

**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:** 2 November 2012**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**


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**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**

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**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 hold a public hearing to investigate the OCIJ’s practice of conducting unrecorded interviews with witnesses and the effect this may have had on the witnesses’ recorded statements and in-court testimony. This Request is made necessary because the Defence has recently discovered 12 instances (in addition to the instances pointed out by the Defence in past requests and by other Defence teams) in which OCIJ Investigators conducted unrecorded interviews with witnesses. It thus appears that this practice was not an aberration from the OCIJ’s normal investigative procedure, but was in fact a widespread and systematic practice, condoned if not actively encouraged by the Co-Investigating Judges themselves: a policy set at the highest levels of the upper echelon of the OCIJ. This practice casts doubt on the reliability of witness statements and testimony refreshed by these statements, and therefore impacts upon Mr. IENG Sary’s fair trial rights to mount a defence and examine the evidence against him. As such, it is in the interest of justice for the Trial Chamber to exercise its Rule 93 investigative powers to hear public testimony from the OCIJ Investigators known to be involved in conducting these unrecorded interviews, to determine if any further action should be taken, and to determine the weight, if any, to ascribe the statements in question if admitted.

## I. BACKGROUND

1. The OCP has filed requests to put thousands of witness statements before the Trial Chamber without calling the witnesses to testify in court.<sup>1</sup> The Trial Chamber recently announced that the Defence may object to these statements in writing by 26 April 2013.<sup>2</sup>
2. Though the Defence is in the early stages of its review of the statements requested by the OCP in order to prepare any objections to these statements, it has come across at least 12

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<sup>1</sup> Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement, 15 June 2012, E208; Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with confidential Annexes 1, II, III and Public Annex IV, 5 July 2012, E208/2; Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16, 27 July 2012, E96/8.

<sup>2</sup> Trial Chamber Memorandum entitled “Forthcoming Document Hearings and Response to Lead Co-Lawyers’ Memorandum Concerning the Trial Chamber’s Request to Identify Civil Party Applications for use at Trial (E208/4) and KHIEU Samphan Defence Request to Revise Corroborative Evidence Lists (E223),” 19 October 2012, E223/2, para. 14.

instances in which it appears that the OCIJ Investigators held prior unrecorded interviews with the witnesses.<sup>3</sup> More unrecorded interviews are likely to be uncovered.

3. This revelation of 12 additional unrecorded statements follows previously noticed irregularities in the taking of witness interviews / summary statements. In particular, during the trial proceedings it was uncovered that OCIJ Investigators conducted unrecorded interviews with witnesses Oeun Tan, Phy Phuon and Norng Sophang prior to conducting formal recorded interviews.<sup>4</sup> In none of the written records of the interviews with witnesses Oeun Tan, Phy Phuon and Norng Sophang was any mention made of any unrecorded questioning or statements.<sup>5</sup>
4. Other parties have brought other instances of unrecorded interviews to the Trial Chamber's attention as well, most recently during the testimony of Witness Sokh Chhin, who stated that he was interviewed off the record prior to his recorded interview.<sup>6</sup>

## II. LAW AND ARGUMENT

### A. The OCIJ was required to record all witness interviews

5. The Rules require that formal records be made of *all* witness interviews and define the procedures that OCIJ Investigators are to follow when interviewing witnesses. OCIJ Investigators could not simply conduct informal "off the record" interviews with no transparent record of who was interviewed, what questions were asked or answered, how long the interviews took place, what was said to the witnesses or what documents may have been provided to them.
6. Rule 55(7), under the heading "General Provisions Concerning Investigations" requires that a "written record *shall* be made of *every* interview."<sup>7</sup>

<sup>3</sup> See D108/6/10R, at 00:06:30; D125/168R, at 00:00:30; D91/16R, at 00:04:10, D369/32R, at 00:07:17; D125/31R, at 00:04:00; D125/92R, at 00:00:45 – 00:00:50, 00:01:35 – 00:01:45, 00:07:05 – 00:07:15, 00:08:00 – 00:08:10; D232/70R, at 00:21:50; D369/30R, at 01:10:00; D125/26R, at 00:02:15, 00:05:50; Written Record of Interview D232/46; Written Record of Interview D232/74; Written Record of Interview D232/32.

<sup>4</sup> See Transcript, 14 June 2012, E1/87.1, p. 46-48; Transcript, 25 July 2012, E1/96.1, p. 70-72; Transcript, 1 August 2012, E1/100.1, p. 3-14; Transcript, 6 September 2012, E1/123.1, p. 45-46.

