

ក្រុមបេធាវីការពារក្តី អៀង សារី
IENG SARY DEFENCE TEAM
EQUIPE DE DEFENSE DE IENG SARY

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Co-Lawyers for IENG Sary

9 July 2012



To: **Susan LAMB**
 Senior Legal Officer, ECCC Trial Chamber

Copy: **Defence Teams**

Office of the Co-Prosecutors

Civil Party Lead Co-Lawyers

Re: **Objections to Witness Statements**

Dear Ms. Lamb,

We write to request clarification concerning: **a.** when and how the Trial Chamber will hear objections to the witness statements requested by the Co-Prosecutors; and **b.** whether a written response to the Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with Confidential Annexes I, II, III and Public Annex IV ("Second Request")¹ will be necessary.

On 15 June 2012, the Co-Prosecutors filed a Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement ("First Request").² Shortly thereafter, on 20 June 2012, the Trial Chamber issued its Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber.³ The Trial Chamber stated that the Defence "shall" be afforded the right to pose objections to OCIJ witness statements proposed to be put before the Chamber in the absence of the testimony of their authors and that "[t]hese statements may be entitled to little, if any, probative value or weight either because of the lack of opportunity for confrontation or because significant deficiencies in these statements or transcripts have been credibly alleged and identified."⁴

¹ Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with Confidential Annexes I, II, III and Public Annex IV, 5 July 2012, E208/2.

² Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement, 15 June 2012, E208.

³ Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, E96/7.

⁴ *Id.*, para. 27.

The Trial Chamber required all parties who intend to put witness statements before the Chamber to: **a.** review their document lists for compatibility with criteria for admission set out by the Trial Chamber; **b.** set out the evidentiary purpose for each document or category of documents; **c.** consider proposing a representative sample rather than all requested documents; and **d.** provide this information by 27 July 2012 in order to permit the Trial Chamber to schedule hearings or otherwise allow the filing of objections.⁵ The Trial Chamber stated that it “will in due course schedule a hearing or otherwise provide opportunity to put any relevant objections to the proposed evidence pursuant to Rule 87(3).”⁶

On 27 June 2012 we filed a Response to the First Request. We stated that we intend to object to many of the witness statements put forward by the Co-Prosecutors and will do so once the Co-Prosecutors complied with the directions set out in the Trial Chamber’s 20 June 2012 Decision and the Trial Chamber has scheduled the opportunity to submit objections.

On 5 July 2012, we were notified of the Second Request. In this Request, the Co-Prosecutors requested the admission of witness statements relevant to “phase 2 of the population movement” and requested the Trial Chamber to consider the First Request, even though it was submitted prior to the Trial Chamber issuing the directions set out in its 20 June 2012 Decision. The Co-Prosecutors also informed the Trial Chamber that they anticipate submitting a third request for the admission of witness statements before the 27 July 2012 deadline.⁷

Please inform us whether the Trial Chamber requires a response to the Second Request (or any future such requests) should we intend to object to the witness statements requested by the Co-Prosecutors.

Furthermore, please convey to the Trial Chamber our need / request for sufficient time to be provided to prepare objections to the requested witness statements. We have been reviewing the audio recordings (where available) of each of the 186 OCIJ witness statements⁸ requested by the Co-Prosecutors in the First Request. We will repeat this process with the 58 OCIJ witness statements⁹ requested in the Second Request and any additional witness statements requested before the 27 July 2012 deadline. Each of these audio recordings generally lasts at least half a day. Transcripts of these recordings are generally not available. This is a lengthy exercise, but one we consider necessary in performing our due diligence obligations.

⁵ *Id.*, para. 35.

⁶ *Id.*, para. 36.

⁷ Second Request, para. 7.

⁸ Note that the First Motion states that there are 186 OCIJ witness statements requested. Paragraph 11 states that there are 122 statements listed in Annex 1 and para 17 states that Annex 2 contains 64 statements. There also appear to be two statements listed in the OCP’s Annexes which are not OCIJ witness statements, but are instead extracts from books. *See* First Request, Annex 4, #2, 128.

⁹ Note that paragraph 9 of the Second Request states that there are 58 statements requested, but the Annexes list only 57 statements. Eight of these statements appear to be non-OCIJ witness statements, despite what is stated at paragraph 5 of the Second Request. Note too that certain of these statements are duplicates of statements requested in the First Request. There appear to be 27 duplicate statements.

