

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 27 September 2012**CLASSIFICATION****Classification of the document
suggested by the filing party:** PUBLIC**Classification by OCIJ
or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**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:**Distribution to:****The Co-Lawyers:**ANG Udom
Michael G. KARNAVAS**The Trial Chamber Judges:**Judge NIL Nonn
Judge YOU Ottara
Judge YA Sokhan
Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge THOU Mony
Reserve Judge Claudia FENZ**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 93 and 21 of the ECCC Internal Rules (“Rules”), hereby requests the Trial Chamber to seek clarification from the Office of Co-Investigating Judges (“OCIJ”) as to the circumstances of Witness Norng Sophang’s questioning by the OCIJ on 17 February 2009, and to summon the investigators who questioned him to give evidence regarding these circumstances. This Request is made necessary because the audio recording of Norng Sophang’s 18 February 2009 interview indicates that the investigators conducted an unrecorded interview with him the previous day, of which no mention was made in the OCIJ-prepared summaries of his statements. The Defence requests the Trial Chamber to seek clarification from the OCIJ as to the circumstances of Norng Sophang’s 17 February 2009 interview and to summon the investigators involved to determine: **a.** whether any record in fact exists of an interview with Norng Sophang on 17 February 2009; **b.** the length of the interview; **c.** the individuals who were present; **d.** the documents and other materials, if any, that were shown to Norng Sophang; and **e.** if no record exists, the reasons for the lack of any record. Mr. IENG Sary is entitled to test the credibility of witness testimony, which, in ECCC proceedings, inherently includes the witnesses’ statements to the OCIJ. The Defence incorporates by reference all relevant facts and legal arguments from its previous submissions related to material differences and discrepancies between OCIJ witness statements and the audio recordings of the interviews.¹ To further assist the Trial Chamber in appreciating the Defence’s efforts to uncover investigative irregularities, annexed to this Request is the Defence’s Third Investigative Request.

I. BACKGROUND

1. For purposes of this Request, the following facts are relevant:
 - a. In the audio recording of Norng Sophang’s 18 February 2009 interview, the OCIJ investigators twice allude to speaking with Norng Sophang the day before, on 17 February 2009.² For example, before questioning Norng Sophang about Pang, one of the investigators stated: “As you told me

¹ IENG Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012, E224; IENG Sary’s Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuon’s Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221; Letter from IENG Sary Defence Team to Trial Chamber’s Senior Legal Officer entitled “Objections to Witness Statement,” 9 July 2012, E96/7/1; Letter from IENG Sary Defence to Trial Chamber’s Senior Legal Officer entitled “Mixed up / missing audio files on the Case File,” 3 May 2012; Letter from IENG Sary Defence to Trial Chamber’s Senior Legal Officer entitled “Request for audio/video recordings of certain OCIJ witness interviews,” 9 March 2012.

² D200/3R, 01:25:00-01:26:00; 00:07:55-00:08:19.

yesterday about a person named Pang...”³ The 18 February 2009 written record of interview does not indicate that any prior interviews with Norng Sophang had been conducted.⁴

- b. On 6 September 2012, during his examination by the Defence, and after a lengthy discussion summarized below, Norng Sophang indicated that he had indeed met with the OCIJ investigators prior to his first recorded interview of 18 February 2009. He stated that he did not believe that meeting was recorded, and the OCIJ investigators had spoken with him for about one hour.⁵
2. The relevant portion of the 6 September 2012 in-court exchange concerning the line of questioning that led to this admission is as follows:
- a. International Co-Lawyer Michael G. Karnavas began questioning Norng Sophang about the circumstances of his first recorded interview.⁶
 - b. President Nil Nonn interrupted this line of questioning to ask: “the questions that you have been posing to the witness, do they related -- or are they related to any charges against your client?” and “did you ever read these statements during the investigative phase?”⁷ When Mr. Karnavas attempted to respond, President Nil Nonn cut him off to read out a portion of Rule 76 concerning annulment and to state that procedural defects may not be raised before the Trial or Supreme Court Chambers. President Nil Nonn stated that the Defence’s questions seemed to relate to procedural defects rather than the charges against Mr. IENG Sary.⁸
 - c. Mr. Karnavas explained that he was not seeking nullification of any investigative acts, but wished to explore questions about what happened during the unrecorded interview, such as: “Was he shown documents? How

³ D200/3R, 01:25:00-01:26:00.

