



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
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Kingdom of Cambodia
Nation Religion King
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Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
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Before: **Judge NIL Nonn, President**
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON DEFENCE REQUESTS CONCERNING IRREGULARITIES ALLEGED TO HAVE OCCURRED DURING THE JUDICIAL INVESTIGATION (E221, E223, E224, E224/2, E234, E234/2, E241 AND E241/1)

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1. INTRODUCTION

1. This decision consolidates the Trial Chamber disposition of all recent requests filed by the IENG Sary and the KHIEU Samphan Defence concerning alleged irregularities and other procedural defects attributed to the Office of the Co-Investigating Judges (“OCIJ”) during the judicial investigation preceding the trial in Case 002/01.¹ The portion of the KHIEU Samphan First Request regarding objections to the Co-Prosecutors’ lists of written statements to be put before the Chamber has been addressed separately.²

2. SUBMISSIONS

2.1. IENG Sary Request to Hear Evidence Concerning the Interview of Witness PHY Phuon by the OCIJ

2. The IENG Sary Defence requests the Trial Chamber to call as a witness the interpreter present during an OCIJ interview with witness PHY Phuon. Based on an assessment of the audio recordings of the interviews, the testimony of witness PHY Phuon at trial, and alleged

¹ 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 (“First IENG Sary Request”); 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 2012, 29 August 2012, E224 (“Second IENG Sary Request”); Submission in Support of Mr IENG Sary’s Request E221, and Request for the Trial Chamber to Order the Co-Prosecutors to Revise the List of Written Statements they are Seeking to put Before the Chamber in Lieu of Oral Testimony, 29 August 2012, E223 (“First KHIEU Samphan Request”); Submission in Support of Mr 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, 10 September 2012, E224/2 (“Second KHIEU Samphan Request”); 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, 28 September 2012, E234 (“Third IENG Sary Request”); 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, 5 November 2012, E241 (“Fourth IENG Sary Request”); Notice of Joinder to IENG Sary’s Request E234, 2 November 2012, E234/2, (“NUON Chea Joinder”) and Soutien de la “Demande de IENG Sary visant à ce que la chambre de première instance tiende une audience publique pour examiner la pratique répandue et systématique suivie par le bureau des co-juges d’instruction et ayant consisté à mener des entretiens avec des témoins sans que ceux-ci soient enregistrés”, 16 November 2012, E241/1 (“KHIEU Samphan Joinder”).

² See First KHIEU Samphan Request, paras 6-22; see also Trial Chamber Memorandum Entitled “Forthcoming Document Hearings and Responses 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 and 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 (“Decision on Admission of Witness Statements”), para. 36 (indicating that the Chamber will in due course schedule a hearing or otherwise provide an opportunity to put any relevant objections to the parties requests to put before the Chamber documents pertaining to the movement of the population).



discrepancies between the OCIJ interviews of the witness, they allege that the OCIJ interview with this witness was staged, in that questions and answers were pre-prepared based on a prior unrecorded interview and then re-enacted to emulate a spontaneous interview. The IENG Sary Defence submits that this amounts to misconduct warranting the intervention of the Trial Chamber.³

3. In response, the Co-Prosecutors submit that alleged investigative irregularities cannot be raised during the trial phase, that ample opportunity was available to have them resolved during the pre-trial phase and that the First IENG Sary Request should be denied.⁴ Further, witness PHY Phoun's testimony in court, which included examination by the Defence, adequately protected the fair trial rights of the Accused against any adverse consequences of the procedural defects alleged and in any case the ECCC Internal Rules do not require OCIJ investigators to record witness interviews.⁵ Finally, they submit that the IENG Sary Defence, in communicating directly with the interpreter, violated the Internal Rules which assign investigative competence exclusively upon the Co-Investigating Judges and the Trial Chamber, and prohibits interference with witnesses by the parties.⁶

2.2. IENG Sary Request to Seek Clarification from the OCIJ Regarding Questioning of Witness OEUN Than

4. The IENG Sary Defence also requests the Trial Chamber to seek clarification from the OCIJ as to the existence of any record of questioning of witness OEUN Tan by its investigators on 8 October 2008. The witness, during his interview on 9 October 2008, is alleged to have indicated that he was also interviewed on the previous day. However, no record of this interview exists.⁷ The IENG Sary Defence further submits that the witness's interview was tainted because of the investigators' conduct.⁸ The reliability of the witness' evidence is therefore compromised and, without a record of the first interview, the IENG Sary Defence cannot properly challenge the evidence of the witness, undermining the Accused's

³ First IENG Sary Request, preamble and paras 1-8 and 15-20.

⁴ Co-Prosecutors' Response to IENG Sary's Request to Hear Evidence from the Interpreter Concerning Witness PHY Phoun's Second OCIJ Interview, 4 September 2012, E221/1, ("OCP Response to First IENG Sary Request") paras 2 and 5-9.

⁵ OCP Response to First IENG Sary Request, paras 10-16.

⁶ OCP Response to First IENG Sary Request, paras 4 and 20-22.

⁷ Second IENG Sary Request, paras 1-5.

