

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 8 October 2012

CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC

Classification by Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



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"

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. The Co-Prosecutors were notified on 28 September 2012 of a filing by the defence for Ieng Sary (“the Defence”) seeking to have the Trial Chamber: (1) seek clarification from the OCIJ with respect to five points of information regarding any interview conducted with Norng Sophang on 17 February 2009; (2) place any extant records of said interview on the Case File; and (3) “[s]ummon the investigators to give evidence concerning the circumstances of their 17 and 18 February 2009 interviews with Norng Sophang”¹ (the “Request”).
2. The Co-Prosecutors submit that the Defence have not identified any error that justifies a remedy of any sort, and therefore the very premise of their filing is fatally flawed. The Co-Prosecutors have previously responded to a similar request in relation to Norng Sophang made by the defence for Khieu Samphan.² That request asked the Trial Chamber to, *inter alia*, “seek clarification from the OCIJ regarding the interview of witness Norng Sophang.”³ The Co-Prosecutors responded that the Trial Chamber should deny that request because it had failed to substantiate any error justifying the requested remedy.⁴ The instant Request is likewise unsubstantiated and should be dismissed.
3. Furthermore, the Co-Prosecutors submit that there are numerous indications that the Request has not been made in good faith. While this is an independent ground on which to dismiss the Request, the Co-Prosecutors submit that it would be much preferable for the Trial Chamber to issue a decisive ruling on the claims regarding the investigative phase of Case 002 that the defence teams have been repeatedly raising of late.
4. The Co-Prosecutors object to all of the Defence’s forms of requested relief but do not oppose the request for the Trial Chamber to inquire as to the existence of a record of any 17 February 2009 interview with Norng Sophang, and to place on the Case File any such record if available. While there is absolutely no evidence whatsoever that Norng Sophang’s testimony has been

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 OCJIJ Investigators to Give Evidence Regarding this Interview, 27 September 2012 (hereinafter “Request”), at p. 15.. Notified 28 September 2012.

² **E224/2** 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; **E224/3** Co-Prosecutors’ Response to Khieu Samphan’s “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”, 18 September 2012.

³ **E224/2** 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, para. 6.

⁴ **E224/3** Co-Prosecutors’ Response to Khieu Samphan’s “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”, 18 September 2012, para. 20.

improperly influenced, and while the witness's oral evidence supports the accuracy and reliability of his prior written statements, if other records of relevant interviews with the witness exist, their placement on the file would be appropriate.

II. ARGUMENT

A. The Defence Fail to Demonstrate a Basis for Their Claim Regarding Norng Sophang

5. The Request fails to substantiate any error justifying its requested remedies in regards to Norng Sophang. As the Co-Prosecutors have consistently explained in regards to similar claims directed at other witnesses⁵ and in relation to Norng Sophang⁶: 1) any procedural defects that occurred at the investigatory stage have been cured; 2) the appearance of Norng Sophang in court to provide testimony during which the Defence was able to, and did, test his evidence protects Ieng Sary's fair trial rights; and 3) the written record of Norng Sophang's interview accurately reflects the interview and complies with ECCC rules.

i. Alleged Procedural Defects in the Judicial Investigation are Cured by the Closing Order

6. The Request is based on alleged procedural defects in the judicial investigation – specifically, the manner in which the interview of Witness Norng Sophang was conducted by OCIJ investigators. However, as previously ruled by this Chamber, “the Internal Rules do not envisage examination by the Trial Chamber of the procedural correctness of the judicial investigation upon being seized of the case.”⁷
7. Pursuant to those Rules, applications concerning procedural defects can only be brought during the pre-trial phase, and as this Chamber has found “[t]he ECCC legal framework concerning the judicial investigation contains sufficient procedural safeguards for the Accused, including opportunities to address the CIJs on any matter and appeal to the Pre-Trial Chamber on decisions taken by the CIJs, where considered necessary.”⁸
8. These safeguards include properly formulated investigatory requests made under Rule 55(10). It is strange, however, that the Defence relies on “Ieng Sary's Third Request for Investigative

⁵ See **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; **E221/1** 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.