⁴ Written Record of Interview, 18 February 2009, E3/64. Similarly, the report filed by the OCIJ investigators on the execution of the OCIJ’s rogatory letter does not indicate that an interview took place on 17 February 2009 between Norng Sophang and the investigators. *See* Rogatory Letter Completion Report, 10 September 2009, D200/1.

⁵ Transcript, 6 September 2012, E1/123.1, p. 45-46.

⁶ *Id.*, p. 29-32.

⁷ *Id.*, p. 32-33.

⁸ *Id.*, p. 34.

long was the conversation? Why wasn't that initial interview tape-recorded? What's the purpose of having a dress rehearsal?"⁹

- d. Judge Lavergne then stated: "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.... I believe that we have explored the matter extensively and we are now ready to move on to the next topic."¹⁰
- e. Mr. Karnavas responded that the questions he intended to ask "are essential in determining what weight, if any, to give this witness's testimony here in Court, because, in part, his testimony is on his statements which occasionally he has to refer to."¹¹
- f. At this point, the Court broke for morning recess. Following the recess, Judge Cartwright stated:

[T]he 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, as Judge Lavergne has expressed, the investigation is treated as the starting point and can be rebutted only in exceptional instances. Any such rebuttal must relate not to technical issues but to substance. And in raising an exception, you must satisfy the Trial Chamber that you have well-grounded concerns about the reliability of any part of the investigation. To use a well-known common law term, you cannot embark on a fishing ... expedition.... You need to satisfy the Trial Chamber that there is a well-grounded reason for going back inside the investigation and investigating it. Therefore, we would prefer and so rule that you simply ask the questions that you have of the witness.¹²

II. LAW AND ARGUMENT

A. Mr. IENG Sary has the right to confront witnesses and examine evidence

3. Article 31 of the Cambodian Constitution¹³ and Article 14 of the International Covenant on Civil and Political Rights ("ICCPR")¹⁴ (incorporated into the Constitution,

⁹ *Id.*, p. 34-35.

¹⁰ *Id.*, p. 36-37.

¹¹ *Id.*, p. 38.

¹² *Id.*, p. 43-44.

¹³ Article 31 of the Cambodian Constitution states: "[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human [R]ights, the covenants and conventions related to human rights, women's and children's rights."

Agreement¹⁵ and Establishment Law¹⁶) guarantee Mr. IENG Sary the right to a fair and transparent trial, which includes the right to examine the evidence against him and to mount a defence. Rule 21 calls for the ECCC proceedings to be “adversarial,” thus confirming the right of the parties to confront witnesses in testing and challenging witness testimony. This right to confront witnesses/examine evidence is violated where Mr. IENG Sary is prohibited from asking questions which directly relate to the credibility of witnesses’ statements and in-court testimony and the weight that may be accorded to them. It would be tantamount to acting with willful blindness were the Trial Chamber to prevent the Defence from uncovering irregularities in the investigative process that directly impact upon witness credibility and the weight to give to witnesses’ statements and testimony. The Trial Chamber should not shield itself from information impacting the value of a witness’s testimony; this is antithetical to the Trial Chamber’s overarching obligation to seek the truth.

4. Judge Cartwright, speaking on behalf of the Trial Chamber, has recognized that the Defence is “entitled to ask probing and challenging questions. Indeed, it’s your duty to do so.”¹⁷ The OCP has similarly recognized that the Defence has a right to test the evidence and that “some latitude should be given” to explore prior statements and transcripts.¹⁸ Senior Assistant Co-Prosecutor Tarik Abdulhak acknowledged: “where significant inconsistencies arise, where there is a legitimate question as to the credibility of a witness – we would agree with our learned friends that a -- that some latitude should be given to them to explore prior statements and prior transcripts...”¹⁹ Similarly, when the Defence

¹⁴ Article 14(3) of the ICCPR states:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...

¹⁵ Article 12(2) of the Agreement provides that the Extraordinary Chambers “shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the [ICCPR], to which Cambodia is a party.”

¹⁶ Article 33 new of the Establishment Law provides that the Extraordinary Chambers “shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the [ICCPR].”

¹⁷ Transcript, 1 August 2012, E1/100.1, p. 62.

¹⁸ Transcript, 6 September 2012, E1/123.1, p. 41.

