

**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:** 4 March 2013**CLASSIFICATION****Classification of the document  
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**IENG SARY'S RESPONSE TO CO-PROSECUTOR'S' RULE 93 REQUEST TO OPEN  
AN INVESTIGATION INTO THE WHEREABOUTS OF POTENTIAL WITNESS****(REDACTED)**

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Judge YOU Ottara  
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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”), hereby responds to the Co-Prosecutors’ (“OCP”) Rule 93 Request to Open an Investigation into the Whereabouts of Potential Witness ██████ (“Request”).<sup>1</sup> This Response is made necessary because: **a.** the request for an investigation is untimely and should have been made at the pre-trial stage; and **b.** the OCP’s submission that a transcript of ██████’s interview with Professor Benedict Kiernan could be admitted as evidence if ██████ is deceased or cannot be located with reasonable diligence must fail under ECCC Internal Rule (“Rule”) 87. The Defence takes no position on the substance of the OCP’s request for an investigation into the whereabouts of ██████ pursuant to Rule 93, or the relevance of ██████’s evidence to Mr. KHIEU Samphan. The Defence makes submissions only on the admissibility of Professor Kiernan’s transcript in lieu of in-court testimony as admission of such a document is an issue that may affect Mr. IENG Sary (and other parties) in the future regarding other witnesses. The Defence incorporates by reference all prior relevant arguments raised before the Trial Chamber.<sup>2</sup>

## I. BACKGROUND

1. On 11 December 2009, the Office of the Co-Investigating Judges (“OCIJ”) wrote to Professor Kiernan. The OCIJ requested information about, *inter alia*, interviews Professor Kiernan had conducted and referred to in his book *The Pol Pot Regime*.<sup>3</sup>
2. On 31 December 2009, the OCIJ placed on the Case File a handwritten transcript of Professor Kiernan’s interviews with ██████ and other individuals.<sup>4</sup> This transcript was created by Professor Kiernan.<sup>5</sup>
3. On 5 March 2010, Professor Kiernan informed the OCIJ that he had conducted an interview with ██████ and that the interview was tape-recorded. Professor Kiernan stated that the recording was not in his possession. Professor Kiernan recalled that

<sup>1</sup> Co-Prosecutors’ Rule 93 Request to Open an Investigation into the Whereabouts of Potential Witness ██████, 19 February 2013, E266.

<sup>2</sup> See IENG Sary’s Response to the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for a Public Hearing, 22 July 2011, E96/3.

<sup>3</sup> Letter of the CIJs to Ben Kiernan, 11 December 2009, D269. See also Letter of the CIJs to Ben Kiernan dated 19 February 2010, 19 February 2010, D269/3, reiterating the request to Professor Kiernan for information about the interviews he conducted.

<sup>4</sup> See Interview with ██████, Oudong, 26 August 1981, ██████.

<sup>5</sup> Response of Ben Kiernan to the CIJs dated 5 March 2010, 18 March 2010, D269/4, para. 6.

Professor Michael Vickery had been present at the interview and had tape-recorded the interview.<sup>6</sup>

4. On 18 March 2010, the OCIJ wrote to Professor Vickery. The OCIJ requested that he provide them with the tape recording and additional information about the interview.<sup>7</sup>
5. On 19 March 2010, Professor Vickery responded that he did not remember the specific interview but was probably present for it. He stated that he did not have the tape recording in his possession.<sup>8</sup>
6. On 19 April 2011, the OCP filed its Rule 80(3) Trial Document List.<sup>9</sup> Annex 12 of this list included Professor Kiernan's handwritten transcript of his interviews with [REDACTED] and other individuals.<sup>10</sup>
7. On 22 July 2011, the OCP filed its list of documents it intended to put before the Trial Chamber during the first phase of the trial.<sup>11</sup> Annex 12 of this list included Professor Kiernan's handwritten transcript of his interviews with [REDACTED] and other individuals.<sup>12</sup>
8. On 19 February 2013, the OCP filed its Request. The OCP submitted that [REDACTED]'s evidence is highly probative and aids in ascertaining the truth because he can give evidence relating to plans by CPK leaders to evacuate Phnom Penh as early as 1974.<sup>13</sup> The OCP also submitted that [REDACTED] can give evidence relating to Mr. KHIEU Samphan's alleged contribution to, and support for, these plans.<sup>14</sup> The OCP noted that, pursuant to evidentiary principles outlined by the Trial Chamber, if [REDACTED] is unavailable to testify as a witness, his interview with Professor Kiernan would be admissible as evidence.<sup>15</sup> The OCP requested that the Trial Chamber: **a.** order an

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<sup>6</sup> *Id.*

<sup>7</sup> CIJs' Letter to Michael Vickery, 18 March 2010, D269/8.