⁶ **E224/3** Co-Prosecutors' Response to Khieu Samphan's “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”, 18 September 2012.

⁷ **E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011, para.17 (hereafter “Fairness of Judicial Investigation Decision”).

⁸ **E116** Fairness of Judicial Investigation Decision, at para. 18.

Action”⁹, a request that nowhere mentions specific alleged irregularities with respect to witness interviews and that was in any case held by the Pre-Trial Chamber to be “not one falling within the right of the Charged Person to make under the laws applicable to the ECCC or its Internal Rules”¹⁰. It is also disconcerting that the Defence fail to reference the Pre-Trial Chamber’s ruling anywhere in their Request.

9. Nevertheless, the OCIJ did respond to the Defence’s “Third Request for Investigative Action”.¹¹ In addition to the Defence’s erroneous claim that the OCIJ violated Rule 25, as described more fully in sub-part II(A)(iii) below, the Defence fail to show how the general information they were requesting supports their claims regarding Norng Sophang. They aver that “[h]ad the OCIJ provided the information sought, the Defence would have been in a position during the investigation phase of the proceedings to show that the investigation was being carried out in a haphazard and substandard manner.”¹² And yet they acknowledge that their basis for the instant Request, which concerns only the interview of Norng Sophang, is the audio recording of that interview which they had access to during the investigatory phase.¹³ It is therefore unclear how *more* information would have had any impact on the instant Request, when the Defence failed to review the information already available to them. The Defence seeks to hide its failure to exercise due diligence and make timely and relevant requests during the investigation behind a supposed failure by the OCIJ to respond to broad requests for information on systems and procedures, which requests the OCIJ was not required to entertain in the first place.
10. In addition to investigative requests under Rule 55(10), during the judicial investigation the Defence also had the right under Rule 76 to make applications for the annulment of written records or other investigative acts, and to appeal any adverse decision.¹⁴ Indeed, the President made this point to the Defence during their questioning of Norng Sophang.¹⁵ The Defence did not apply to annul any acts of the Co-Investigating Judges in relation to Norng Sophang. The argument as to the Defence’s limited resources and its choice to focus on legal and technical

⁹ **D171** Ieng Sary’s Third Request for Investigative Action, 21 May 2009.

¹⁰ **D171/4/5** Decision on Ieng Sary’s Appeal Against the Co-Investigating Judges’ Constructive Denial of Ieng Sary’s Third Request for Investigative Action, 22 December 2009, para. 9.

¹¹ **D171/5** Memorandum: “Your ‘Request for Investigative Action’, Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation”, 21 May 2009.

¹² **E234** Request, at para. 19.

¹³ **E234** Request, at para. 1(a).

¹⁴ See also **E71/1** Decision on Ieng Sary’s Motion for A Hearing on the Conduct of the Judicial Investigations, 8 April 2011, p. 2 (“[T]he parties were able to submit reasoned applications of any part of the proceedings they considered null and void during the judicial investigation itself, and ... any decisions concerning such applications were open to appeal before the Pre-Trial Chamber in accordance with the Internal Rules.”).

¹⁵ **E1/123.1** Transcript of Proceedings, 6 September 2012, p. 34 (“During the investigative stage, if any of the parties request to nullify, then it shall be done so through the Co-Investigating Judges by lodging an appeal for nullification to the Pre-Trial Chamber.”).

aspects of the investigation is entirely unconvincing – at the very least, the Defence was under an obligation to review carefully those categories of evidence being placed on the Case File which relate more specifically to their client. Evidence in this category (such as the statements of Norng Sophang) forms a far more limited collection of written records and audio / visual materials than the entire Case File collection which the Defence has referred to.