⁸ Second IENG Sary Request, paras 6-8.

right to a fair trial.⁹ The KHIEU Samphan Defence supports both the First and the Second IENG Sary Requests.¹⁰

5. The Co-Prosecutors do not oppose the Second IENG Sary Request insofar as it seeks further information from the OCIJ regarding their interview with witness OEUN Tan on 8 October 2008. However, the Co-Prosecutors deny that the evidence of the witness or the fair trial rights of IENG Sary have been compromised.¹¹ There is nothing to suggest that the witness was encouraged to provide false testimony during the unrecorded interview.¹² In any case, procedural irregularities, under the ECCC legal framework, are deemed to be cured by the Closing Order. The Defence had ample opportunity to challenge the evidence of the witness both during his testimony at trial and during the pre-trial phase. Finally, the OCIJ's written record of interview accurately summarises the testimony of the witness and the Internal Rules do not require investigators to record all communications with witnesses.¹³

2.3. IENG Sary, KHIEU Samphan and NUON Chea Requests to Seek Clarification from the OCIJ Relating to the Questioning of Witness NORNG Sophan

6. The IENG Sary and KHIEU Samphan Defence request the Trial Chamber to seek clarification from the OCIJ as to the existence of any record of questioning of witness NORNG Sophan by its investigators on 18 February 2009 and to summon the OCIJ investigators who conducted this interview. The IENG Sary Defence submits that it is entitled to expose the flaws in the judicial investigations and the Trial Chamber should take all reasonable and necessary steps to uncover such irregularities.¹⁴ They allege that a preliminary OCIJ interview of this witness was neither recorded nor referred to by the OCIJ investigators in their records, and that the reliability of his testimony is therefore compromised. Without a record of the first interview, the IENG Sary Defence cannot properly challenge the evidence of witness NORNG Sophan, undermining the Accused's right to a fair trial.¹⁵

⁹ Second IENG Sary Request, paras 13-14.

¹⁰ See First KHIEU Samphan Request, paras 1-5 and Second KHIEU Samphan Request, paras 1-2.

¹¹ 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, E224/1 ("OCP Response to Second IENG Sary Request"), paras 2 and 21.

¹² OCP Response to Second IENG Sary Request, paras 16 and 18-20.

¹³ OCP Response to Second IENG Sary Request, paras 6-17.

¹⁴ Third IENG Sary Request, paras 13-23.

¹⁵ Third IENG Sary Request, paras 1-2, 7 and 10; *see also* Second KHIEU Samphan Request, paras 3 and 6.

7. Although agreeing that any record of interview with NORNG Sophang from 17 February 2009 should be placed on the Case File, the Co-Prosecutors submit that the remainder of the Third IENG Sary Request should be dismissed.¹⁶ The Request fails to identify any error that would justify the Trial Chamber ordering an additional investigation, and that procedural defects are, in any case, presumptively cured by the Closing Order.¹⁷ The Defence has had ample opportunity to examine the witness on the substance of his testimony and the procedure followed during his interviews with the OCIJ, and the OCIJ investigators were under no obligation to record their interviews with the witness.¹⁸ Finally, the Third IENG Sary Request inappropriately suggests impropriety on the part of OCIJ investigators and flouts prior directions from the Trial Chamber.¹⁹ The Co-Prosecutors also submit that the KHIEU Samphan Defence fails to articulate the factual and legal bases for their request and that it should be rejected, particularly as the Accused's fair trial rights were adequately protected by the in-court examination of witness NORNG Sophang.²⁰

8. In their supplementary submissions in support of the Third IENG Sary Request, the NUON Chea Defence submits that if the Chamber tolerates investigative irregularities, this will encourage domestic courts in Cambodia to do the same, undermining the legacy of the ECCC.²¹ It further submits that the Chamber, as a body charged with ascertaining the truth, should have an acute interest in any investigative irregularity.²² It also argues that the ECCC legal framework does not prohibit parties from exploring the reliability and credibility of witnesses during cross-examination.²³ The NUON Chea Defence concedes that the Internal Rules do not require investigators to audio-record all witness interviews. However, it submits that, as OCIJ investigators did record almost all interviews, the failure to record select interviews raises questions about why those particular interviews were not recorded and what was discussed off the record.²⁴ Finally, it submits that it diligently represented its client's

¹⁶ 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 ("OCP Response to Third IENG Sary Request"), paras 4 and 34.

¹⁷ OCP Response to Third IENG Sary Request, paras 2, 5 and 16-17.

¹⁸ OCP Response to Third IENG Sary Request, paras 18-28.

¹⁹ OCP Response to Third IENG Sary Request, paras 29-32.

²⁰ Co-Prosecutors' Response to KHIEU Samphan's "Submissions in Support of 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", E224/3, paras 3 and 6-20.

²¹ NUON Chea Joinder, paras 1-8 and 32.

²² NUON Chea Joinder, paras 9-10.

²³ NUON Chea Joinder, paras 11-12.

²⁴ NUON Chea Joinder, paras 14-19.

interests during the investigation phase, but was not required to listen to all audio-recordings of witness interviews, considering the primacy of written summaries within the ECCC and the practical impossibility of reviewing hundreds of hours of recordings.²⁵

9. The Co-Prosecutors submit that the filing of the NUON Chea Joinder is time-barred.²⁶ The Co-Prosecutors also argue that the NUON Chea Defence has no genuine interest towards the legacy of the ECCC.²⁷ Finally, the NUON Chea Defence also had sufficient time to review the Case Filed during the three-year long judicial investigation phase.²⁸

2.4. IENG Sary Request that the Trial Chamber Hold a Public Hearing Regarding the Interviewing Practices of the OCIJ

10. The IENG Sary Defence also requests the Trial Chamber to hold a public hearing to investigate the alleged OCIJ practice of conducting unrecorded interviews with witnesses, and any effect these practices may have had on witnesses' recorded statements or in-court testimony. It claims to have discovered 12 additional instances in which OCIJ Investigators held prior unrecorded interviews with witnesses.²⁹ They allege that this practice contravenes the Internal Rules, particularly Rule 25, which require that formal records be made of all witness interviews.³⁰ Without complete records of all witness interviews, the Accused cannot examine the evidence against him or mount a proper defence, in contravention of his fundamental fair trial rights.³¹ The IENG Sary Defence further suggests that the alleged practice of partial records shows a general pattern of a biased investigation given Judge Marcel LEMONDE's alleged tendency to favour inculpatory over exculpatory evidence.³² This request is supported by the KHIEU Sampan Defence.³³

²⁵ NUON Chea Joinder, paras 13 and 20-26.