¹⁹ *Id.*, p. 40-41. The OCP, however, erroneously asserts that the Defence’s questioning of Norng Sophang on his prior interviews with the OCIJ was an “attempt to create a false sense of controversy.” The OCP seems to assert that such questioning should not be allowed since Norng Sophang, in its opinion, provided “consistent and compelling testimony” and was “at pains to stress the accuracy of his responses and to qualify those responses which he thought verged on speculation.” *Id.* The OCP’s opinion of Norng Sophang’s testimony is not relevant to whether the Defence may raise issues which might affect his credibility.

raised irregularities with Witness Phy Phuong's OCIJ interview (i.e. the fact that the witness summary was actually a verbatim transcript of the interview, suggesting that the interview was staged)²⁰ and suggested that these be dealt with by the Trial Chamber prior to beginning the examination of the witness, Senior Assistant Co-Prosecutor Dale Lysak stated:

I thank counsel for bringing -- raising that matter at this time. I think it is premature a little bit but I understand what he's saying. I saw the transcript when it was posted yesterday in French and looked at it, and it appeared to me to match the actual written statement. And I understand now that counsel are complaining because the recorded interview matches the statement. What I would simply say is we're going to question this witness. If there are any issues, it will come up in his testimony.... But at this stage, I think we should proceed with the questioning, and that's why we bring the witness into Court.²¹

5. The Trial Chamber, through Judge Lavergne, appears to have misunderstood the Defence's purpose in questioning witnesses about the circumstances of their OCIJ interviews, finding these questions "redundant and repetitive."²² Questioning witnesses concerning the circumstances in which their interview(s) took place, when, as in this instance, the questions relate directly to the witnesses' credibility, is neither redundant nor repetitive. Questioning related to the integrity of witness statements is exceptionally necessary in Case 002/01 when considering that the OCP is seeking to admit thousands of witness statements absent *viva voce* testimony.²³
6. President Nil Nonn²⁴ and Judge Lavergne²⁵ mistakenly surmised that the Defence is seeking the annulment of the proceedings pursuant to Rule 76. The Defence sought to determine in what ways and to what extent Norng Sophang's statements and in-court testimony were influenced by the OCIJ investigators when they met with him for an unrecorded interview. The Defence *does not know and cannot know* what exactly transpired with Norng Sophang during this surreptitious non-recorded meeting: what

²⁰ For further submissions on this matter, see IENG Sary's Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuong's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221.

²¹ See Transcript, 25 July 2012, E1/96.1, p. 64.

²² Transcript, 6 September 2012, E1/123.1, p. 37.

²³ See Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement, 15 June 2012, E208; Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with confidential Annexes I, II, III and Public Annex IV, 5 July 2012, E208/2; Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16, 27 July 2012, E96/8.

²⁴ Transcript, 6 September 2012, E1/123.1, p. 32-34.

²⁵ *Id.*, p. 36.

questions were asked of him and what answers may have been provided; whether information was provided to him directly, such as by asking leading questions where the answers were suggested or by showing him documents; or to what extent his memory was refreshed or perhaps even manipulated.

7. The “well-grounded reason”²⁶ for obtaining clarification from the OCIJ and hearing from the investigators is to ascertain the full nature of the non-recorded interview. Such evidence, which only the OCIJ is capable of providing, would enable the Defence to determine whether further relief should be sought and would further assist the Trial Chamber in determining what weight it should give Norng Sophang’s testimony and summary statements. Hence, there is a need to summon the OCIJ investigators who interviewed Norng Sophang to give evidence, under oath, in a public forum.

B. The Trial Chamber has the authority to grant this Request

8. Rule 93(1) authorizes the Trial Chamber to conduct investigations when deemed necessary.²⁷ Rule 21 requires that the applicable law and procedure “*shall* be interpreted so as to *always* safeguard the interests of ... [the] Accused ... and so as to ensure legal certainty and transparency of proceedings.”²⁸ It logically follows that the Trial Chamber *can* – and, as shown below in relation to its inherent duties, *should* – seek clarification when necessary to preserve the integrity of the trial proceedings. The Pre-Trial Chamber has held that “the trial stage is an additional and alternate forum for the Defence to contest the reliability of the evidence,” acknowledging the Trial Chamber’s additional powers of investigation under Rule 93;²⁹ a matter also endorsed by the OCIJ.³⁰
9. The OCP acknowledges that the Trial Chamber has authority to clarify matters related to the integrity of the OCIJ investigation, particularly as related to the summary statements prepared by the OCIJ investigators. This is evident from its previous position on the need

²⁶ *Id.*

²⁷ Rule 93(1) reproduces Article 339 of the Cambodian Criminal Procedure Code.