11. At the notification of the close of the investigation, the parties had an additional opportunity to request further investigative actions and any rejections of such requests were also subject to appeal¹⁶. The Defence did not request any additional investigative actions at that point in relation to Norng Sophang.
12. After all of these opportunities to correct any perceived concerns had passed unused by the Defence, the Closing Order was issued. Rule 76(7) provides: “Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”¹⁷ The ECCC rules are thus crystal clear that procedural challenges to investigative acts are limited to the pre-trial phase. It is striking, and revealing of how disingenuous the Request is, that the Defence do not even address Rule 76(7).
13. The Defence’s requested action seeking to interview investigators and seeking various explanations from the OCIJ in the absence of a shred of evidence of actual problematic irregularity would contravene the division enshrined in both the Rules and general structure of the ECCC between investigative and trial stages. The Trial Chamber is “not an appeal or review body in relation to decisions of [the Pre-Trial] Chamber.”¹⁸ Accordingly, “[a]s a general matter, objections regarding procedural steps or decisions taken by the CIJ’s and the Pre-Trial Chamber during the investigative phase must be raised with the competent judicial organs before the Closing Order becomes final.”¹⁹
14. The Trial Chamber has indicated that exceptions to Rule 76(7) may be available “where the parties can demonstrate that they did not have an opportunity to detect the alleged distortion before the opening of the trial or if it appears necessary to safeguard the fairness of trial

¹⁶ Internal Rule 66.

¹⁷ See also **E71/1** Decision on Ieng Sary’s Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, p. 2.

¹⁸ **E116** Fairness of Judicial Investigation Decision, at para. 18.

¹⁹ **E116** Fairness of Judicial Investigation Decision, at para. 15.

proceedings.”²⁰ Neither of those exceptions applies here. The Defence had ample opportunity to detect the issue they allege in their Request, which they claim they were alerted to by a question put to Norng Saphong in the audio recording of his interview.²¹ As this Chamber has previously noted:

*Both the audio recordings and the written records were ... placed in the Case File on a rolling basis over the course of the judicial investigation and have therefore been available to the parties (all of whom have competence in both Khmer, as well as English and/or French) for several years.*²²

15. The Trial Chamber has thus rejected a Rule 35 request by the Nuon Chea Defence based on alleged inconsistencies between the audio and written records of OCIJ interviews, finding that “[d]uring the investigation phase, all parties had access to the case file, including the audio recordings” and that the Defence failed to demonstrate that it was not possible to assess the existence of irregularities in written records “before the opening of trial.”²³ Similarly here, the Defence could have reviewed the audio recording and written record of interview of Norng Saphong. There is thus no legitimate excuse for failing to have discovered and raised the supposed concerns that the Defence is now raising prior to the opening of trial.

16. Judge Cartwright recently reaffirmed these principles to the parties in court:

Therefore, the general rule is that there is a legal presumption of the integrity of the investigation, that any concerns about the methods or the subject matter traversed during the investigation must be raised during the investigation. And now, at trial, ... the investigation is treated as the starting point and can be rebutted only in exceptional circumstances.

Any such rebuttal must relate not to technical issues but to substance. And in raising an exception, [a Party] must satisfy the Trial Chamber that [a Party has] well-grounded concerns about the reliability of any part of the investigation. To use a well-known common law term, [a Party] cannot embark on a fishing ... expedition.

*... [A Party] need[s] to satisfy the Trial Chamber that there is a well-grounded reason for going back inside the investigation and investigating it.*²⁴

²⁰ **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. 7 (hereafter “Witness Interview Decision”).

²¹ **E234** Request, at para. 1(a).

²² **E142/3** Witness Interview Decision, at paras. 6, 8.

²³ **E142/3** Witness Interview Decision, at para. 8.

²⁴ **E1/123.1** Transcript of Proceedings, 6 September 2012, p. 43; see also *ibid.* at pp. 36-37 (Wherein Judge Lavergne noted “some very obvious facts”, including that “[t]he judicial investigation that preceded this trial lasted many years. During the course of the investigation, there were investigative acts that were put on the case file. They were made accessible by the defence teams and by the Accused. ... We are not discussing the investigation at this point in time. ... We are here to study and examine issues of substance. Issues relating to the judicial investigation must not be subject to redundant and repetitive questions.”).