²⁶ Co-Prosecutors Response to NUON Chea Notice of Joinder to IENG Sary's Request E234, 19 November 2012, E234/2/1 (OCP Response to NUON Chea Joinder), para. 1.

²⁷ OCP Response to NUON Chea Joinder, paras 2-5.

²⁸ OCP Response to NUON Chea Joinder, paras 8-12.

²⁹ Fourth IENG Sary Request, paras 1-3.

³⁰ Fourth IENG Sary Request, paras 11-12.

³¹ Fourth IENG Sary Request, para. 13.

³² Fourth IENG Sary Request, para. 12.

³³ KHIEU Samphan Joinder, paras 2-4.

11. The Co-Prosecutors reiterate their submissions in response to the previous requests filed by IENG Sary and oppose also the Fourth IENG Sary Request.³⁴ The 12 additional instances of alleged prior unrecorded interviews referred by the IENG Sary Defence pertain to the interview of witnesses who are not scheduled to testify during the trial.³⁵ The Co-Prosecutors also submit that the conduct of the OCIJ investigators did not violate the Internal Rules, particularly Internal Rule 25.³⁶

3. FINDINGS

3.1. Legal Framework

12. The ECCC Internal Rules govern the conduct of the judicial investigation before the ECCC, consolidate applicable Cambodian law and, where appropriate, adopt additional rules established at the international level. They include provisions aimed at safeguarding the integrity of the investigation and the truthfulness of the record, the rights of all parties and, in particular, the rights of the Accused.³⁷ Throughout the investigation and, under certain conditions, during trial, they also enable the Accused, as well as the other parties, to examine and challenge the evidence in the Case File supporting the charges contained in the indictment and to request that further investigations be conducted.

13. In its previous decisions, the Trial Chamber has outlined the legal framework applicable to the investigation phase, as well as the impact of alleged procedural irregularities occurring during this phase upon the on-going trial proceedings.³⁸

³⁴ 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, E241/2 (“OCP Response to Fourth IENG Sary Request”).

³⁵ OCP Response to Fourth IENG Sary Request, paras 3-4.

³⁶ OCP Response to Fourth IENG Sary Request, paras 21-39.

³⁷ Internal Rules, Section III(B); *see also* Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“ECCC Agreement”), Article 12 and Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“ECCC Law”), Article 33. *See also* Decision on Defence Requests Concerning the Filing of Material in Preparation for Trial and Preliminary Objections, 4 April 2011, E35/2 and *further* Internal Rule 21 (enshrining fundamental fair trial principles in relation to the Accused).

³⁸ *See* 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 (“OCIJ Audio and Written Records Decision”); Decision on IENG Sary’s Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, E71/1 (“Decision on Conduct of the Judicial Investigations”); *see also* Decision on NUON Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), E116 (“Decision on Fairness of Judicial Investigation”) and Trial Chamber Memorandum Entitled “Translation requests in support of NUON

14. Pursuant to Internal Rule 55(5), following the filing of introductory submissions by the Co-Prosecutors, the Co-Investigating Judges “may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.”³⁹

3.1.1. Interviews of Victims and Witnesses during the Investigation Phase

15. A fundamental feature of the investigation phase is the collection of evidence through the interview of victims and witnesses.⁴⁰ While the Co-Investigating Judges may interview directly any victim or witness, they may also through a rogatory letter delegate the conduct of interviews, as well as other investigative measures, to investigators from their Office.⁴¹ Except when a confrontation is organized at the discretion of the Co-Investigating Judges, witnesses are interviewed in the absence of any party.⁴² The investigators act under the instructions and supervision of the Co-Investigating Judges and must draw up a written record of their investigations and findings in the execution of rogatory letters.⁴³

16. Before being interviewed, witnesses swear an oath.⁴⁴ In accordance with Internal Rule 55(7), a written record is to be made of every interview. The written record is read back to its author, who confirms the accuracy of its contents by providing a signature or thumbprint on every page. This record is then placed on the Case File and thus made available to the parties. As observed by the Chamber, written records by the Co-Investigating Judges or their

Chea motion E142 and IENG Sary letter to the Trial Chamber Senior Legal Officer of 11 December 2011 (E142/1)”, 20 December 2011, E142/2.

³⁹ See Internal Rules 53 and 55; ECCC Agreement, Article 5; and ECCC Law, Article 23new; see also Code of Criminal Procedure of the Kingdom of Cambodia, Article 127.

⁴⁰ Internal Rule 55(5)(a); see also Internal Rule 60(1).

⁴¹ Internal Rule 62; see also Internal Rules 14(5) and 55(9) and Code of Criminal Procedure of the Kingdom of Cambodia, Articles 131, 173-174. According to Internal Rule 16, investigators shall be accredited before the Ministry of Justice of Cambodia and swear an oath before a Chamber of the ECCC.