During our review process of these OCIJ witness statements, it has come to light that some of them contain errors. While some OCIJ witness statements differ materially from the audio recordings of these witness interviews (something that has been previously brought to the Trial Chamber's attention),¹⁰ other OCIJ witness statements are incomplete or misleading. Naturally, this calls into question the reliability of these statements.

Most disconcerting are discrepancies that appear to have occurred during the interview process. We have noticed that certain interviews lack audio recordings¹¹ or that it is clear from the audio recordings available that prior unrecorded interviews were conducted with the witnesses.¹² As the Trial Chamber will recall, during a recent trial session Mr. OEUN Tan testified that he was questioned by OCIJ investigators on 9 October 2008 and that this interview had been recorded.¹³ Mr. OEUN Tan then revealed that, a day prior to this interview, OCIJ investigators questioned him for the entire day without recording their questions or his answers.¹⁴ The OCIJ witness interview of 9 October 2008 made no mention of this prior interview. Acknowledging the existence of doubt as to "what was placed on the record and what interviews took place" between OCIJ investigators and Mr. OEUN Tan,¹⁵ the Co-Prosecutors requested a transcript of the 9 October 2008 interview and clarification from the OCIJ of the existence of a record, if any, of the 8 October 2008 interview.¹⁶ While the Trial Chamber did not issue an oral ruling on this request, it stated that the parties could include it in their submissions.¹⁷

It merits recalling that the International Co-Prosecutor Andrew Cayley acknowledged that interviews originally conducted for Cases 003 and 004 revealed similar errors, i.e., in comparing the audio recordings to the OCIJ witness statements "a number of inconsistencies or omissions"¹⁸ were exposed. This recurring pattern is, of course, troubling, particularly when considering the Trial Chamber's predilection of accepting OCIJ summaries of witness statements as accurate and complete on the basis of a signature or thumbprint.¹⁹

¹⁰ Some OCIJ witness statements differ materially from the audio recordings of these witness interviews, something that has been previously brought to the Trial Chamber's attention. *See, e.g.*, Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 17 November 2011, E142.

¹¹ For example, D199/15. It appears that there are at least 12 witness statements requested in the First Request that have no audio recordings available on the Case File.

¹² For example, D125/92R at 00:07:58-00:08:10.

¹³ Trial Transcript, 14 June 2012, E1/87.1, p. 47.

¹⁴ *Id.*, p. 47-48.

¹⁵ *Id.*, p. 53.

¹⁶ *Id.*




¹⁷ *Id.*, p. 54.

¹⁸ International Co-Prosecutor's Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A, 6 October 2011, E127, para. 14.

¹⁹ It bears recalling the questioning by Judge Lavergne of Witness Long Norin and the exchange that ensued with Co-Lawyer for Mr. IENG Sary, Michael G. Karnavas, concerning the acceptance of summary statements. Mr. Karnavas explained that "what is worrying to us is the fact that they have investigators who are feeding the answers and manipulating the witnesses, and then they come up with a summary, and then we come here, and now we are going to pretend that this summary is an accurate reflection; that's the problem." Trial Transcript, 15 December 2011, E1/23.1, p. 21-26 (quote p. 25-26).

In sum, considering that the Co-Prosecutors have requested (and will continue to request)²⁰ the admission of hundreds of witness statements and that the Trial Chamber has required the parties to identify inconsistencies with particularity (which will require the parties to review hundreds, if not thousands, of hours of audio recordings), we are respectfully submitting that the Trial Chamber must allow sufficient time for the parties to formulate objections to the requested witness statements. This is entirely consistent with what the Trial Chamber has already acknowledged, i.e., that “it will entertain allegations of inconsistency between the audio recording and written records of interview only where these are identified with sufficient particularity” and that “[a]ny party raising such a challenge ... bears the burden of clearly identifying the alleged inconsistency and giv[ing] timely advance notice to the Chamber and the other parties of these allegations and the documents relevant to them.”²¹

Respectfully requested,




ANG Udom **Michael G. KARNAVAS**

Co-Lawyers for Mr. IENG Sary

²⁰ Second Request, para. 7.

²¹ 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, E142/3, para. 12.