²⁸ Emphasis added.

²⁹ Pre-Trial Chamber Decision on Appeal and Further Submissions in Appeal against OCIJ Order on NUON Chea’s Request for Interview of Witnesses, 20 September 2010, D375/1/8, para. 57 and fn 92.

³⁰ OCIJ Order on NUON Chea’s Request for Interview of Witnesses, 9 April 2010, D375, para. 8. *See also* Order on Request for Transcription, 5 November 2009, D194/2, para. 4, where the OCIJ, concerning an investigative request to clarify inconsistencies in two different OCIJ witness statements given by the same witness, stated: “The Co-Investigating Judges possess several procedural means, *proprio motu* or at the request of the parties, of clarifying testimony that seems contradictory; in particular, they possess the power to re-interview the witness or to organise a confrontation. *Such contradictions may also be clarified at trial.*” (Emphasis added).

for clarification when irregularities came to light concerning the OCIJ's summary statements. For example, when it came to light that OCIJ investigators (the same investigators who interviewed Norng Sophang) had conducted an unrecorded interview with Witness Oeun Tan, the OCP requested that the Trial Chamber consider seeking clarification from the OCIJ and stated that such clarification "would assist in ascertaining the truth, because there is a degree of – of doubt, now, as to just what – what was placed on the record and what interviews took place."³¹ The present Request calls for the same remedy the OCP conceded would clarify matters concerning Oeun Tan's interview.

C. The Trial Chamber has the obligation to grant this Request

10. The OCIJ investigators conducted an unrecorded interview with Norng Sophang, making but faint reference to this interview in Norng Sophang's later recorded interview (i.e., by stating "As you told me yesterday"). This appears to have been the practice of OCIJ Investigators Chay Chandaravann and Thomas Kuehnel; they met with witnesses, engaged in an unrecorded question-and-answer session, and then later conducted a recorded session covering the same topics, if not the exact questions and answers, as the prior session.³² The recorded session then became the basis of the "faithful and accurate"³³ witness statement that was presented to the Trial Chamber, with no mention or acknowledgement that a prior unrecorded session took place. Indeed, the Defence has uncovered yet another instance where these two OCIJ Investigators engaged in this practice when interviewing TCW-695.³⁴ This investigative ploy violates Rule 25, which states that "a person may be questioned without being audio or video-recorded *where the circumstances prevent such recording taking place. In this case, the reasons for not recording the questioning shall be stated in writing...*"³⁵
11. The Trial Chamber must seek clarification from the OCIJ as to the circumstances surrounding the 17 February 2009 question-and-answer session and must obtain answers

³¹ Transcript, 14 June 2012, E1/87.1, p. 53.

³² These two investigators similarly first met and interviewed Oeun Tan without recording the interview and then returned later to record an interview with him. See IENG Sary's Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012, E224.

³³ Transcript, 15 December 2011, E1/23.1, p. 21-23, where Judge Lavergne questioned Witness Long Norin about his written record of interview, on which he had placed his signature and thumbprint (p. 22-23), and which Judge Lavergne sought to treat as a "faithful and accurate" reflection of his statements to the OCIJ investigators (p. 23).

³⁴ See D232/8R, from 5:55-6:05.

³⁵ Emphasis added.

from the OCIJ investigators as to why they failed to fulfill their obligations under Rule 25 to provide reasons for the lack of any recording. The credibility and weight that may be given to Norng Sophang's statements can *only* be determined *effectively* by analyzing the circumstances in which his statements were given, particularly when the OCIJ investigators deviated from the practice required by the Rules and when Norng Sophang's memory in court was "refreshed" by referring to these statements.³⁶ President Nil Nonn, on behalf of the Trial Chamber, has recognized that irregularities in the conduct of OCIJ interviews present "a very critical issue."³⁷ The issue concerning Norng Sophang's unrecorded interview is no different.