⁴² Internal Rule 60(2): “Except where a confrontation is organised, the Co-Investigating Judges or their delegates shall interview witnesses in the absence of the Charged Person, any other party, or their lawyers, in a place and manner that protects confidentiality;” see also Code of Criminal Procedure of the Kingdom of Cambodia, Article 153.

⁴³ Internal Rule 62(3)(a). While this provision requires compliance with Internal Rule 51(8), which mandates the Co-Investigating Judges to “record the duration of any interview, and the duration of any breaks between interview periods,” the reference to these provisions is of limited relevance as it concerns only the procedure for a report on the arrest of a person taken into police custody. See also Code of Criminal Procedure of the Kingdom of Cambodia, Article 178.

⁴⁴ Internal Rule 24; see also Code of Criminal Procedure of the Kingdom of Cambodia, Article 154

delegates are not verbatim records but summary reports, as complete and impartial as possible, of the statements made by a victim or a witness.⁴⁵

17. Although Internal Rule 25 permits the audio or video recording of an interview, this Chamber has already clarified that it is not mandatory to do so.⁴⁶ Internal Rule 25 specifically requires the audio or video recording only for interviews of suspects or Charged Persons. This practice is in accordance with procedural rules established at the international level where the audio and video recording of witness interviews during the investigation phase is not mandatory.⁴⁷ The procedural safeguards applicable before the ECCC during the investigation phase, which derive from the independence and impartiality of the Co-Investigating Judges, are absent from other internationalized tribunals where investigations are instead conducted by the parties to the proceedings.⁴⁸

3.1.2. Access to the Case File by the Parties

18. The Case File contains all evidence, both inculpatory and exculpatory, gathered during the judicial investigation and relevant to the charges against an Accused, including records of investigative actions undertaken during the judicial investigation, written records and audio or video recording of interviews, as well as all applications made by the parties to the proceedings. Suspects, upon being charged, and their lawyers are given immediate access to the Case File. The Case File is accessible to all the parties at all times.⁴⁹

⁴⁵ OCIJ Audio and Written Records Decision, para 11.

⁴⁶ OCIJ Audio and Written Records Decision, para 6. In addition, it is clear from a comprehensive reading of Internal Rule 25 in its three official languages versions that paragraphs 1 to 3 of this Rule apply to interviews of Suspects or Charged Persons conducted by the Office of the Co-Prosecutors or OCIJ, while paragraph 4 applies to the questioning of “other persons” namely witnesses, experts or Civil Parties at pre-trial stage, whereas paragraph 5 applies to the questioning of any person appearing before the Chambers.

⁴⁷ See ICTY Rules of Procedure and Evidence, Rule 43 (foreseeing a mandatory audio or video recording only in regard to the interview of suspects); see also ICC Rules of Procedure and Evidence, Rule 112(4) and (5) (Stating that “[...] in particular where the use of such procedures could assist in reducing any subsequent traumatization of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence.” Upon the Prosecutor’s request, the Pre-Trial Chamber may also order an audio or video recording of the questioning of any person when it is demonstrated that it is a unique opportunity to take testimony or a statement from a witness which may not be available subsequently for the purposes of trial).

⁴⁸ In addition, the Code of Criminal Procedure of the Kingdom of Cambodia neither requires nor foresees the possibility for audio and video recording of interviews with suspects and charged persons, nor victims or witnesses. In all those instances, only written records are required; see Code of Criminal Procedure of the Kingdom of Cambodia, Articles 93, 115 and 242.

⁴⁹ Internal Rule 55(6). Access to the Case File by the parties is maintained throughout the trial phase (see Internal Rule 86).

19. When the Co-Investigating Judges consider that all relevant material collated during the investigation on the Case File provides sufficient grounds for the issuing of an indictment, the Case File is transferred to the Trial Chamber and the Accused is committed for trial on the basis of the indictment.⁵⁰

3.1.3. Challenges to the Regularity of the Investigation Phase

20. The Internal Rules provide several opportunities for the parties to test the information gathered during the investigation. During the investigation phase, the parties may request the Co-Investigating Judges to issue orders or undertake investigative actions they consider useful for the conduct of the investigation.⁵¹ In addition, during the judicial investigation itself, the parties may also challenge the validity of any part of the proceedings, including investigative actions, and seek their annulment. Appeal to the Pre-Trial Chamber of orders or decisions of the Co-Investigating Judges, including the decision to conclude the investigation and to send the Case File, together with the Closing Order, to the Trial Chamber for trial, constitute further procedural safeguards.⁵²

21. In view of the substantial procedural safeguards available during the investigation phase, Internal Rule 76(6) provides that “the Closing Order [when final] shall cure any procedural defects in the judicial investigation.” Accordingly, pursuant to this Rule, “[n]o issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”⁵³ In consequence, the Trial Chamber may only consider the nullity of procedural acts made “after the indictment was filed.”⁵⁴

22. The ECCC legal framework therefore does not envisage examination by the Trial Chamber of the procedural correctness of the judicial investigation upon being seized of the Case File.⁵⁵ The Chamber has also indicated that it is not an appellate or review body in relation to steps taken by other judicial entities during the investigation phase.⁵⁶ Further, as they are prepared under the judicial supervision of the Co-Investigating Judges with

⁵⁰ Internal Rules 67 and 69; *see also* Internal Rule 79(1).

⁵¹ Internal Rule 55(10).

⁵² *See* Internal Rules 66, 67, 73, 74 and 76.

