

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**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"**

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## I. INTRODUCTION AND PROCEDURAL HISTORY

1. Since the start of the trial, the defence for Ieng Sary (“Defence”) has filed three requests alleging procedural improprieties in interviews conducted with particular witnesses during the judicial investigation in Case 002.<sup>1</sup> The Co-Prosecutors have refuted these claims, submitting that the Defence have failed to demonstrate any procedural irregularity or impact on Ieng Sary’s fair trial rights.<sup>2</sup>
2. On 5 November 2012 the parties were notified that the Defence had filed the instant request for the Trial Chamber to conduct an investigation and hold a public hearing regarding a purported “widespread and systematic practice of conducting unrecorded interviews with witnesses”<sup>3</sup> (“Request”). The Defence allege that their Request “is made necessary because the Defence has recently discovered 12 instances (in addition to the instances pointed out by the Defence in past requests and by other Defence teams) in which Office of the Co-Investigating Judges’ (OCIJ) Investigators conducted unrecorded interviews with witnesses.”<sup>4</sup> The Request goes on to attempt to demonstrate that OCIJ investigators’ alleged practice of not audio recording or noting in writing all discussions with witnesses constituted a violation of the Internal Rules and therefore a violation of Ieng Sary’s fair trial rights. As a remedy, they request the Trial Chamber to hold a public hearing “to investigate the OCIJ’s practice of conducting unrecorded interviews with witnesses and the effect this may have had on the witnesses’ recorded statements and in-court testimony.”<sup>5</sup>
3. The twelve individuals who the Defence claim were interviewed in violation of the Rules, unlike the individuals who were the subjects of the previous requests, are not scheduled to be called as witnesses at trial. Rather, their sworn statements, given to OCIJ, have been tendered by the Co-Prosecutors to be considered for their own evidentiary value in the absence of the

<sup>1</sup> **E221** Ieng Sary’s Request to Hear Evidence from the Interpreter Concerning Witness Phy Phoun’s Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012; **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; **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 OCIJ Investigators to Give Evidence Regarding this Interview, 27 September 2012.

<sup>2</sup> **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; **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 (the Co-Prosecutors did not oppose the request to have the Trial Chamber seek additional information from the OCIJ); **E234/1** 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.

<sup>3</sup> **E241** 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, 2 November 2012 (hereinafter “Request”). Notified 5 November 2012.

<sup>4</sup> **E241** Request at p. 1 and fn.3 (citing to nine audio recordings of interviews and three written records of interview).

<sup>5</sup> **E241** Request at p. 7.

individuals' testimony.<sup>6</sup> These statements are of a corroborative nature and are not submitted for the purposes of proving the acts and conduct of the Accused as charged in the Closing Order.<sup>7</sup>

4. The Trial Chamber has stated that it will consider statements taken by the OCIJ "in light of the legal principles set forth in its decision E96/7."<sup>8</sup> This necessarily includes the Chamber's recognition, in that decision, that OCIJ records of witness interviews carry a presumption of reliability and relevance.<sup>9</sup> These documents will also be subject to "adversarial challenge"<sup>10</sup> and to challenge by written motion,<sup>11</sup> which provides the defence teams ample opportunity to raise any claims they might have regarding the weight that should be attributed to the statements.
5. In support of one of Ieng Sary's previous applications, the defence for Khieu Samphan also made allegations of procedural impropriety in relation to OCIJ witness statements.<sup>12</sup> In response to these allegations, the Trial Chamber stated that it had already addressed concerns regarding alleged defects in the OCIJ investigators' conduct of witness interviews and indicated that a further decision would be shortly forthcoming "in response to a number of similar motions."<sup>13</sup>
6. Furthermore, the Trial Chamber has already addressed several of the concerns the Defence raise here, holding that "it is not mandatory to make an audio or video recording of an interview with a witness or a Civil Party."<sup>14</sup> The Chamber further stated:

*Where written record of interviews are alleged to have been tampered in order to knowingly and wilfully distort the content of the statements and obstruct the investigation, the parties should have seized the Pre-Trial Chamber with a request for annulment of the written records or of the whole investigation, pursuant to Internal Rule 76. It follows that the Trial Chamber will not at this stage consider issues that should have been addressed at the investigative phase and will only do so where the parties can demonstrate that they did not have an opp[or]tunity to detect the alleged distortion before the*

<sup>6</sup> E241 Request at para. 1.