<sup>5</sup> Upon hearing this testimony, the Defence filed investigative requests to the Trial Chamber to investigate the circumstances of their unrecorded interviews. See 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, E224; 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, E221; 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, E234.

<sup>6</sup> Transcript, 23 October 2012, E1/137.1, p. 57, 61.

7. Rule 62(3) requires OCIJ investigators to act under the supervision of the Co-Investigating Judges. It further requires the OCIJ Investigators, when issued with Rogatory Letters by the Co-Investigating Judges, to draw up a written record of their “*investigations and findings, which shall comply with the provisions of Rule 51(8) as appropriate.*”<sup>8</sup>
8. Rule 51(8) sets out a list of information which, pursuant to Rule 62(3), must be included in the written record of the OCIJ Investigators’ investigations and findings. It requires the Investigators to specify: “[t]he duration of any interview and the duration of any breaks between interview periods.”
9. Rule 25(2) specifically requires witness interviews to be audio recorded, providing that “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.*”<sup>9</sup>
10. The above Rules must be applied and interpreted in light of Rule 21, titled “Fundamental Principles.” This Rule requires all the Internal Rules to be interpreted so as to safeguard to interests of the Accused and to ensure transparency.
11. The OCP has previously argued that Rule 25(2) does not apply to witness interviews.<sup>10</sup> This assertion is incorrect:
  - a. Rule 25 is titled generally “Recording Interviews” (not “Recording Interviews with Suspects and Charged Persons”). The title reflects that this Rule applies to *all* interviews.
  - b. Rule 25(1) requires that interviews conducted with suspects or charged persons *shall* be recorded, details the procedure for conducting such interviews and states that copies of the recordings *shall* be provided to the suspects/charged persons. Notably,

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<sup>7</sup> Emphasis added.

<sup>8</sup> Emphasis added.

<sup>9</sup> Emphasis added.

<sup>10</sup> 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, E234/1, paras. 25-26.

unlike Rule 25(2), it *does not* require suspects/charged persons to sign copies of their statements.

- c. Rule 25(2), in contrast, does not specifically apply only to suspects/charged persons. It states that “[a] person may be questioned without being audio or video-recorded where the circumstances prevent such recording taking place.” The Defence notes that the French version of this Rule may imply that 25(2), like 25(1), applies only to suspects/charged persons, due to the phrase “La personne concernée” rather than “A person.” Since neither the English nor the Khmer versions contain similar wording, the French version cannot be taken as controlling.
- d. Rule 25(2) also contrasts with Rule 25(1), in that 25(1) requires recording in *all* instances. If Rule 25(2) were intended to apply only to suspects/charged persons, its statement that a person “may” be questioned without the interview being recorded would not make sense, considering Rule 25(1)’s requirement that interviews “shall” be recorded.
- e. Rule 25(4) is not, as the OCP has claimed,<sup>11</sup> rendered superfluous if Rule 25(2) is read to apply to all interviewees. Rule 25(4) simply states that “[t]he Co-Prosecutors or Co-Investigating Judges may choose to follow the procedure in this Rule when questioning other persons than those mentioned above....” This means that the procedures set out in Rule 25(1) (such as providing a copy of the recording to the witness) may optionally be applied when interviewing all witnesses, not only suspects/charged persons. It does not affect Rule 25(2).
- f. Rule 21 supports the Defence’s interpretation of Rule 25. If Rule 25(4) were read so as to make it optional for the OCIJ to record interviews with witnesses, this would not ensure transparency, nor would it safeguard Mr. IENG Sary’s interests, as required by Rule 21.

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<sup>11</sup> *Id.*

- g. Rule 25(2) is unambiguous and therefore it should simply be applied according to its plain language. An absurd result would not follow by interpreting 25(2) to apply to all interviewees.<sup>12</sup>
- h. If there is any doubt as to the appropriate interpretation of Rule 25, such doubt must be resolved in favor of the Accused in accordance with the principle of *in dubio pro reo*, a fundamental principle of criminal law that is recognized by Article 38 of the Constitution. This principle applies to interpretations of law, subject to Civil Law rules of interpretation.<sup>13</sup>