⁵³ Internal Rule 76(6); *see also* Code of Criminal Procedure of the Kingdom of Cambodia, Article 256 and Decision on Conduct of the Judicial Investigations and Decision on Fairness of Judicial Investigation, paras 15 and 17.

⁵⁴ Internal Rule 89(1)(c); *see also* Decision on Fairness of Judicial Investigation, para 15.

⁵⁵ Decision on Fairness of Judicial Investigation, para 17.

⁵⁶ Decision on Fairness of Judicial Investigation, para 18.

safeguards as to their authenticity and reliability, witness statements, particularly those referred to in the Closing Order, taken during the judicial investigation by the OCIJ are entitled to a presumption of reliability.⁵⁷ This presumption may be rebutted only where cogent reasons are provided by the parties, supported by clear evidence that the statements in question are unreliable or inaccurate.

3.2. Standard of Review of Procedural Challenges to the Judicial Investigation

23. The parties have raised a number of specific allegations of irregularity and other procedural defects alleged to have occurred during the interview of certain witnesses by OCIJ investigators during the pre-trial phase. These include allegations that investigators staged their interviews with witnesses or did not make a complete audio recording of these interviews.

24. Trial proceedings, which in Case 002/01 followed a lengthy judicial investigation, are intended to examine issues of substance relevant to the facts contained the Closing Order and the allegations against the Accused.⁵⁸ All the parties, including the Defence, also have the opportunity to confront witnesses called to testify regarding alleged discrepancies between their oral evidence and prior statements where this is relevant to the evidence at trial.⁵⁹

25. In the domestic civil law system, in general not all the witnesses heard during the investigation phase are later called to testify at trial. The fact that a significant number of witnesses have been called in the current trial reflects in part the need to ensure that, following the confidential investigation phase, the public is afforded an opportunity to hear the testimony of witnesses, experts and Civil Parties The Chamber notes also that both the OCIJ (and on appeal, the Pre-Trial Chamber) have ruled that examination of witnesses may be conducted at trial, thereby requiring the Chamber to allow the parties a reasonable opportunity for this to occur.⁶⁰

⁵⁷ Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors' Annex A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, E185, para. 20.

⁵⁸ See also T., 6 September 2012, pp.36-37 and 42-43.

⁵⁹ OCIJ Audio and Written Records Decision, para. 13; see also Decision on Fairness of Judicial Investigation, para 19.

⁶⁰ E.g. Decision on Appeal and Further Submissions in Appeal against OCIJ Order on NUON Chea's Request for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340, 20 September 2012, D375375/1/8, para. 57.

26. One issue for determination is the impact, at trial, of the OCIs determination – contrary to the usual practice in civil law systems and reflecting time constraints during the judicial investigation – to remit consideration of certain challenges to witness interviews to the Trial Chamber for resolution. The Trial Chamber has therefore ruled that it might consider specific and reasoned challenges to the testimony of witnesses at trial, where relevant inconsistencies between their written record and audio recording of interview during the investigation phase are alleged, provided that the parties did not have an opportunity to detect the alleged irregularity before the trial commenced and that these inconsistencies are relevant to assessing the probative value of the evidence or necessary to safeguard the fairness of the proceedings.⁶¹ The rationale for this ruling is that the parties must be afforded a direct opportunity to test evidence introduced during the proceedings, particularly when directly relevant to the acts and conduct of the Accused, where this opportunity was denied during the pre-trial phase.⁶²

27. Where, however, alleged inconsistencies have no bearing on the facts at issue in trial, or on a witness' credibility, no challenge to their statements at the trial stage shall be entertained.

28. Where warranted, the Chamber will consider all irregularities in the witnesses interviews held during the investigation phase as well as all discrepancies between these interviews and their testimony at trial, when determining the probative value and the weight to be accorded to the evidence put before it.

⁶¹ OCIC Audio and Written Records Decision, paras 7, 12 and 14 (further clarifying that the Trial Chamber will entertain allegations of inconsistency only where these are identified with sufficient particularity and pertain to alleged discrepancies on the substance which have clear relevance to the trial and that any party raising such a challenge bears the burden of clearly identifying the alleged inconsistency and give timely advance notice to the Chamber and the other parties of these allegations and the documents relevant to them); *see also* Decision on Immediate Appeal by NUON Chea against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7, para. 31 (the Supreme Court Chamber, in discussing the rigid division of judicial competence at the ECCC in connection with allegation of interference with the administration of justice, indicated that any judicial organ seized of the case "cannot but withhold a residual power to guarantee that the proceedings comport with the international standards of justice").

⁶² In a previous Decision, this Chamber already recognized how affording the opportunity for the Defence to challenge such evidence is a condition for its admissibility at trial; *see* Decision on Admission of Witness Statements, paras 21-25 (indicating in the absence of oral testimony and an opportunity for confrontation the probative value and weight to be accorded to such evidence may be in many circumstances be limited); *see also* Code of Criminal Procedure of the Kingdom of Cambodia, Article 297.