<sup>7</sup> See E223/1 Co-Prosecutors' Response to Khieu Samphan's Request to Revise Corroborative Evidence Lists, 10 September 2012, para. 12, citing E96/8 Co-Prosecutors' further request to put before the Chamber written statements and transcripts with confidential annexes 1 to 16, 27 June 2012, para. 17.

<sup>8</sup> E223/2 Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and Khieu Samphan Defence request to revise corroborative evidence lists (E223), 19 October 2012, para. 9 (hereinafter "Forthcoming Document Hearings Memorandum").

<sup>9</sup> E96/7 Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, para. 26.

<sup>10</sup> E223/2 Forthcoming Document Hearings Memorandum at para. 9.

<sup>11</sup> E223/2 Forthcoming Document Hearings Memorandum at para. 14.

<sup>12</sup> E223 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.

<sup>13</sup> E223/2 Forthcoming Document Hearings Memorandum at para. 9.

<sup>14</sup> E142/3 Decision on Nuon Chea's Request for a Rule 35 Investigating Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, para. 6.

*opening of the trial or if it appears necessary to safeguard the fairness of trial proceedings.*<sup>15</sup>

This decision resolves the central issue which the Defence are now seeking to re-litigate without meeting the burden to justify the opening of a specific inquiry, contrary to the Chamber's directions.

7. The Trial Chamber has also previously refused a request by the Defence for a wide ranging hearing on the conduct of the judicial investigations made on the basis of general allegations of bias in the investigation.<sup>16</sup> In that decision the Trial Chamber noted, *inter alia*, "that subject to any appeal before the Pre-Trial Chamber, the Closing Order shall cure any procedural defects in the judicial investigation and no issues concerning such procedural defects might be raised before the Trial Chamber or the Supreme Court Chamber."<sup>17</sup>
8. The Defence's request for the Trial Chamber to conduct an investigation pursuant to Rule 93 refers to their previous requests. As the Co-Prosecutors have already responded to those requests, they respectfully refer the Trial Chamber to their relevant previous submissions and will address in this response only the new claims made in the Request. The Co-Prosecutors submit that the Defence have failed to meet the burden necessary to engage the Chamber's discretionary power to open an investigation. To the extent that the Defence took issue with the procedures adopted by the Co-Investigating Judges, the Co-Prosecutors submit that: 1) The Defence were on notice of OCIJ practices throughout the judicial investigation, and failed to raise any concerns with those practices at the relevant stage; 2) The Defence have failed to demonstrate that any irregularities occurred in the judicial investigation which would warrant an investigation at the trial stage; and 3) If the Defence wish to make submissions on the probative value to be attached to the evidence collected by the OCIJ, they can avail themselves of the procedures put in place by the Trial Chamber.

## II. ARGUMENT

9. As relief, the Defence request the Trial Chamber to "HOLD A PUBLIC HEARING to investigate the OCIJ's practice of conducting unrecorded interviews with witnesses and the effect this may have had on the witnesses' recorded statements and in-court testimony."<sup>18</sup> They make this Request "pursuant to Rules 93 and 21."<sup>19</sup> Rule 93 authorises the Trial Chamber to order additional investigations "[w]here the Chamber considers that a new investigation is

<sup>15</sup> E142/3 Decision on Nuon Chea's Request for a Rule 35 Investigating Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, para. 7.

<sup>16</sup> E71/1 Decision on Ieng Sary's Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, quoting E71 Ieng Sary's Motion for a Hearing on the Conduct of the Judicial Investigation, 25 March 2011.

<sup>17</sup> E71/1 Decision on Ieng Sary's Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, p.2. The Trial Chamber also referred that matter to the Defence Support Section "pursuant to its power to refuse part payment for work claimed where the work carried out is not 'necessary and reasonable'". See *ibid.* p. 3.

<sup>18</sup> E241 Request at p. 7.

<sup>19</sup> E241 Request at p.1.

necessary.”<sup>20</sup> Rule 21 lays out a number of “fundamental principles” governing the proceedings before the ECCC.<sup>21</sup> The Defence argue that granting their Request would “ensure transparency” and “safeguard Mr. IENG Sary’s interests, as required by Rule 21.”<sup>22</sup> The Co-Prosecutors will establish below that the Defence have once again failed to demonstrate any procedural improprieties meriting any relief.