### **B. The OCIJ did not record all witness interviews**

12. It is now beyond cavil that the OCIJ Investigators did not record *many* interviews that they conducted with witnesses,<sup>14</sup> in contravention of Rules 21(1), 25, 51(8), 55(7) and 62(3). It appears that the OCIJ Investigators had a practice of going into the field and meeting informally with witnesses to hear what the witnesses had to say before returning later to record formal interviews. Written records were then prepared which – in most cases<sup>15</sup> – made it appear as if the OCIJ Investigators were meeting with the witnesses for the first time. This practice goes against the Co-Investigating Judges’ stated policy of abiding by Rule 25 “systematically”<sup>16</sup> and is worrying to the Defence, especially considering that during the judicial investigation Co-Investigating Judge Marcel Lemonde exclaimed to his investigators that he “**would prefer that [they] find more inculpatory evidence than exculpatory evidence.**”<sup>17</sup>

### **C. The OCIJ’s failure to record witness interviews has violated Mr. IENG Sary’s fair trial rights**

<sup>12</sup> See Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT’L L. 195, 201-02 (2003).

<sup>13</sup> See Decision on Immediate Appeal by KHIEU Samphan on Application for Immediate Release, 6 June 2011, E50/3/1/4, para. 31.

<sup>14</sup> See examples provided in Background section, *supra*.

<sup>15</sup> There are 3 written records of witness interviews prepared by the OCIJ available in English on the Case File which explicitly state that the witness told the OCIJ Investigators certain facts “off the record.” See Written Record of Interview D232/46; Written Record of Interview D232/74; Written Record of Interview D232/32.

<sup>16</sup> Order on Request for Transcription, 5 November 2009, D194/2, para. 9.

<sup>17</sup> See *Case of IENG Sary*, 002/09-10-2009-ECCC/PTC(01), IENG Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, 9 October 2009, 1, opening, Annex 1.

13. As explained in past Requests, incorporated herein by reference,<sup>18</sup> Mr. IENG Sary has the fundamental fair trial rights to examine the evidence against him and to mount a defence. The OCIJ's failure to follow proper investigative procedure and deliberate omission of relevant information from the record has made it impossible for Mr. IENG Sary to meaningfully exercise these rights.

**D. The Trial Chamber has the power and obligation to hold a public hearing to address this fair trial violation**

14. Rule 93(1) authorizes the Trial Chamber to conduct additional investigations whenever it deems such investigations necessary. The Trial Chamber therefore *can* and *should* hold a public hearing to investigate the OCIJ's practice of conducting unrecorded interviews with witnesses and the effect this practice may have had on their statements and testimony.

15. The purpose of the requested investigation is *not* to annul investigative acts due to procedural defects, but to determine exactly what effect the OCIJ's practice of conducting unrecorded meetings has had on the evidence now before the Trial Chamber. Thus, argument that the investigation sought is prohibited under Rule 76(7) (i.e., that the Closing Order cures all procedural defects in the judicial investigation) is without merit.

16. The Pre-Trial Chamber has made clear (relying upon the Trial Chamber's additional powers of investigation under Rule 93) that "the trial stage is an additional and alternate forum for the Defence to contest the reliability of the evidence..."<sup>19</sup> The Defence is attempting to do just that: contest the reliability of the evidence by uncovering any investigative irregularities that may have tainted the purported knowledge of the witness.

17. A public hearing with testimony from the OCIJ Investigators is necessary and reasonable. The Trial Chamber *must* determine the sources and reliability of the actual knowledge of the witnesses in question. This is essential to protect Mr. IENG Sary's fundamental fair

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<sup>18</sup> 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, E224, paras. 9, 13; IENG Sary's Request to Hear Evidence from the Interpreter Concerning Witness Phy Phoun's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221, paras. 17, 20; 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, E234, paras. 3-7.

<sup>19</sup> Pre-Trial Chamber Decision on Appeal and Further Submissions in Appeal against OCIJ Order on NUON Chea's Request for Interview of Witnesses, 20 September 2010, D375/1/8, para. 57 and fn 92.

trial rights. In determining what weight should be ascribed to witness testimony, the Trial Chamber must, without passion or prejudice, examine all relevant facts that call into question the reliability and integrity of the OCIJ's practices in conducting interviews and obtaining statements.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to HOLD A PUBLIC HEARING to investigate the OCIJ's practice of conducting unrecorded interviews with witnesses and the effect this may have had on the witnesses' recorded statements and in-court testimony.

Respectfully submitted,

  
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Signed in Phnom Penh, Kingdom of Cambodia on this 2<sup>nd</sup> day of November, 2012