3.3. Assessment of the Defence Requests

3.3.1. *Timeliness of the Requests*

29. Each of the witnesses in question was interviewed during the investigation phase. Witness PHY Phuong was interviewed by OCIJ investigators on 5 December 2007 and on 21 September 2008. The written records of these interviews were placed on the Case File by 10 September 2008 and on 10 September 2009, respectively.⁶³ Audio recording of these interviews were made and placed on the Case File on 14 July 2008 and on 10 September 2009, respectively.⁶⁴ Witness OEUN Tan was interviewed on 9 October 2008 and on 26 March 2009. The written records of these interviews were placed on the Case File by 4 November 2008 and on 14 September 2009, respectively.⁶⁵ The audio recording of the 9 October 2008 interview was placed on the Case File on 29 October 2008.⁶⁶ Finally, Witness NORNG Sophan was interviewed on 18 February 2009 and on 28 March 2009. The written records of these interviews were placed on the Case File by 8 December 2009 and on 5 March 2010, respectively.⁶⁷ The audio recording of the 18 February 2009 interview was placed on the Case File on 14 September 2009.⁶⁸

⁶³ Written Record of Interview of PHY Phuong, 5 December 2007, E3/24. The Khmer version of this written record was placed on the Case File on 14 July 2008, while the English version was placed on the Case File on 10 September 2008. In addition, the French version was initially placed on the Case File on 27 April 2010 and reissued after a correction on 4 November 2011; *see also* Written Record of interview of PHY Phuong, 21 September 2008, E3/63.

⁶⁴ Interview of PHY Phuong, 5 December 2007, D91/10R; The Khmer version of the full transcription of the audio recording of this interview was placed on the Case File on 15 November 2011, while the English version was placed on the Case File on 21 December 2011; *see* Transcript of Recorded Interview with PHY Phuong, D91/10.1. *See also* Audio Recording of the Interview of PHY Phuong, 21 September 2008, D107/3R. A partial transcription of the audio recording of this interview is now available. *See* Transcript of Recorded Interview with PHY Phuong, D107/3.1.

⁶⁵ Written Record of Interview of OEUN Tan, 9 October 2008, E3/33; Written Record of Interview of OEUN Tan, 26 March 2009, D200/8. The Khmer and the French versions of the written record of the 9 October 2011 were placed on the Case File on 29 October 2008, while the English version was placed on the Case File on 4 November 2008.

⁶⁶ Audio Recording of the Interview of OEUN Tan, 9 October 2008, D107/2R. A partial transcription of the audio recording of this interview is now available; *see* Partial Transcript of Recorded Interview with Mr. OEUN Tan, D107/2.1. The audio recording of the 26 March 2009 interview was placed on the Case File on 14 September 2009; *see* Audio Recording of Interview of OEUN Tan, 26 March 2009, D200/8R.

⁶⁷ Written Record of Interview of NORNG Sophan, 18 February 2009, E3/64; Written Record of Interview of NORNG Sophan, 28 March 2009, E3/67. The Khmer and the English versions of the written record of 18 February 2009 were placed on the Case File on 14 September 2009, while the French version was placed on the Case File on 8 December 2009.

⁶⁸ Audio Recording of Interview of NORNG Sophan, 18 February 2009, D200/3R. Several partial transcriptions of this audio recording are now available. The audio recording of the 28 March 2009 interview was placed on the Case File on 14 September 2009; *see* Audio Recording of Interview of NORNG Sophan, 28 March 2009, D200/9R.

30. During the Initial Hearing held on 27-29 June 2011, the Chamber discussed with the parties the list of individuals proposed to be heard during the trial and, on 25 October 2011, issued a provisional list of witnesses, experts and Civil Parties to be heard at trial. This list included witnesses PHY Phuon, OEUN Tan and NORNG Sophan.⁶⁹

31. According to the IENG Sary and KHIEU Samphan Defence, they were alerted to the possible irregularities of the written records and the audio recordings of the interviews of PHY Phuon, OEUN Tan and NORNG Sophan by the OCIJ during their preparation for the testimony of these witnesses. This was several years after the interviews were conducted and their written records and audio recordings placed on the Case File, and thus made available to all parties, and several months after the commencement of the trial. The Chamber finds these allegations not to be timely and indeed, difficult to assess given the impact of the passage of time on the recollection by the witnesses of the precise circumstances of their interviews.⁷⁰ The Chamber therefore finds that the IENG Sary and the KHIEU Samphan Defence failed to raise this issue during the investigation phase or in a timely manner upon the commencement of the trial.

3.3.2. Impact of the Alleged Irregularities on the Fairness of the Proceedings

32. Witness PHY Phuon testified before the Trial Chamber from 25 July to 2 August 2012, Witness OEUN Tan on 13-14 June 2012, and Witness NORNG Sophan on 29 August and on 3-6 September 2012. Upon the commencement of their testimony, each witness indicated that they had reviewed the written records of their prior interviews with the OCIJ and confirmed the accuracy of their contents.⁷¹ All parties, including the IENG Sary and the KHIEU Samphan Defence, questioned the witnesses in relation to several topics, including the modalities of their interviews before the OCIJ. During their testimony, several portions of their written records of these interviews were also put to the witnesses for comment or

⁶⁹ Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, 25 October 2011, E131/1.1.

⁷⁰ When questioned at trial about possible irregularities during his interviews with the OCIJ, witness NORNG Sophan indicated that he could not remember much about it due to the length of time which had elapsed (T., 5 September 2012, p. 62).

⁷¹ See, respectively, T., 25 July 2012, pp. 69-72; T., 13 June 2012, pp. 9-10; T., 29 August 2012, pp. 32-33. This practice applied to all witnesses testifying at trial; see Notice to parties regarding revised modalities of questioning and response to Co-Prosecutors' request for clarification regarding the use of documents during witness testimony (E201), 14 June 2012, E201/2 and Trial Chamber memorandum entitled "Provision of prior statements to witnesses in advance of testimony at Trial", 24 November 2011, E141/1 (indicating that the purpose of this practice is to avoid wasting valuable in-court time and to provide witnesses with an opportunity to refresh their memories in advance of their testimony).



clarification on matters of substance, or to test the witnesses' credibility. At the outset, the Chamber notes that it does not consider the testimony of any of these witnesses to give rise to serious allegations of misconduct or other significant irregularities in their interviews by OCIJ investigators such as threats, inducement or obvious expressions of partiality in the conduct of questioning.