<sup>8</sup> Email of Michael Vickery dated 19 March 2010, D269/8/1.1.

<sup>9</sup> Co-Prosecutors' Rule 80(3) Trial Document List, 19 April 2011, E9/31.

<sup>10</sup> Co-Prosecutors' Rule 80(3) Trial Document List, Annex 12: Witness Statements, 19 April 2011, E9/31.12, number 796.

<sup>11</sup> Co-Prosecutors' Response to the Trial Chamber's Request for Documents Relating to the First Phase of Trial, 22 July 2011, E109/4.

<sup>12</sup> Co-Prosecutors' Response to the Trial Chamber's Request for Documents Relating to the First Phase of Trial, Annex 12: Witness Statements, 22 July 2011, E109/4.12, number 796.

<sup>13</sup> Request, paras. 5, 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, para. 7.



investigation into the whereabouts of ██████████; **b.** if ██████████ is located, summon him to testify before the Trial Chamber; or, **c.** if ██████████ is deceased or cannot be located with reasonable diligence, place on the Case File the documents recording the results of the investigation.<sup>16</sup> The OCP suggested that appropriate measures for conducting the investigation would include: **a.** seeking additional information from Professor Kiernan and Professor Vickery; **b.** contacting ██████████'s family; and **c.** directing relevant authorities to search for ██████████.<sup>17</sup>

## II. LAW AND ARGUMENT

### A. The OCP's Rule 93 request for an investigation is untimely

9. The OCP's request that the Trial Chamber order an investigation into the whereabouts of ██████████ pursuant to Rule 93 is untimely and should be rejected. The appropriate time to make such a request would have been while the OCIJ was still conducting its judicial investigation.<sup>18</sup> Presumably, the OCP has been aware of ██████████'s existence since at least December 2009, when the OCIJ contacted Professor Kiernan and placed Professor Kiernan's transcript of his interview with ██████████ on the Case File. Indeed, the OCP has considered ██████████ to be relevant to Case 002 for at least the last two years, since the OCP placed the transcript of ██████████'s interview on its document list in 2011.<sup>19</sup> Although Rule 93 gives the Trial Chamber the authority to *proprio motu* order a new investigation at any time,<sup>20</sup> the Trial Chamber should not do so with regard to this Request.

### B. Professor Kiernan's transcript of his interview with ██████████ is inadmissible under Rule 87

10. The Accused have the fundamental fair trial right to confront or examine the evidence and witnesses against them. This right is guaranteed by the Agreement,<sup>21</sup> the Establishment Law,<sup>22</sup> the Rules<sup>23</sup> and the International Covenant on Civil and Political Rights,<sup>24</sup> which

<sup>16</sup> *Id.*, para. 16.

<sup>17</sup> *Id.*, para. 17.

<sup>18</sup> See Rule 55(10).

<sup>19</sup> See Co-Prosecutors' Rule 80(3) Trial Document List, Annex 12: Witness Statements, 19 April 2011, E9/31.12, number 796.

<sup>20</sup> Rule 93(1) states, in relevant part: "Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations."

<sup>21</sup> Agreement, Art. 13(1).

<sup>22</sup> Establishment Law, Art. 35 new (e).

<sup>23</sup> Rule 84(1).

<sup>24</sup> International Covenant on Civil and Political Rights, Art. 14(3)(d).

Cambodia must respect pursuant to the Cambodian Constitution.<sup>25</sup> The right of the Accused to confront the evidence and witnesses against him is “basic to any civilised notion of a fair trial”<sup>26</sup> and is recognized in both Civil Law and Common Law jurisdictions.<sup>27</sup>

11. At the ECCC, the admission of written statements or transcripts that go to the acts and conduct of the Accused is not permitted unless the Defence is afforded the opportunity to confront or examine the authors of the statements or transcripts in court.<sup>28</sup> Such documents are, subject to limited exceptions, regarded as “not allowed under the law” pursuant to Rule 87(3)(d).<sup>29</sup>
12. The Trial Chamber subsequently identified an exception to this rule: written statements or transcripts of witnesses who are deceased, cannot be traced with reasonable diligence, or are unable to testify due to a bodily or mental condition, *may* be admitted even when the statements relate to the acts and conduct of the Accused.<sup>30</sup> The Trial Chamber outlined a three-factor test for any such admission: **a.** the witness must be genuinely unavailable; **b.** the evidence must be reliable; and **c.** the probative value of the evidence must not be substantially outweighed by the need to ensure a fair trial.<sup>31</sup>
13. With regard to establishing the reliability of the proposed evidence, the following factors, defined in International Criminal Tribunal for the Former Yugoslavia jurisprudence, were found to be relevant:
  - a.** the circumstances in which the statement was made and recorded, including whether the statement was given under oath, whether the statement was signed by the witness with an accompanying acknowledgment that the statement is true to the best

<sup>25</sup> Cambodian Constitution, Art. 31.