17. Indeed, as Judge Cartwright observed, the conduct of the OCIJ is entitled to a presumption of regularity that cannot be rebutted by motions that are “considered to be speculative or unsubstantiated” as is the instant one.²⁵

ii. The Testimony of This Witness Adequately Addresses Any Questions about the Circumstances of his OCIJ Interview and Protects the Fair Trial Rights of the Accused

18. Moreover, an exception to Internal Rule 76(7) is not necessary here to safeguard the fairness of trial proceedings. Even if there were questions about the manner in which the interview of Norng Sophang was conducted, this Witness testified in Court and the Defence had the opportunity to, and did, cross-examine him on both the substance of his testimony and the procedure followed in his OCIJ interview,²⁶ as did other defence teams.²⁷ It is that process that allowed the Defence to “test the credibility of witness testimony”²⁸. In rejecting the Nuon Chea Defence Rule 35 request based on alleged discrepancies between written records of interviews and audio recordings, the Trial Chamber ruled that the Defence “will in any event have the further safeguard of being able to question any witness at trial on these alleged discrepancies, where these alleged inconsistencies are demonstrably relevant either to assessing the probative value of the evidence or necessary to safeguard the fairness of trial proceedings.”²⁹ The fair trial rights of the Accused have thus already been adequately protected in relation to the testimony of this witness.

19. To be clear, the Co-Prosecutors support the right of the defence teams to put reasonable, relevant inquiries to witnesses regarding the process of the witnesses’ investigatory interviews. As the Co-Prosecutors stated in court, “[w]e would agree with counsel that where significant inconsistencies arise, where there is a legitimate question as to the credibility of a witness ... that some latitude should be given to [the Defence] to explore prior statements and prior transcripts. ... [W]e will always support [the Defence’s] right to test the evidence, but it is a question of degree, and in this case they have certainly gone beyond that which is legitimate.”³⁰

20. It is important to note that in relation to Norng Sophang, the Defence did have the opportunity to ask questions relating to the investigative process, although a reader who relied on what the Defence summarize as the “relevant portion” of the transcript from 6 September 2012 would be

²⁵ **E142/3** Witness Interview Decision, at para. 10.

²⁶ **E1/123.1** Transcript of Proceedings, 6 September 2012, at pp. 29-108.

²⁷ **E1/122.1** Transcript of Proceedings, 5 September 2012, at pp. 38-102; **E1/123.1** Transcript of Proceedings, 6 September 2012, pp. 5-28.

²⁸ **E234** Request, at p. 1.

²⁹ **E142/3** Witness Interview Decision, at para. 14; *see also* **E116** Fairness of Judicial Investigation Decision, at para. 19.

³⁰ **E1/123.1** Transcript of Proceedings, 6 September 2012, p. 41.

forgiven for believing they did not, as those exchanges are curiously neither mentioned nor quoted therein.

21. Indeed, on the page after where the Defence's "relevant portion" concludes³¹, the transcript shows International Counsel for Ieng Sary, Michael Karnavas, asking various questions of Norng Sophang regarding any interactions the witness had with investigators prior to the recorded interview, including "The day before you were interviewed on tape, did you have a meeting with the investigators?", "Do you recall whether, indeed, you discussed Pang the day before you went on tape?", "[O]n that day that you were tape recorded, were you also asked questions prior to being interviewed?", and "What about your conversation from the day before? Can you please tell us, at least, how long that lasted – how much chatting was done the day before?".³² Norng Sophang responded to all of Mr. Karnavas's questions, which continued uninterrupted until Mr. Karnavas himself expressed satisfaction and decided he wanted to address a different subject, stating "All right Thank you. Let's move on a little bit ... ". The record clearly demonstrates how the Defence has been able to test Norng Sophang's evidence and his credibility – including by asking questions with respect to his discussions with OCIJ. In fact, the record demonstrates how, over several days of questioning on highly technical matters, the witness gave lucid and coherent evidence that is entirely consistent with his prior statements. There was not a shred of information that would support an argument that the witness was in some way improperly influenced by the OCIJ prior to giving his statements.
22. Moreover, the Defence was not the only, or even the first, defence team to address this precise line of questioning. Indeed, the day before Mr. Karnavas put his questions to Norng Sophang regarding the witness's OCIJ interviews, Arthur Vercken, International Counsel for Khieu Samphan, also asked the Witness about any prior interviews, and similarly concluded that line of questioning of his own volition.³³ The defence for Nuon Chea also engaged in questioning regarding the conduct, rather than the substance, of the OCIJ interview, although of a different sort.³⁴

³¹ E234 Request, at para. 2(f).

