioning on alleged procedural irregularities assist in evaluating the truth of the Closing Order, and not waste time on minor procedural technicalities or side issues that in the end are much ado about nothing.

C. The Defence Had Sufficient Time to Review the Case File During the Three-Year Judicial Investigation

8. The Co-Prosecutors note that their Introductory Submission was filed on 18 July 2007, that the judicial investigation in Case 002 continued until July 2010 and that the Closing Order was issued on 15 September 2010. Notwithstanding this, the Defence provide a litany of excuses as to why they were unable to properly review OCIJ’s interviews during that 3-year judicial investigation.
9. The Defence excuses are riddled with inconsistencies. The Defence first asserts that they should have been allowed to attend OCIJ witness interviews, which attendance “would have uncovered and resolved most of the issues that are surfacing at this junction.”⁹ Several pages later, however, they assert that they did not have sufficient time even to listen to the audio recordings of those interviews during the course of the investigation.¹⁰ If the Defence would have been able to travel to the provinces with OCIJ investigators to attend and participate in

⁹ E234/2 Notice of Joinder, para. 13.

¹⁰ E234/2 Notice of Joinder, para. 21-26.

witness interviews, then they certainly could have listened to the tapes in lieu of such attendance, and saved the travel time to work on other matters.

10. The Defence questions whether the Trial Chamber, “in preparation for trial, reviewed all the audio records of witness interviews, and if not, why not?”¹¹ This attack overlooks that the Trial Chamber, unlike the Defence, was not seized of Case 002 and given access to the Case File until after the issuance of the Closing Order. The Defence concludes its list of excuses asserting that the OCIJ audio recordings were of “secondary importance” and thus properly ignored during the judicial investigation phase, but then immediately changes its tune and argues that this same evidence is now “indispensable” for purposes of their cross-examinations during trial.¹²
11. The answer to the question posed by the Trial Chamber as to what the Defence lawyers were doing during the three-year judicial investigation can be seen by reviewing the Case File itself. Rather than prepare for trial by reviewing the evidence and identifying the particular witness interviews relevant to their client, the Defence chose to spend its time filing baseless investigative requests, motions and appeals in a transparent effort to delay the case and prevent it from ever reaching trial. As they admit themselves, the Defence filed 26 requests for investigative action, including requests that OCIJ investigate the extent to which China “exercised effective control over the DK government” and whether 11 foreign states (Vietnam, China, the United States of America, Thailand, France, Russia, North Korea, Laos, Cuba, Albania and Yugoslavia) “operated a network of covert agents within DK territory.”¹³ The Defence also filed at least 17 other motions or requests with OCIJ,¹⁴ as well as 16 appeals to the Pre-Trial Chamber,¹⁵ during the pre-trial phase.
12. While the extensive filings by the Defence consumed considerable time and resources during the judicial investigation, they added little (if anything) of substantive value to the Case File. In any event, the Co-Prosecutors submit that the excessive papering of the file by the Defence during the pre-trial phase was the primary reason that minimal attention was paid by them to the witness interviews conducted by OCIJ during that same time period.

¹¹ E234/2 Notice of Joinder, para. 13 (fn. 18).

¹² E234/2 Notice of Joinder, para. 26.

¹³ D101 Third Request for Investigative Action, 18 August 2008, para. 11 [China]; D102 Fourth Request for Investigative Action, 27 August 2008, para. 9 [Vietnam]; D105 Fifth Request for Investigative Action, 26 September 2008, para. 10 [United States]; D126 Eighth Request for Investigative Action, 21 January 2009, para. 8 [Thailand]; D128 Ninth Request for Investigative Action, 27 January 2009, para. 8 [France, Russia, China, Vietnam, North Korea, Laos, Cuba, Albania and Yugoslavia].

¹⁴ D54; D55; A158; A169; A186; A201; A195; A202; D114; D116; D100/4; D124; D171/2; D235; D254; D384; C65.

¹⁵ C11/4; D55/I/1; D54/V/1; C33/I/3; C9/4/1; D158/5/1/1; D164/4/1; D100/9/1; D300/1/1; D253/3/1; D315/1/1; D314/2/4; D273/3/2; D356/2/1; D375/1/1; D384/5/1.