33. The Trial Chamber has reviewed the written record and the audio recording of PHY Phuon's OCIJ interview of 5 December 2007. The audio recording consists of the investigators and the witness reading the written record of the interview. The Trial Chamber agrees with the IENG Sary Defence that a decision on the part of the OCIJ to simply read out the summarized statement to a witness in order for it to be recorded is puzzling and defeats the purpose of producing an audio recording of an interview with a witness. The IENG Sary Defence, however, had the primary duty to bring this issue to the attention of the Co-Investigating Judges or the Pre-Trial Chamber for appropriate relief at the relevant time. The Chamber considers that this irregularity does not reach the threshold of creating a significant inconsistency between the witness' prior statements and his testimony at trial and does not jeopardize the fairness of the proceedings. Both the witness and the parties were allowed to provide comments on the circumstances of the interview in question during the witness' testimony at trial.⁷² Accordingly, the Chamber does not deem it necessary to summon the interpreter present during witness PHY Phuon's interview with the OCIJ.

34. During his testimony, witness OEUN Tan indicated that he was interviewed by OCIJ investigators also on 8 October 2008, for about the whole day, that he answered the questions put to him by the investigators and that the interview was not audio recorded.⁷³ The audio recording of the interview of 9 October 2008 also confirms that the witness was questioned on the previous day.⁷⁴ The witness and the parties provided comments on the circumstances of this interview. The Chamber finds that the irregularities alleged by the Defence are limited to procedural issues and fail to raise well-founded concerns regarding the reliability of the investigation phase. The IENG Sary Defence also failed to substantiate its allegations that the written record of interview of OEUN Tan of 9 October 2008 is "nothing short of subterfuge" which "deliberately misleads" the Chamber.⁷⁵ In the audio recording of 9 October 2008, the

⁷² T., 25 July 2012, pp. 61-65, 69-72; T., 31 July 2012, p. 81; T., 1 August 2012, pp. 3-16. 83-86.

⁷³ T., 14 June 2012, pp. 25-35, 45-51.

⁷⁴ Partial Transcription of Recorded Interview with Mr. OEUN Tan, D107/2.1, p. 4.

⁷⁵ Second IENG Sary Request, paras 6-8.

investigators themselves indicate that no audio recording was made on the previous day.⁷⁶ These indications are inconsistent with any intention by the investigators to mislead the Chamber. Accordingly, the Chamber finds it unnecessary in the circumstances to seek further clarification from the OCIJ on this issue or to otherwise substantiate the serious allegations levelled against the Co-Investigating Judges by the IENG Sary Defence.

35. Similarly, during his testimony, NORNG Sophang was questioned and indicated that he was interviewed by OCIJ investigators also on 17 February 2009, for about one hour, and that the meeting was not recorded.⁷⁷ The witness confirmed that the investigators told him to speak the truth and to confine his answers to his own experiences.⁷⁸ The audio recording of the interview of 18 February 2009 also refers to the witness being questioned on the previous day.⁷⁹ The Chamber therefore finds it unnecessary in the circumstances to seek further clarification from the OCIJ on this issue or to summon its investigators.

3.3.3. *Conclusions*

36. The Chamber is satisfied that the Defence of all the Accused have been afforded the opportunity to confront the above witnesses over alleged discrepancies between their written records and audio recordings of interviews with the OCIJ, including during their oral testimony at trial. It finds that the irregularities alleged by the Defence do not amount to significant or substantial inconsistencies likely to impact negatively the fairness of trial proceedings. Allegations of bad faith on the part of the OCIJ investigators are not substantiated by any of the material forming part of the trial record or by any responses given by these witnesses to questioning by the bench or by any party at trial.⁸⁰

⁷⁶ Partial Transcription of Recorded Interview with Mr. OEUN Tan, D107/2.1, p. 4.

⁷⁷ T., 5 September 2012, pp. 60-65 and 87-101; T., 6 September 2012, pp. 29-48.

⁷⁸ See T., 5 September 2012, p. 101.

⁷⁹ Partial Transcript of Recorded Interview by Investigator with NORNG Sophan, D200/3.12, p. 2.

⁸⁰ Many allegations raised are repetitious and have been the subject of several decisions issued by the Pre-Trial Chamber and the Trial Chamber, (see e.g. Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request to Seize the Pre-Trial Chamber with a view to Annulment of all Investigations (D263/1), 25 June 2010, D263/2/6; Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by IENG Thirith, 31 December 2009, D264/1; Decision on IENG Sary's Application to Disqualify Co-Investigating Judge Marcel LEMONDE, 9 December 2009, 002/09-10-2009-ECCC/PTC(01), Doc. No. 7).