12. It merits highlighting that Norng Sophang's memory was "refreshed" with his previous statements during his examination. For example, the following exchange from the 3 September 2012 transcript illustrates the use of his statement in refreshing Norng Sophang's memory:

[Norng Sophang:] A. ... And if the matter was of strictly confidential nature, they did not need to go through telegrams or messages; they had to come in person to the Centre.

[Tarik Abdulhak:] Q. Just following on from that answer, do you know who it was that came in person to meet at the Centre?

[Norng Sophang:] A. I do not know clearly about this because it was part of the secret matters by the Centre and I was tasked only with coding and transmitting telegrams, and I cannot respond to you concerning who would be meeting who in person.

[Tarik Abdulhak:] Q. *I just want to see if we can explore that a little bit further and see if your statement might refresh your memory.* Returning to E3/64 -- Khmer ERN 00328035; French, 00411703; and English, 00334053 -- and this was a brief discussion on this issue.

Question: 'Which zone's telegrams did you translate?'

Answer: 'All zones. They included the substances on building dams and canals, requesting materials, internal situation, and any events that took place at the bases. As for the messages about the reports on the enemy situation or treason, the zone committee came in person to meet with the Central Committee.'

Is that an accurate summary of your statement to the Co-Investigating Judges -- that it was the zone committees that would come and meet in person with the Central Committee?

³⁶ When questioned by President Nil Nonn, Norng Sophang stated that he had reviewed his OCIJ statements prior to testifying in order to refresh his memory. Transcript, 29 August 2012, E1/117.1, p. 34.

³⁷ Transcript, 1 August 2012, E1/100.1, p. 86. Similarly, President Nil Nonn recognized that the circumstances of Chea Say's OCIJ interview were relevant, as they impact on the witness's credibility. See Draft Transcript, 20 September 2012, p. 63-64.

[Norng Sophang:] A. I stand by that statement because most of the time, for the internal affairs that were transmitted through telegram -- were to a minimal; and that, I mostly did not know about it. For the internal affairs, sometimes it would not be transmitted through a telegram; sometimes it -- communicated through a person who would come to the Centre.³⁸

The trial transcript reflects that there were approximately 25 other occasions in which the OCP or Civil Party lawyers read out portions of Norng Sophang's statements and either asked him to confirm their accuracy or asked for additional information.³⁹

13. The Trial Chamber should take all reasonable and necessary steps to uncover any irregularities by the OCIJ investigators, particularly when such irregularities directly relate to the Trial Chamber's obligation to get as close to the truth as possible.⁴⁰ The Trial Chamber had access to the Case File for two years, since the Closing Order was issued in September 2010.⁴¹ Just as the lawyers at the ECCC must act with due diligence, the Trial Chamber Judges are mandated to act diligently. Article 5 of the ECCC Code of Judicial Ethics requires: "Judges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties.... Judges shall perform all judicial duties properly and expeditiously." In accordance with the Civil Law system employed by the ECCC, the Trial Chamber should have read and analyzed the entire Case File prior to trial to determine which witnesses to summon and which documentary evidence to use at trial. This review process would presumably include reviewing the audiotapes of the witness interviews and comparing them to the OCIJ-prepared summaries.

14. Accordingly, if the discrepancies in the OCIJ's interviews of Norng Sophang and other witnesses and in the audio recordings (or lack of recordings) were so blatant, the Trial Chamber – having reviewed the entire Case File as required prior to the commencement of the trial – would have noticed them. Considering the ECCC Judges' duty to preserve the integrity of the proceedings, the Trial Chamber Judges would have (as now being

³⁸ Transcript, 3 September 2012, E1/120.1, p. 16-18 (emphasis added).

³⁹ Transcript, 29 August 2012, E1/117.1, p. 35, 65-66, 69, 73; Transcript, 3 September 2012, E1/120.1, p. 13-14, 22-23, 32, 34-35, 40, 58-62, 76, 85-87, 91-93; Transcript, 4 September 2012, E1/121.1, p. 17-20, 34-36, 51-54, 57-59.

⁴⁰ See Cambodian Code of Criminal Procedure, Art. 318; Rule 85(1). See also Rule 21.