³² E1/123.1 Transcript of Proceeding, 6 September 2012, pp. 45-46.

³³ E1/122.1 Transcript of Proceedings, 5 September 2012, pp. 60-65.

³⁴ E1/122.1 Transcript of Proceedings, 5 September 2012, pp. 87-100 (during these pages, the defence for Nuon Chea was admonished for asking leading questions and impugning in unnecessary terms the honesty of the Office of the Co-Investigating Judges, but not for inquiring into the proceedings of the interview).

23. It should also be emphasized that now that Norng Sophang has given three-and-a-half aggregate days of consistent testimony before the Chamber³⁵, the question of his prior discussion with the OCIJ is of little or no consequence. It is his three-and-a-half days of court testimony that is the primary evidence now before the Chamber. The Defence seek to claim that error resulted from using Norng Sophang's witness statement to refresh his memory during his testimony.³⁶ However, as further described below, the witness statement complied with the Internal Rules and thus was not problematic in itself. More importantly, every time Norng Sophang was presented with a passage from his statement he was given the opportunity to confirm, deny and/or clarify the veracity of that statement. Again, the Defence also had the opportunity to question Norng Sophang on those facts.

iii. OCIJ's Written Record of Interview Accurately Reflected the Testimony of The Witness and Complied with ECCC Rules

24. The Trial Chamber has previously noted that "in accordance with the practice followed under Cambodian law, interviews before the OCIJ are not verbatim records but a report made by the Co-Investigating Judges of the relevant statements made by a witness, a Civil Party or Accused."³⁷ Irrespective of whether an additional discussion took place the written record fairly and accurately summarized the knowledge and testimony of the witness. Norng Sophang confirmed the accuracy of that statement both at the time it was made (by signing and placing his thumbprint on the record)³⁸ and when he appeared in Court to testify³⁹. There is thus no basis for the Defence to contend that the written record is not an accurate reflection of the prior interview conducted by OCIJ investigators. The procedural irregularities alleged by the Defence do not establish any substantive inconsistency in the evidence given by the Witness.

25. In attempting to construct an impression of wrongdoing, the Defence erroneously seek to apply Rule 25(2) to the OCIJ interview of witnesses, claiming that in circumstances where the OCIJ investigators were unable to audio or video record the interview they were required to state the reasons for not doing so in writing.⁴⁰ Read in conjunction with the other sections of Rule 25, which the Defence do not reference or discuss, it is clear that Rule 25(2) applies only to interviews with Suspects or Charged Persons.

³⁵ See **E1/117.1** Transcript of Proceeding, 29 August 2012; **E1/120.1** Transcript of Proceeding, 3 September 2012; **E1/121.1** Transcript of Proceeding, 4 September 2012; **E1/122.1** Transcript of Proceeding, 5 September 2012; **E1/123.1** Transcript of Proceedings, 6 September 2012.

³⁶ **E234** Request, at paras. 11, 12.

³⁷ **E142/3** Witness Interview Decision, at para. 11.

³⁸ **E3/64** Written Record of Interview of Witness Norng Sophang, 18 February 2009.

³⁹ **E1/117.1** Transcript of Proceeding, 29 August 2012, at p. 34.

⁴⁰ **E234** Request, at paras. 10, 11, 18.