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

10. The Request is based on alleged procedural defects in the judicial investigation – specifically, the manner in which the interviews of twelve individuals were conducted by OCIJ investigators.<sup>23</sup> 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.”<sup>24</sup>
11. Under the ECCC procedural framework, applications concerning procedural defects can only be brought during the pre-trial phase. 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.”<sup>25</sup>
12. These safeguards include the right to make investigatory requests during the investigation as well as requests for “such others...as they consider useful for the conduct of the investigation” pursuant to Rule 55(10). 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.<sup>26</sup> The Defence failed to avail themselves of these opportunities during the judicial investigation despite ample notice of OCIJ’s investigative practices. In this regard, the Co-Prosecutors note that, during the judicial investigation, all parties had equal access to witness statements and other evidence collected by the OCIJ.
13. 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

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<sup>20</sup> Rule 93(1).

<sup>21</sup> Rule 21.

<sup>22</sup> E241 Request at para. 11(f).

<sup>23</sup> E241 Request at para. 2.

<sup>24</sup> 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”).

<sup>25</sup> E116 Fairness of Judicial Investigation Decision, at para. 18.

<sup>26</sup> 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.”).

appeal.<sup>27</sup> Again, the Defence did not request any additional investigative actions at that point in relation to the issues they are now raising.

14. After all of these opportunities to address 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.”<sup>28</sup> The ECCC rules are thus crystal clear that procedural challenges to investigative acts are limited to the pre-trial phase.
15. The Defence argue that, because they are not seeking to annul investigatory acts, an “argument that the investigation sought is prohibited under Rule 76(7)...is without merit.”<sup>29</sup> The Defence have misconstrued Rule 76(7). The effect of the Rule is to cure all procedural defects during the investigation, no matter whether the remedy sought based on those alleged procedural defects is annulment or additional investigations. Thus, regardless of whether the investigation sought is “prohibited under Rule 76(7),” the legal position is that alleged procedural defects the Defence are attempting to claim have been cured, and can no longer support their claim for relief.
16. Furthermore, the Defence’s request for the Trial Chamber to open an investigation into OCIJ practices in the absence of a shred of evidence of actual substantive interference with witnesses’ evidence would contravene the division enshrined in the Rules between investigative and trial stages. The Trial Chamber is “not an appeal or review body in relation to decisions of [the Pre-Trial] Chamber.”<sup>30</sup> 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.”<sup>31</sup>
17. As noted in the Introduction and Procedural History above, 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 proceedings.”<sup>32</sup> Neither of those exceptions applies here. The Defence had ample opportunity to detect the issues they allege in their Request, which

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<sup>27</sup> Internal Rule 66.

<sup>28</sup> 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.

<sup>29</sup> E241 Request at para. 15.

<sup>30</sup> E116 Fairness of Judicial Investigation Decision, at para. 18.

<sup>31</sup> E116 Fairness of Judicial Investigation Decision, at para. 15.

<sup>32</sup> 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”).

they claim they were alerted to by reviewing witness statements and audio recordings of interviews.<sup>33</sup> 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.<sup>34</sup>*

18. 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 inconsistencies in written records “before the opening of trial.”<sup>35</sup> Similarly here, in exercising their due diligence obligations, the Defence could have reviewed the audio recordings and written records of interviews earlier. There is 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.

19. 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.**<sup>36</sup>

<sup>33</sup> E241 Request at para. 2 and fn. 3.

<sup>34</sup> E142/3 Witness Interview Decision, at paras. 6, 8.

<sup>35</sup> E142/3 Witness Interview Decision, at para. 8.

<sup>36</sup> E1/123.1 Transcript of Proceedings, 6 September 2012, p. 43, emphasis added. In the course of same proceedings, at pp. 36-37, 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.”).

20. 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 speculative or unsubstantiated, as in the present instance.<sup>37</sup>

**B. The Defence Fail to Demonstrate that the Alleged Conduct Violated the Internal Rules**

21. Even if the Closing Order had not cured all procedural defects, the Request should be dismissed because the Defence have failed to show that OCIJ's investigative practices violated the Rules. The essential premise of the Defence's claim is that, if investigators spoke to witnesses without recording or noting those interactions, they have violated the Rules. These submissions are contrary to the Trial Chamber's own ruling on this very issue. And yet, the Defence seek to re-litigate the point by putting forward tortured readings which are contrary to the letter and spirit of the Rules. The Co-Prosecutors will demonstrate this by addressing each of the Defence's arguments in the order they are raised.

22. The Defence first turn to Rule 55(7), stating "Rule 55(7), under the heading 'General Provisions Concerning Investigations' requires that a 'written record *shall* be made of *every* interview."<sup>38</sup> A written record was produced for each of the interviews that the Defence claim are problematic.<sup>39</sup> Indeed, it is these written records that the Co-Prosecutors have submitted for consideration by the Trial Chamber. Therefore, Rule 55(7) has not been violated.