⁴¹ Rule 69(3) states that "The filing of an appeal against a Closing Order does not prevent access by the Trial Chamber and Civil Party Lead Co-Lawyers to the case file for the purposes of advance preparation for trial."

requested) exercised their *inherent duty* to address any irregularities,⁴² irrespective of the consequences – such as causing embarrassment to their colleagues or staff at the OCIJ, or calling their investigative processes into disrepute. The fact that the Trial Chamber has not raised *sua sponte* the irregularities in the OCIJ’s interviews with Norng Sophang and other witnesses indicates that the investigators’ concealment of these irregularities was such that they escaped the Trial Chamber’s attention. Because the OCIJ investigators conducted their interviews as a masquerade, engaging in a secret dress rehearsal prior to the main event, the Defence was no more capable of uncovering the discrepancies than the Trial Chamber.

D. The Defence is entitled to expose flaws in the judicial investigation

15. The Defence did not wait passively for the OCIJ’s investigation to be complete and thus waive any opportunity to challenge the investigation at trial, as Judge Lavergne insinuated when he asked: “*What have the defence lawyers been doing over the course of the many years of the judicial investigation? That is my question.*”⁴³ Over three years ago, the Defence recognized that the OCIJ did not appear to be conducting the judicial investigation in an organized and transparent fashion. Unsatisfied with the lack of transparency that permeated the OCIJ’s investigative process, as well as with the OCIJ’s practice of putting only *summaries* of witness interviews on the Case File (rather than complete transcripts), the Defence filed an investigative request, noting *inter alia* that “[c]ollections of witness interviews are arbitrarily placed on the Case File, often months after the interviews were conducted, with little or no explanation of how these interviews fit in to the judicial investigation” and that “there is no proof as to whether there is any

⁴² ECCC Code of Judicial Ethics, Art. 3(1): “Judges shall conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary”; Art. 5: “1. Judges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties....3. Judges shall perform all judicial duties properly and expeditiously.” See also Bangalore Principles of Judicial Conduct (2002), Value 3, Application: “3.1. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer. 3.2. The behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. *Justice must not merely be done but must also be seen to be done*” (emphasis added); Value 6.2, Application: “A judge shall devote the judge’s professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court’s operations”; *Id.*, Value 6.5, Application: “A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.” The 2002 Bangalore Principles of Judicial Conduct contain one of the first studies on judicial conduct and are intended to apply to judges the world over. They have been reviewed and revised in accordance with commentary from a large number of civil law and common law jurisdictions. For a description of this process, see The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct, March 2007, p. 9-18, available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF>.

⁴³ Transcript, 6 September 2012, E1/123.1, p. 36 (emphasis added).

system in place and, if so, whether it is being scrupulously followed by OCIJ Investigators in searching for exculpatory evidence. This missing information impacts directly on how the factual conclusions reached by the OCIJ are evaluated.”⁴⁴

16. In this Investigative Request, the Defence requested the following information:

- a. the procedural law applied by the OCIJ and its Investigators;
- b. the OCIJ’s planning and overall strategy of the judicial investigation;
- c. the qualifications and experience of Investigators and their Standard Operating Procedures; and
- d. the collection and analysis of exculpatory evidence by the OCIJ, encompassing information on alternative theories of the events set out in the Introductory Submission which were considered by the OCIJ and information on how these alternative theories are translated into systems for identifying, collecting and analyzing exculpatory evidence.⁴⁵

17. The Defence specifically asked for information to be added to the Case File such as “whether safeguards have been put in place to ensure that the investigations are conducted in such a manner so as not to violate the rights of suspects ... and to ensure the maximum protection and preservation of evidence,” which would include the preservation of recordings of interviews, and “whether the OCIJ Investigators have kept a list of questions they asked of persons they interviewed.”⁴⁶ The Defence noted that “[t]he importance of a systematic approach to identifying, collecting and analyzing exculpatory evidence can not be overstated [because i]t is the foundation for a fair, impartial and competent judicial investigation.”⁴⁷ This specific request regarding a systematic approach to gathering exculpatory evidence is analogous to the need for a methodical and systematic approach to gathering *all* types of evidence.

18. The OCIJ responded in a twelve-page letter, taking a defensive tone and failing to actually provide most of the information sought. Concerning witness interviews, the OCIJ stated (inaccurately, as it now appears):

As for the interviewing of witnesses, compliance with all formal requirements is recorded in the written record of interview... The interviews are recorded in

⁴⁴ IENG Sary’s Third Request for Investigative Action, 21 May 2009, D171, para. 3, introduction.