26. Rule 25(1) describes the audio and video recording guidelines that must be followed “[w]henver possible[] when the Co-Prosecutors or Co-Investigating Judges question a Suspect or Charged Person”. Rule 25(2) follows on from that, explaining the procedure to be used when such recording is not possible: “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... .” Any doubt that Rule 25(2) also refers exclusively to Suspects or Charged Persons evaporates on reaching Rule 25(4), which 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...*”⁴¹ The only “persons” who have been “mentioned above” are Suspects and Charged Persons. Put another way, if the use of the word “person” in Rule 25(2) was meant to refer to all persons, rather than only Suspects or Charged Persons, Rule 25(4) would be rendered superfluous because there would be no “other persons” in Rule 25(4) not encompassed by a generic interpretation of “person” in Rule 25(2). Interviews of witnesses, therefore, fall under Rule 25(4), which makes clear that the OCIJ “may choose” to follow the parameters of Rule 25(1)-(3), but are not obligated to do so. The Trial Chamber has also concluded that the ECCC Internal Rules do not mandate that OCIJ investigators record witness interviews with audio / video equipment, or record the exact duration of witness interviews and breaks between interview periods.⁴²
27. Notwithstanding that they were not required to do so, most OCIJ interviews were audio-recorded, and those recordings were placed on the Case File and made available for review by the Defence and other parties. As the Chamber has noted, this practice of the OCIJ is “inconsistent with a deliberate practice of obstructing the investigation.”⁴³ In the present case, also inconsistent with any deliberate attempt to obstruct the investigation is the fact that during the recorded interview the investigators themselves referred to previous discussions with the witness.⁴⁴ The Defence’s allegations of impropriety directed at OCIJ investigators are therefore entirely unfounded and unfair.
28. In addition, the Defence fails to satisfy the standard laid down by this Chamber whereby it will consider entertaining “allegations of inconsistency between the audio recording and written records of interview only where these are identified with sufficient particularity and pertain to

⁴¹ Rule 25(4) (emphasis added).

⁴² **E142/3** Witness Interview Decision, at para. 6, fn. 13.

⁴³ **E142/3** Witness Interview Decision, at para. 14.

⁴⁴ **E3/1739** Partial Interview Transcript, 18 February 2009, p. 1.

alleged discrepancies on the substance which have clear relevance to the trial.”⁴⁵ The Defence have not established, whether in a generalized or particular fashion, any substantive problem in the written records of OCIJ interviews. Nor have they complied with the Trial Chamber’s procedural directive that “[a]ny party raising such a challenge further 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.*”⁴⁶ Indeed, the Defence provided no notice, timely or otherwise, to the parties or Trial Chamber that they sought to challenge Norng Sophang based on alleged inconsistencies between his prior statement and the audio recording of his interview. Instead, they raised the claim for the first time as they were examining the witness, and *after* the Co-Prosecutors and Civil Parties had concluded their examination of the witness.

B. The Defence do not Make their Request in Good Faith

29. The indications that the Defence do not come in good faith unfortunately do not end with the misrepresentations in their Request noted in the foregoing. During the testimony of Norng Sophang the Defence assured the Court that they “understand” and “appreciate” the Trial Chamber’s pronouncements regarding the “exceptional circumstances” they must show to justify an inquiry into procedural acts during the investigatory stage, and promised that they would “endeavour to do this ... because now [they] understand the Court’s position”⁴⁷. And yet they fail to make such showing here.
30. Furthermore, despite being informed by Judge Cartwright that in relation to the investigatory stage “[a]ny suggestions of impropriety are themselves improper” and acknowledging that directive⁴⁸, and despite being told by Judge Lavergne during the questioning of Norng Sophang that “issues raised at trial should be raised openly without containing in themselves allegations according to which the Co-Investigating Judges’ investigations have been dishonest or fraudulent” and that “at this stage in the proceedings such allegations are inappropriate”⁴⁹, in the Request the Defence refer to the actions of the OCIJ as “surreptitious”⁵⁰, an “investigative ploy”⁵¹, “concealment”⁵², “concealing the occurrence of prior unrecorded interviews”⁵³,

⁴⁵ E142/3 Witness Interview Decision, at para. 12.

⁴⁶ E142/3 Witness Interview Decision, at para. 12 (emphasis added).

⁴⁷ E1/123.1 Transcript of Proceeding, 6 September 2012, at p. 44.

⁴⁸ E1/123.1 Transcript of Proceeding, 6 September 2012, at p. 45.

⁴⁹ E1/122.1 Transcript of Proceedings, 5 September 2012, at p. 95.

⁵⁰ E234 Request, at para. 6.

⁵¹ E234 Request, at para. 10.

⁵² E234 Request, at para. 14.