<sup>26</sup> *R. v. Hughes*, 2 N.Z.L.R. 129, 148, quoted in Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, CRIM. L. R. 255, 255 (2010). This right is “widely agreed to be a fundamental element of a fair trial, rather like the presumption of innocence.” *Id.*

<sup>27</sup> Article 6(3)(d) of the European Convention on Human Rights and Fundamental Freedoms, which has been ratified by almost all European States and is applied across a range of legal systems, is virtually identical to Article 14(3)(d) of the International Covenant on Civil and Political Rights.

<sup>28</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, E96/7, para. 22.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, para. 32.

<sup>31</sup> *Id.*

of his or her recollection; and whether the statement was taken with the assistance of a duly qualified interpreter;

b. whether the statement has been subject to cross-examination;

c. whether the statement relates to events about which there is other evidence; and

d. other factors, such as the absence of manifest or obvious inconsistencies in the statements.<sup>32</sup>

14. Contrary to the OCP's submission,<sup>33</sup> if ██████████ is deceased or cannot be located with reasonable diligence, Professor Kiernan's handwritten transcript of his interview with ██████████ would *not* be admissible in lieu of ██████████'s in-court testimony. There is insufficient evidence that the transcript is reliable. Accordingly, the transcript is not allowed under the law and its admission would violate Rule 87.<sup>34</sup>

15. There is insufficient information as to the circumstances surrounding ██████████'s interview with Professor Kiernan and the creation of the transcript. The only information the Trial Chamber and the parties possess is Professor Kiernan's statement that his interview with ██████████ was tape-recorded and his reference to this document being his hand-written translation of the interview.<sup>35</sup> No tape recording of the interview has been located; therefore, the contents of the transcript cannot be objectively verified. There is no evidence that ██████████ took an oath before his interview, nor is there any evidence that ██████████ has ever even seen the transcript, let alone attested to its truthfulness. The transcript is not signed by ██████████ or Professor Kiernan. There is no evidence as to who acted as the translator during the interview, or this person's qualifications as a translator. Moreover, although the apparent date of the interview is included on the transcript, there is no information as to whether Professor Kiernan created the transcript on the same day as the interview or at a later date.

16. The author of the transcript will not be subject to confrontation or examination by the Trial Chamber or the parties. Professor Kiernan will not be appearing before the Trial

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<sup>32</sup> *Id.*, para. 32, fn. 54, citing *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92quater, 25 November 2009, para. 29.

<sup>33</sup> Request, paras. 7, 11.

<sup>34</sup> See Rule 87(3)(d).

<sup>35</sup> See Response of Ben Kiernan to the CIJs dated 5 March 2010, 18 March 2010, D269/4, para. 6.



Chamber to give evidence.<sup>36</sup> Accordingly, neither the Trial Chamber nor the parties will have any opportunity to examine Professor Kiernan as to the circumstances surrounding ██████'s interview and the creation of the transcript.

17. The transcript is an informal handwritten document purportedly created by Professor Kiernan. The transcript is *not* a witness statement signed by ██████, nor is it an official ECCC transcript of ██████'s prior in-court testimony. The transcript bears insufficient independent *indicia* of reliability that would permit its admission under Rule 87. The Trial Chamber should not admit this document in lieu of ██████'s in-court testimony. Even if the Trial Chamber were to find Professor Kiernan's transcript reliable and admit it into evidence, the transcript must be accorded little, if any, probative value.<sup>37</sup>

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **REJECT** the OCP's request to admit Professor Kiernan's transcript of his interview with ██████ in lieu of in-court testimony, in the event that ██████ is determined to be deceased or cannot be located with reasonable diligence.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 4<sup>th</sup> day of **March, 2013**

<sup>36</sup> Trial Chamber Memorandum titled "Proposed testimony of Benedict KIERNAN before the Trial Chamber", 13 June 2012, E166/1/4.

<sup>37</sup> *Id.*, p. 2: "In accordance with internationally-protected fair trial guarantees, it follows from the Trial Chamber's inability to call Professor KIERNAN that his conclusions can have little if any probative value in Case 002 given that their author cannot be adversarially challenged."