⁴⁵ *Id.*, para. 7.

⁴⁶ *Id.*, para. 28.

⁴⁷ *Id.*, para. 38 (emphasis added).

virtually all instances... The written records of witness interviews record the questions asked as well as the answers. As explained above the interviews are systematically recorded.⁴⁸

As we now know, the investigation did *not* comply with all formal requirements. The investigators violated Rule 25 by failing to record their initial interviews or to explain why audio or video recordings did not occur.

19. Had 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. The OCIJ was obligated to conduct an impartial investigation for the purpose of ascertaining the truth,⁴⁹ with the ultimate goal of either issuing a Closing Order or dismissing the case.⁵⁰ Under the ECCC's procedural system, the Defence *should* be able to rely upon the OCIJ's *neutral* investigation and should not be tasked with policing whether the OCIJ has ethically and accurately performed its tasks. The Defence is entitled to the *reasonable expectation* that the OCIJ's investigation was conducted in an appropriate and systematic manner. By concealing the occurrence of prior unrecorded interviews⁵¹ and, according to the interpreter present at Phy Phuong's interview, staging at least one recorded interview,⁵² the OCIJ investigators have ensured that any such reliance by the Defence is impossible.
20. Although the Defence was not entitled to conduct its own investigation and, in fact, was warned against doing so,⁵³ the Defence worked diligently on Mr. IENG Sary's behalf within the constraints of its resources. In addition to filing twelve Investigative Requests during the judicial investigation, the Defence reviewed material as it was placed on the Case File. However, due to the sheer number of documents placed/dumped on the Case File and the modest resources of the Defence,⁵⁴ it was impossible to review thoroughly

⁴⁸ Letter from the OCIJ to the Defence, "Your 'Request for Investigative Action', Concerning, Inter Alia, the Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation," 11 December 2009, D171/5, paras. 26, 33 (footnotes omitted).

⁴⁹ Establishment Law, Art. 23 new; Rule 55(1), (5).

⁵⁰ Rule 67(1).

⁵¹ See IENG Sary's Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuong's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221.

⁵² *Id.*

⁵³ See Letter from the OCIJ to the NUON Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/I, p. 2.

⁵⁴ Senior Assistant Co-Prosecutor Tarik Abdulhak is incorrect to assert that the resources of the OCP are roughly equal to that of the Defence. Transcript, 6 September 2012, E1/123.1, p. 40. The OCP began investigating Mr. IENG Sary on 10 July 2006. See Closing Order, D427, para. 3. The Defence was prohibited

every piece of evidence. As of the issuance of the Closing Order in September 2010, there were roughly **31,627** English-language documents on the Case File (including submissions by the parties and supporting material but not including Khmer and French documents), consisting of roughly **150,939** pages of material. If the Defence were to review *only* the English language documents, it would have taken approximately **755** days, reading **200** pages per day, to review all of this material. In addition to documentary evidence, there were approximately **846** audio recordings of witness interviews prepared by the OCIJ on the Case File (not including audio and video recordings prepared by outside researchers which the OCIJ placed on the Case File), consisting of approximately **1,767** hours of tape. If the Defence were free to do *nothing* but listen to these recordings for eight hours per day, it would take the Defence **221** days to review all the recordings.

21. The Defence was not free to devote itself to policing the investigative habits of the OCIJ as there were several urgent and vital legal matters the Defence was required to address during the judicial investigation. Failure to do so would have meant waiving these issues, not acting with due diligence and not providing competent legal representation to Mr. IENG Sary. It bears recalling that the ECCC is a *sui generis* institution and, as such, all the substantive and procedural law needed to be scrutinized. Virtually every issue was a matter of first impression.⁵⁵

from conducting any of its own investigations. *See* Letter from the OCIJ to the NUON Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/1, p. 2. The Defence team was not even formed until nearly a year and a half later. Furthermore, during the judicial investigation the OCP had the assistance of several full-time analysts in addition to its legal staff, while the Defence only had the services of one part-time analyst.