⁵³ E234 Request, at para. 19.

“staging at least one recorded interview”⁵⁴ “a masquerade”⁵⁵ and imply that they may have “manipulated”⁵⁶ the witness.

31. The Defence also “incorporates by reference”⁵⁷ previous filings of theirs that have labeled the actions of the OCIJ as “subterfuge: a staged interview”⁵⁸, “deliberately mislead[ing]”⁵⁹, “staged and contrived”⁶⁰, “conducting a surreptitious unrecorded question-and-answer session, the OCIJ investigators deliberately set out to control, and if necessary create, ... testimony”⁶¹, conducting “a practice session designed and carried out to influence/manipulate [the witness’s] recorded statement”⁶², “[k]nowing that the written record of interview would be relied upon by the Trial Chamber and the parties, particularly since the witness signed it without objection, the OCIJ investigators presented an incomplete, inaccurate and misleading record”⁶³, engaging in a “deliberate failure to acknowledge the existence of an unrecorded question-and-answer session”⁶⁴, and stating that “[t]he OCIJ investigators deliberately provided a half-truth to the Trial Chamber and parties.”⁶⁵ The Defence also re-reference information they purportedly gleaned by interrogating an interpreter privately regarding matters they intended to call him as a witness to testify on—conduct the Co-Prosecutors have submitted is a clear violation of Rule 35(1)(d), which prohibits, *inter alia*, interfering with a potential witness.⁶⁶
32. All of this indicates that the Request is not a good faith filing seeking information that would legitimately advance the ascertainment of the truth. Rather, it is an entirely disingenuous tactical ploy, designed to create a false sense of procedural controversy in the face of compelling evidence against the Accused.

⁵⁴ **E234** Request, at para. 19.

⁵⁵ **E234** Request, at para. 14.

⁵⁶ **E234** Request, at para. 6.

⁵⁷ **E234** Request, at p. 1.

⁵⁸ **E221** 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, p. 1; *see also ibid.*, at para. 15; **E224** 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, (hereinafter “Oeun Tan Request”), at para. 6.

⁵⁹ **E224** Oeun Tan Request, at para. 6.

⁶⁰ **E224** Oeun Tan Request, at para. 6.

⁶¹ **E224** Oeun Tan Request, at para. 7.

⁶² **E224** Oeun Tan Request, at para. 8.

⁶³ **E224** Oeun Tan Request, at para. 9.

⁶⁴ **E224** Oeun Tan Request, at para. 14.

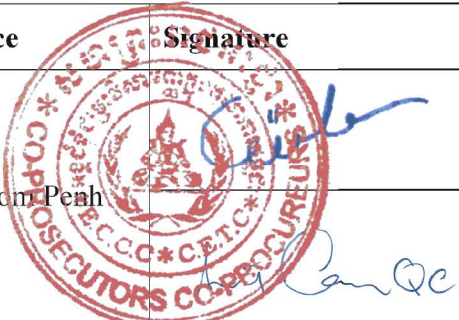

⁶⁵ **E224** Oeun Tan Request, at para. 18.

⁶⁶ **E234** Request, at para. 19; **E221/1** Co-Prosecutors’ Response to Ieng Sary’s Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuon’s Second OCIJ Interview, 4 September 2012, at paras. 20-22.

III. CONCLUSION

33. There is no disagreement between the Defence and the Co-Prosecutors that the Trial Chamber has the power to conduct investigatory measures under Rule 93. Where there is a fundamental disagreement is whether the Trial Chamber should exercise that power based on unfounded allegations that fly in the face of the record (as the Defence would have it do), or whether that power should be exercised judiciously and under limited circumstances not present here.
34. For reasons stated in the Introduction, the Co-Prosecutors do not oppose the Defence's request that "[i]f a record does exist of a 17 February 2009 interview, place it on the Case File for review and use by the parties"⁶⁷. However, the Co-Prosecutors submit that the Trial Chamber should dismiss all other parts of the Request as unmerited.

Respectfully submitted,

Date	Name	Place	Signature
8 October 2012	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

⁶⁷ E234 Request, at p. 15.