3.4. Preclusion of Investigations Carried Out by the Parties

37. Pursuant to Internal Rule 93, the Trial Chamber alone may conduct new investigations at this stage of the proceedings.⁸¹ The Co-Investigating Judges have already indicated that pursuant to Internal Rule 55, the parties are not authorized to conduct their own investigative actions, although a party may conduct such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative actions.⁸² The IENG Sary Defence is well aware of this prohibition, having recalled it in several of its previous filings,⁸³ and having been issued a warning during the judicial investigation by the Co-Investigating Judges.⁸⁴

38. According to the First IENG Sary Request, after raising the matter of the discrepancies between the written record and the audio recording of interview of witness PHY Phoun during the hearing of 25 July 2012 and requesting the Chamber to summon the interpreter who was present during the OCIJ interview, on 1 August 2012 the IENG Sary Defence spoke directly to the interpreter.⁸⁵ The Chamber finds that the conduct of the IENG Sary Defence amounts to an interview with a potential witness on a matter which was already clearly under the Chamber's consideration and extends beyond a preliminary inquiry related to its request for investigation, is therefore inappropriate and in breach of the Internal Rules.⁸⁶ In addition, this interview was conducted by individuals who, as parties to the proceedings, are not entitled to a presumption of impartiality and was conducted without any sort of record. Accordingly, the Chamber issues a warning pursuant to Internal Rule 38 to the IENG Sary Defence that they are prohibited from conducting investigations and that any breach of this provision may result in the application of sanctions against them.

⁸¹ Where the Trial Chamber considers that a new investigation is necessary, it may appoint a Judge to conduct such investigation. The Judge shall act under the same conditions as the Co-Investigating Judges. *See* Internal Rule 93(1) and (2).

⁸² *See e.g.* OCIJ Memorandum Entitled "Copy to CP, Defence teams 002 and Head of DSS of the CIJ Response to NUON Chea's Lawyers Letter dated 20 December 2007", 14 January 2008, A110/II. This was confirmed by the Trial Chamber.; *see* Trial Chamber Memorandum Entitled "NUON Chea Defence Notice to the Trial Chamber Regarding Research at DC-Cam (E211)", 13 August 2012, E211/2, paras 2 and 4.

⁸³ *See e.g.* IENG Sary's Request for Investigative Actions Under Internal Rule 35 to Determine whether the OCP has been Conducting Impermissible Investigations into Case File 002, 31 March 2012, D374, para 5; *see also* IENG Sary's Response to Co-Prosecutors' Investigative Request to Place Additional Evidentiary Material on the Case File, 23 March 2010, D366/1, para. 5; IENG Sary's Appeal against the OCIJ's Order on Translation Rights and Obligations of the Parties, 25 July 2008, A190/II/1, para 17 and Third IENG Sary Request, para. 20.

⁸⁴ Order Issuing Warning Under Rule 38, 25 February 2012, D367, paras 6-9 (Indicating that the IENG Sary Defence is prohibited from conducting their own investigations).

⁸⁵ T., 1 August 2012, pp. 83-86. *See also* First IENG Sary Request, para. 7.

⁸⁶ *See also* Internal Rule 35(1)(d) and 35(5) (concerning interferences with potential witnesses).

3.5. Unauthorized Disclosure of a Filing Prior to Its Classification

39. Finally, the Chamber notes that excerpts of the Third and the Fourth IENG Sary Requests appeared in newspaper articles dated 24 September and 5 November 2012 by journalists Julia Wallace and Abby Seiff published in the local newspapers the *Cambodia Daily* and the *Phnom Penh Post*.⁸⁷ These publications amount to an unauthorized disclosure of a filing pending its classification by the Chamber. Pending its translation in Khmer and filing in the Case File, the IENG Sary Defence distributed a courtesy copy of the Request to the Chamber and the other parties on 21 September 2012. The Third IENG Sary Request was not filed until 28 September 2012 and was classified as public. The Fourth IENG Sary Request was submitted on 2 November 2012 and the filing process, including its notification to the parties and the public, took place on 5 November 2012. While in the interests of transparency the Trial Chamber classifies the vast majority of documents and filings as public, it is for the Chamber to determine how relevant documents on the Case File are to be classified.⁸⁸ This determination is complete only upon the filing of a document by a party and its notification by the Chamber.⁸⁹ This Chamber has already advised media representatives of the possible impact of unauthorized disclosure of material on the interests of victims, witnesses and the entirety of the trial proceedings. In light of these new incidents, the Chamber reiterates its invitation to media representatives to verify whether material in their possession is legitimately in the public domain by contacting, where necessary, the Trial Chamber Senior Legal Officer (via the ECCC Public Affairs Office) for assistance.⁹⁰

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REJECTS the First, Second, Third and Fourth IENG Sary Requests;

REJECTS the First and Second KHIEU Samphan Requests as well as the KHIEU Samphan Joinder to the Fourth IENG Sary Request;

REJECTS the NUON Chea Joinder to the Third IENG Sary Request;

⁸⁷ More Witness Statements Questioned by IENG Sary Team, *Cambodia Daily*, 24 September 2012, page 18; Examine interview sessions: IENG Sary Team, *Phnom Penh Post*, 5 November 2012, page 4.

⁸⁸ See also Decision on Immediate Appeal by NUON Chea against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7, para. 37.

⁸⁹ After a document is submitted for filing, there may be a delay, for administrative reasons, before its classification is determined and notification takes place. Such a delay is particularly likely in a complex case involving multiple defendants, different working languages and large quantities of documents.

⁹⁰ See Trial Chamber Press Release entitled "Trial Chamber Decision on Misconduct of the NUON Chea Defence", 29 June 2012.

ISSUES a warning pursuant to Internal Rule 38 to the IENG Sary Defence that they are prohibited from conducting investigations and that any breach of this provision may result in the application of sanctions against them.

REMINDS media representatives that they may verify whether material in their possession is legitimately in the public domain by contacting, via the ECCC Public Affairs Office, the Trial Chamber Senior Legal Officer for assistance. *pc*

Phnom Penh, 07 December 2012
President of the Trial Chamber