⁵⁵ The Defence had to address several issues which required resolution, which it did by filing, *inter alia*, the following submissions: IENG Sary's Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, 7 April 2008, C/22/I/26; IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3; IENG Sary's Motion Against the Application of Command Responsibility at the ECCC, 15 February 2010, D345/2; IENG Sary's Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC, 15 February 2010, D345/3; IENG Sary's Appeal Against the OCIJ's Order on IENG Sary's Motion Against the Application of Command Responsibility at the ECCC, 13 April 2010, D345/5/1; IENG Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240; IENG Sary's Motion against the Application of Grave Breaches at the ECCC, 7 May 2010, D379; IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 6 August 2009, D180/4; IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning Forced Marriage and Forced Sexual Relations, 11 August 2009, D188/3; IENG Sary's Motion against the Application of Crimes Against Humanity at the ECCC, 13 April 2010, D378; IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes Against Humanity at the ECCC, 23 June 2010, D378/2; IENG Sary's Motion Against

22. In all, the Defence filed at least 213 submissions during the period of the judicial investigation, not including other necessary and reasonable correspondence and memoranda.⁵⁶ As International Co-Prosecutor Andrew Cayley explained to the Cambodia Daily in the wake of the Initial Hearing (over the course of which several jurisdictional challenges were discussed): “This court is uniquely placed and has linked it to some highly placed technical legal issues which must be addressed by the parties and then determined by the judges. Ang Udom and Michael Karnavas are simply doing their jobs – what is expected of them.”⁵⁷
23. Suffice it to say, despite the diligence of the Defence, the crux of the issue at hand is whether the Trial Chamber can, at this stage, look into these irregularities – a matter that is inescapable and beyond cavil. The Trial Chamber’s obligation at this stage to conduct the investigation sought as to the manner in which Norng Sophang’s interview was conducted, as well as to look into other irregularities, was explained by the Pre-Trial Chamber, which stated:

[the Co-Investigating Judges held that] if they properly exercise their discretion to refuse a request for investigative action, such as to interview or re-interview a witness, *the trial stage affords the Defence ‘every opportunity to contest the evidence,’ including the possibility to ‘request the Trial Chamber to summon any of the witnesses the Co-Investigating Judges have decided not to interview (or re-interview).’* The point made by the Co-Investigating Judges, with which the Pre-Trial Chamber agrees, is that *the trial stage is an additional and alternate forum for the Defence to contest the reliability of evidence.*⁵⁸

III. CONCLUSION AND RELIEF SOUGHT

24. The Trial Chamber has the inherent duty to ensure that the trial is conducted fairly, with “full respect for the rights of the accused,” and that its jurisdiction is exercised in accordance with the ICCPR.⁵⁹ In accordance with this duty, and as authorized by Rule 93, the Trial Chamber *must* either seek clarification concerning the circumstances of Norng Sophang’s OCIJ interviews or disregard his statements and testimony altogether.

the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes) at the ECCC, 10 June 2010, D382; IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3.

⁵⁶ A complete list of these submissions is available upon request.

⁵⁷ Andrew Cayley, *IENG Sary Defence Team Need Not Apologise for Doing Its Job*, CAMBODIA DAILY, 12 July 2011.

⁵⁸ Pre-Trial Chamber Decision on Appeal and Further Submissions in Appeal against OCIJ Order on NUON Chea’s Request for Interview of Witnesses, 20 September 2010, D375/1/8, para. 57 (emphasis added).

⁵⁹ Establishment Law, Art. 33 new. *See also* ECCC Code of Judicial Ethics, Art. 5(1): “Judges shall act diligently in the exercise of their duties....”

The Trial Chamber must recognize that its duty to seek the truth requires it to look critically at the evidence collected during the judicial investigation and the manner in which it was collected. In so doing, the Trial Chamber will protect and ensure Mr. IENG Sary's fundamental fair trial rights to examine the evidence against him and mount a defence, thus preserving the ECCC's legacy as a model court for Cambodia.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a. Seek clarification from the OCIJ as to:
 - i. Whether any record of Norng Sophang's 17 February 2009 interview in fact exists;
 - ii. The length of the interview;
 - iii. The individuals who were present during the interview;
 - iv. The documents and other materials, if any, that were shown to Norng Sophang by the OCIJ investigators;
 - v. If there is no record, the reasons for the lack of any record and for questioning Norng Sophang without recording the interview; and
- b. If a record does exist of a 17 February 2009 interview, place it on the Case File for review and use by the parties; and
- c. Summon the investigators to give evidence concerning the circumstances of their 17 and 18 February 2009 interviews with Norng Sophang.

Respectfully submitted,


ANG Udom




Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 27th day of **September, 2012**