23. The Defence next attempt to show that the alleged conduct of the investigators violated Rules 62(3) and 51(8). The Defence state:

*Rule 62(3) requires OCIJ investigators to act under the supervision of the Co-Investigating Judges. It further requires the OCIJ Investigators, when issued with Rogatory Letters by the Co-Investigating Judges, to draw up a written record of their "investigations and findings, which shall comply with the provisions of Rule 51(8) as appropriate."*<sup>40</sup>

24. Again, it is indisputable that written records were submitted for these witnesses. However, the Defence go on to imply that Rule 62(3) was violated because the reports did not comply with the requirement in Rule 51(8) to include information on "[t]he duration of any interview and the duration of any breaks between interview periods."<sup>41</sup> In relation to the twelve witnesses who are the subject of the Request, the Defence fail to show how this provision was not complied with.

<sup>37</sup> E142/3 Witness Interview Decision, at para. 10.

<sup>38</sup> E241 Request at para. 6 (emphasis added by the Defence).

<sup>39</sup> See D108/6/10 Written Record of Interview, 11 January 2008; D125/168 Written Record of Interview, 17 December 2008; D91/16 Written Record of Interview, 12 December 2007; D369/32 Written Record of Interview, 2 April 2010; E3/369 Written Record of Interview, 29 May 2008; D125/92 Written Record of Interview, 6 of August 2008; D232/70 Written Record of Interview, 1 December 2009; D369/30 Written Record of Interview, 25 March 2010; D125/26 Written Record of Interview, 8 of May 2008; D232/46 Written Record of Interview, 27 of November 2009; D232/74 Written Record of Interview, 8 December 2009; D232/32 Written Record of Interview, 22 October 2009.

<sup>40</sup> E241 Request at para. 7 (emphasis added by the Defence).

<sup>41</sup> Rule 51(8)(g).



25. The primary application of Rule 51(8) is in relation to reports of arrest made by the Co-Prosecutors – and in that context, the application of all of its provisions is mandatory. The Co-Prosecutors have no discretion to determine what information to include in arrest reports but “shall include” all of the information specified in paragraphs (a) – (j). On the other hand, Rule 62(3) clearly grants discretion to the OCIJ regarding which provisions of Rule 51(8) to incorporate into their reports of witness and civil party interviews, stating that the provisions shall be complied with “as appropriate.”
26. The underlying rationale for the difference in the drafters’ approach to Rules 51(8) and 62(3) is obvious. When Rule 51(8) is applied to the Co-Prosecutors, it addresses a situation in which an individual is suspected of having committed a serious criminal offence, has been deprived of liberty, and is being interviewed by the Co-Prosecutors, who are a party to any proceedings before the ECCC. In this context, it is appropriate to mandate the inclusion of several categories of information in a report, including the duration of any interview with the suspect and any breaks between interview periods. The same considerations do not apply to witness interviews conducted by OCIJ, a neutral judicial office whose role is to ascertain the truth in an impartial manner.<sup>42</sup> This is why Rule 62(3), which applies only to civil party and witness interviews,<sup>43</sup> leaves the scope and modalities of implementation of the provisions of Rule 51(8) in the discretion of the Co-Investigating Judges. This distinction also comports with Rule 25, which, as explained further below, requires recordings or statements when interviewing suspects or charged persons, but not witnesses.
27. Faced with this grant of discretion to the OCIJ, and in order to argue that a Rule has been violated, however, the Defence simply re-write the Rule. Thus, having quoted Rule 62(3)’s “as appropriate” language, the Defence state: “Rule 51(8) sets out a list of information which, pursuant to Rule 62(3), must be included in the written record of the OCIJ Investigators’ investigations and findings.”<sup>44</sup> The Defence make mandatory what was discretionary. As actually written, however, the Rule was clearly not violated.
28. The Defence then claim a violation of Rule 25. In response to a similar claim in a previous filing,<sup>45</sup> the Co-Prosecutors demonstrated that Rule 25(2), which requires that interviews be audio or video recorded, applies only to suspects and charged persons. As the Co-Prosecutors explained at the time:

*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*

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<sup>42</sup> Rule 55(5).

<sup>43</sup> Pursuant to Rule 62(3)(b), investigators are not permitted to interview Charged Persons.