D. ECCC Rules Do Not Require the Recording of Witness Interviews

13. The Joinder filed by the Defence does concede one issue that the Ieng Sary Defence has stubbornly refused to recognize – that Internal Rule 25 does not mandate that witness interviews by OCIJ be recorded by audio or video.¹⁶ The Defence is incorrect, however, in its assertion that OCIJ investigators were required to record the duration of interviews and breaks, for reasons outlined in detail in OCP’s recent filing on 15 November 2012.¹⁷
14. The practice of some OCIJ investigators to have preliminary discussions or meetings with witnesses before commencing their formal recorded interview is not a violation of ECCC rules, and undoubtedly served to ensure better communications with the witness and a more accurate written record. The Defence’s speculation that these unrecorded meetings had some sinister purpose is not substantiated by any evidence, and has been repeatedly refuted by each witness who has been questioned on the subject.
15. Moreover, the Defence now claim that the purpose of their submissions is “not to complain about the investigators’ failure to record certain interviews or portions of interviews *as such*,” nor to “complain about the investigators’ failure to record the duration of certain interviews *as such*.”¹⁸ If this was the case, one would expect that Defence questioning of witnesses would not be limited to merely establishing that they met and talked to OCIJ investigators on other occasions before or after their formal recorded interview, and whether the total time of the audio-recording is less than the time between the arrival and departure of the investigators. In truth, however, Defence counsel have generally avoided asking witnesses the questions that would reveal whether there is any significance to their unrecorded communications with OCIJ – e.g., whether they were coached or pressured during such occasions; whether they provided other information to investigators that was not included in their written records of interview. The Co-Prosecutors submit this is because there is no “well-grounded” basis to believe that anything improper occurred during such occasions.

¹⁶ E234/2 Notice of Joinder, para. 15-16. See also E241/2 Co-Prosecutors’ Response to “Ieng Sary’s Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ’s Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses,” 15 November 2012, para. 28-39; 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. 6, fn. 13.

¹⁷ E241/2 Co-Prosecutors’ Response to “Ieng Sary’s Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ’s Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses,” 15 November 2012, para. 24-27.

¹⁸ E234/2 Notice of Joinder, para. 19.

E. The Defence's General Complaints of Unfairness Are Unfounded

16. Finally, the Defence make a number of allegations that they have been treated unfairly by the Trial Chamber, which the Co-Prosecutors submit are unfounded.¹⁹
17. The Defence claim, for example, that when they raised objections concerning the authenticity and chain of custody of documentary evidence, the Trial Chamber's only response was to complain about the untimeliness of the objection and ignore the substance of the issue.²⁰ This assertion is utterly false. In truth, the Chamber heard 6 days of testimony from DC-Cam witnesses on these issues and held numerous hearings at which objections to documents were considered. The Trial Chamber's decisions relating to the admission of documents were based on these hearings and the merits of the parties' submissions, not on the untimeliness of Defence objections.
18. The Defence also complain of the Chamber's "persistent refusal to let the Defence rely on writings that it did not notify in by April 2011."²¹ The Defence fails to mention that it refused to comply with both the Chamber's initial trial preparation order that required all parties to identify the documents they intended to introduce at trial by April 2011,²² and a second opportunity given to the Defence in July 2011 to provide a list of trial documents.²³ In both cases, the Defence refused to provide any document list, asserting that they were not obligated to provide advance notice of the documents they wished to use at trial.²⁴ Notwithstanding their refusal to follow the same rules as the other parties, the Defence have still been allowed during this trial to use documents that were not previously disclosed, where a proper Rule 87(4) motion is filed or the documents are of "sufficient importance" to warrant their late addition.²⁵
19. The Defence complain that they were criticized for raising the self-incrimination rights of a witness during the trial proceedings,²⁶ but overlook that the criticism was because their intervention occurred in the presence of the witness just as he was to respond to a critical line of questioning that would establish information damaging to Nuon Chea. Because the Defence intervention did not involve a question that would have incriminated the witness,

¹⁹ E234/2 Notice of Joinder, para. 27-29.

²⁰ E234/2 Notice of Joinder, para. 28.

²¹ E234/2 Notice of Joinder, fn. 30.

²² E9 Order to File Material in Preparation for Trial, 17 January 2011, para. 12.

²³ E1/4.1 Transcript of Initial Hearing, 27 June 2011, at ERN 00712161.

²⁴ E9/26 Notice of Joinder in Ieng Sary's Initial Submissions Regarding Documents to be Relied Upon at Trial & Additional Submissions Regarding New Documents, 19 April 2011, para. 2; E109/3 Observations Regarding Documents Considered Relevant to the Early Segments of the Trial, 22 July 2011, para. 1, 2(d), 4.

²⁵ E190 Decision Concerning New Documents and Other Related Issues, 30 April 2012, para. 35-37.

²⁶ E234/2 Notice of Joinder, para. 28 (p. 13).



but rather a question that would incriminate their client, it was readily apparent that the real purpose of the intervention was to attempt to intimidate the witness and discourage his testimony.²⁷

20. There is thus no merit to the Defence assertions of unfair treatment by the Trial Chamber in these proceedings.

III. CONCLUSION

21. For the reasons set forth above, the Co-Prosecutors submit that the Ieng Sary Defence motion and Nuon Chea Defence Joinder should be dismissed.

Respectfully submitted,

Date	Name	Place	Signature
19 November 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

²⁷ E1/63.1 Transcript of Trial Proceedings, 18 April 2012, pp. 33-35, 43-44.