<sup>44</sup> **E241** Request at para. 8 (emphasis added).

<sup>45</sup> **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 OCIJ Investigators to Give Evidence Regarding this Interview, 27 September 2012, para. 11.

*the interview they were required to state the reasons for not doing so in writing. 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.*

*Rule 25(1) describes the audio and video recording guidelines that must be followed “[w]henenever 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...”<sup>46</sup> 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.<sup>47</sup>*

29. In the Request, the Defence argue that the Co-Prosecutors (and effectively the Trial Chamber) are wrong, but their arguments to that end fail to withstand any serious scrutiny. Again, the Co-Prosecutors will address them in the order they are raised.
30. The Defence’s first argument is: “Rule 25 is titled generally ‘Recording Interviews’ (not ‘Recording Interviews with Suspects and Charged Persons’). The title reflects that this Rule applies to *all* interviews.”<sup>48</sup> Putting to one side the question of how much interpretive weight a heading should be given, Rule 25 as a whole does deal with *all* interviews. Rule 25(2), however, is just one provision of Rule 25, which, as explained, only applies to suspects and charged persons. All “other persons” are addressed by Rule 25(4). Furthermore, following the logic that the Defence put forward, the title of the Rule is similarly not “Recording All Interviews.” The title accurately reflects that the Rule addresses which interviews need to be recorded.
31. The Defence then seek to contrast Rules 25(1) and 25(2) on three points in an apparent attempt to show that Rule 25(2) also applies to witnesses. First, the Defence argue that Rule 25(1),

<sup>46</sup> Rule 25(4) (emphasis added).

<sup>47</sup> **E234/1** Co-Prosecutors’ Response to “Jeng 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, paras. 25, 26 (internal citations omitted).

<sup>48</sup> **E241** Request at para. 11(a).

unlike Rule 25(2), “does not require suspects/charged persons to sign copies of their statements,”<sup>49</sup> implying that this somehow shows that Rule 25(2) should apply to the interviews of witnesses, but not explaining why. Although the Co-Prosecutors do not follow the logic of this argument, they note that Rule 25(1) addresses circumstances where interviews are audio or video recorded, and states that copies of those audio or video recordings must be given to the subject of the interview. Rule 25(2) addresses interviews “where the circumstances prevent such recording taking place” and therefore, where the only record of the interview is the written statement, a copy of which is provided to the interviewee. Thus, under both Rule 25(1) and Rule 25(2) the suspect or charged person interviewed is given a copy of the best available record of the interview – the two rules provide two alternatives in the context of the same category of interview.

32. The Defence next argue that Rule 25(1) explicitly uses the phrase “Suspect or Charged Person”, whereas Rule 25(2) uses the phrase “[a] person”.<sup>50</sup> The Co-Prosecutors have already explained why the only logical interpretation of “a person” is as a reference to suspect or charged person above.
33. As a final distinction between Rule 25(1) and (2) the Defence argues that Rule “25(1) requires recording in *all* instances. If Rule 25(2) were intended to apply only to suspects/charged persons, its statement that a person ‘may’ be questioned without the interview being recorded would not make sense, considering Rule 25(1)’s requirement that interviews ‘shall’ be recorded.”<sup>51</sup> Here, again, the Defence re-write a Rule in order to try to find a violation. Rule 25(1) does not require recording in *all* instances. By its explicit terms it requires a recording “[w]henever possible.”<sup>52</sup> As previously explained, Rule 25(2) covers circumstances where the questioning of a suspect or charged person is not “possible” because “circumstances prevent such recording taking place.”<sup>53</sup> In those situations, the suspect or charged person “may be questioned without being audio or video-recorded.” There is, therefore, no logical or linguistic incongruity between the two provisions of Rule 25. Indeed, they perfectly complement one another.
34. The Defence’s next argument is as follows:

*Rule 25(4) is not, as the OCP has claimed, rendered superfluous if Rule 25(2) is read to apply to all interviewees. Rule 25(4) simply states that ‘[t]he Co-Prosecutors or Co-Investigating Judges may choose to follow the procedure in this Rule when questioning other persons than those mentioned above....’ This means that the procedures set out in Rule 25(1) (such as providing a copy of the recording to the witness) may optionally be applied when*

<sup>49</sup> E241 Request at para. 11(b).

<sup>50</sup> E241 Request at para. 11(c).

<sup>51</sup> E241 Request at para. 11(d) (emphasis in original).

<sup>52</sup> Rule 25(1).

<sup>53</sup> Rule 25(2).

*interviewing all witnesses, not only suspects/charged persons. It does not affect Rule 25(2).<sup>54</sup>*

35. In response, the Co-Prosecutors note that Rule 25(2) is “above” Rule 25(4), and that their previous point that Rule 25(4) would be rendered superfluous by an interpretation of Rule 25(2) that applied it to all persons has not been refuted by the Defence’s argument.
36. Finally, the Defence advance three arguments concerning interpretive principles that they claim support applying Rule 25(2) to witnesses as opposed to suspects or charged persons. The Defence first argue that Rule 21 supports their interpretation of Rule 25 because “[i]f Rule 25(4) were read so as to make it optional for the OCIJ to record interviews with witnesses, this would not ensure transparency, nor would it safeguard Mr. IENG Sary’s interests, as required by Rule 21.”<sup>55</sup> Rule 21 interpretive guidelines cannot supplant the logical reading of Rule 25. The only logical reading is that advanced by the Co-Prosecutors for the reasons stated previously. Furthermore, the Defence make no showing that transparency and the “interests of Suspects, Charged Persons, Accused and Victims...in light of the inherent specificity of the ECCC”<sup>56</sup> are not adequately protected by the Rules as they are written, rather than as the Defence would like them to be re-interpreted.
37. The Defence next argue that “Rule 25(2) is unambiguous and therefore it should simply be applied according to its plain language. An absurd result would not follow by interpreting 25(2) to apply to all interviewees.”<sup>57</sup> Even assuming, *arguendo*, that the law review article the Defence cite for this principle is authoritative, it is Rule 25 read as a whole that is unambiguous in that Rule 25(2) applies only to suspects or charged persons. An absurd result would occur if Rule 25(2) were interpreted as the Defence advocate, for the reason that Rule 25(4) would be rendered superfluous, as explained above.
38. The Defence’s third, and final, interpretive argument is that “[i]f there is any doubt as to the interpretation of Rule 25, such doubt must be resolved in favor of the Accused in accordance with the principle of *in dubio pro reo*, a fundamental principle of criminal law that is recognized by Article 38 of the Constitution.”<sup>58</sup> As the only logical interpretation of Rule 25 is that explained by the Co-Prosecutors, there is no “doubt” that must be resolved by resort to this principle. Furthermore, as the Supreme Court Chamber stated in the decision cited to by the Defence:

*In so far as in dubio pro reo is applicable to dilemmas about the meaning of law, it must be limited to doubts that remain after interpretation. Therefore, in dubio pro reo is properly applied to doubts about the content of a legal norm that remain after application of the civil law rules of interpretation, that is,*

<sup>54</sup> E241 Request para. 11(e) (internal citations omitted).

<sup>55</sup> E241 Request para. 11(f).

<sup>56</sup> Rule 21(1).

<sup>57</sup> E241 Request para. 11(g).

<sup>58</sup> E241 Request para. 11(h).

*upon taking into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective. As such, as a practical matter, in dubio pro reo will usually be unnecessary on the occasion of addressing legal lacunae, but rather may come into play in the far rarer event of a collision of norms.*<sup>59</sup>

39. This is not one of the rare events of a collision of norms envisaged by the Supreme Court Chamber. Indeed, it is not a situation where any doubts remain after the application of other interpretive tools, as previously explained by the Co-Prosecutors.

### III. CONCLUSION



40. The Co-Prosecutors submit that the Request:

- a. Seeks to re-litigate an issue of procedure that has been ruled upon by the Chamber;
- b. Offers an interpretation of the Rules that is contrary to their letter and spirit;
- c. Is barred by Rule 76(7);
- d. Fails to explain the Defence's inaction with respect to their supposed concerns regarding witness interviews during a judicial investigation lasting three years; and
- e. In any event, fails to show any violation of the Rules, any interference with the evidence, or any violation of Ieng Sary's fair trial rights that would engage the Trial Chamber's discretion to take additional investigatory measures under Rule 93, or to expend its limited time and judicial resources by holding a public hearing.

41. The Defence's gratuitous and generalised allegations of impropriety against the OCIJ should be rejected. The Defence are free to avail themselves of the avenues provided by the Trial Chamber to make submissions on the probative value to be attached to the evidence on the Case File.

42. The Co-Prosecutors respectfully submit that the Request should be **DISMISSED** in full.

Respectfully submitted,

Date	Name	Place	Signature
15 November 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

<sup>59</sup> E50/3/1/4 Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, para. 31.