Admissibility of Witness Statements In Lieu of Oral Testimony

Anne Heindel, Legal Advisor – Documentation Center of Cambodia

July 31, 2012

For over a year the prosecution at the Extraordinary Chambers in the Courts of Cambodia (ECCC) has argued that the accused in Case 002 do not have an absolute right to call and confront witnesses at trial and have sought, in lieu of oral testimony, admission of numerous witness statements providing corroborating evidence not intended to prove the acts and conduct of the accused. They note that this is consistent with "the civil law procedure applicable before the ECCC, which places significant emphasis on the use of written records gathered by investigating judges" and the need for a "flexible approach" in mass crimes cases:[1]

> The purpose of the request is to expedite the trial by putting before the Chamber relevant evidence of witnesses who would not otherwise have the opportunity to testify orally in court. The evidence will assist the Chamber in ascertaining the truth of the numerous allegations contained in the Indictment which are subject of this current trial. Such admission is essential for the effective management of a trial of this size, if the Chamber is to determine the truth of the allegations.[2]

In contrast, all defense teams have claimed an absolute right under the Internal Rules and the Cambodian Procedural Code to confront any witness whom they were unable to examine during the investigation should his or her statement be used as evidence.

The ECCC Rules do not explicitly allow admissibility of written witness statements; although in general all relevant evidence is admissible, Rule 84(1) guarantees the right to confrontation.[3] Comparatively, the rules applied by the International Tribunal for the Former Yugoslavia (ICTY) allow for the admission of witness statements in lieu of oral testimony, while the International Criminal Court rules provide for admissibility of a prior witness statement only when both the prosecution and defense had a contemporaneous opportunity to examine the witness.[4]

Recently, the Trial Chamber ruled on the outstanding prosecution request and found that the right of confrontation is not absolute. It noted that where no opportunity for confrontation is provided, international procedure generally excludes admission of statements going to the acts and conduct of the accused. On the other hand, international courts allow admission of other relevant evidence, in particular when it is cumulative with other witness evidence; related to "historical, political or military background, concerns crime-base evidence or goes to proof of threshold elements of international crimes"; provides general statistical information; "concerns the impact of crimes upon victims"; or when a witness is genuinely unavailable. Nevertheless,

---

[1] Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, ¶ 2 (June 15, 2011).

[2] Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts, ¶ 3 (July 27, 2012).

[3] *See also* ECCC Agreement 13(1); ECCC Law 35*new*(e).

[4] ICTY Rules of Procedure and Evidence, r. 92 *bis*; ICC Rules of Procedure and Evidence, r. 68(a).

the Chamber undercut much of the benefit of this ruling for the prosecution when it found that in the absence of an opportunity for confrontation or of oral testimony at trial, "the probative value and weight to be accorded to such evidence may in many circumstances be limited."[5]

The Chamber's lukewarm reception of witness statements taken by the Co-Investigating Judges (CIJs) is particularly noteworthy. Investigating judges presumptively "seek the truth" by gathering both inculpatory and exculpatory evidence in a written dossier, resulting in a longer investigation but a more efficient trial process. However, Internal Rule 60(2) unaccountably excludes ECCC parties from witness interviews, preventing pre-trial confrontation. In a 2008 memo, the CIJs "indicat[ed] that there was no absolute right to confrontation at the investigation stage and that 'for that reason, Rule [84(1)] recognises the right of the accused person to examine, at the trial stage, any witness against him with whom he was not confronted during the judicial investigation.'"[6]

Re-hearing at trial the testimony of all witnesses who have been questioned by the CIJs is a duplication of effort but one the Trial Chamber apparently believes is generally necessary to protect defense rights. It found that although witness statements taken by the CIJs are "entitled to a presumption of relevance and reliability," unless a witness testifies again at trial, they also may be entitled "to little, if any probative value or weight" where there was a lack of opportunity for confrontation—thus apparently in every instance.[7] If little weight is accorded to testimony compiled by the CIJs, it is not clear how the prosecution can prove many elements of the complex facts and charges at issue without calling numerous witnesses at trial.

The Trial Chamber's caution appears to be the consequence of general recognition that CIJ witness statements are not entirely reliable and perhaps concern that numerous challenges to admitted written statements could overwhelm the Court with requests for transcription and translation of the original audio recordings. As argued by Ieng Thirith before she was removed from the case:

> The OCIJ investigators adopted the practice of interviewing witnesses[] and audio recording the original language interviews. Instead of transcribing these in full, the investigators frequently made summaries based on their own interpretation of the material discussed with the witness and its relevance. These OCIJ Written Records were subsequently added to the case file, and the Co-Prosecutors now refer to them as "witness statements." The defence submits that this term does not accurately represent the document described as the OCIJ Written Records in that it does not contain "the statement" of the witness.[8]

The decision to create summaries instead of verbatim transcripts appears to have been based on a domestic Cambodian—and French-inspired—civil law practice at variance with the procedure

[5] Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, ¶¶ 21, 24-25 (June 20, 2012).
[6] *Id.* ¶ 5.
[7] *Id.* ¶¶ 26-27.
[8] Ieng Thirith Defence Response to "Co-Prosecutors" Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, ¶ 15 (July 22, 2011).

followed by international tribunals such as the ICTY. Due to the length of interviews in mass crimes cases and the need for translation, the challenge of succinct summarization appears predisposed to introducing misinterpretations and errors. All defense teams have compared summaries with the existing audio recordings and noted defects including alleged exclusions of exculpatory evidence.[9] The Prosecutors have acknowledged the existence of "inaccuracies in some written records of Interview" but "emphasise that this does not automatical1y lead to the requirement that every witness testify at trial."[10] They argue:

> While the statements are not a verbatim record of the interview with the witness, the documents record that the statements were made under oath pursuant to ECCC Rule 24 and that the summarized form of the interview was read by or read back to the witness and approved and signed as a truthful account of the interview. To further ensure reliability the signed statements are accompanied by audio recordings. The accuracy of these condensed written records has been confirmed further by numerous witnesses testifying to the truthfulness of their prior statements. No witness to date has claimed that their statements provided to OCIJ investigators were made under inducement or duress.[11]

The Trial Chamber appears to agree—up to a point. It has said that deficiency challenges will only be entertained where alleged defects "are identified with sufficient particularity and have clear relevance to the trial." Nevertheless, it also emphasizes that oral confirmation of the accuracy of witness statements is safeguarded "by the fact that individuals called to give evidence at trial may also be examined by the Chamber or any party on the contents of their prior statements."[12] It thus appears that much of the potential expediency to be derived from a judge-led investigation has been undercut by the twin decisions to not provide for confrontation at the pre-trial stage and to craft witness summaries instead of preparing verbatim transcriptions. The Trial Chamber is currently considering all requests for admissibility of witness statements for the first two trial segments and "in due course" will schedule a time to hear defense objections.[13]

---

[9] *See, e.g., id.* ¶ 16; Memorandum from Ieng Sary Defense Team to Susan Lamb, Senior Legal Officer, *Objections to Witness Statements* (July 9, 2012).
[10] Trial Chamber June 20, 2012 Decision, ¶ 16.
[11] Co-Prosecutors' July 27, 2012 Request, ¶ 3.
[12] Trial Chamber June 20, 2012 Decision, ¶ 26.
[13] Memorandum from Trial Chamber President Nil Nonn to All Parties Case 002, *Co-Prosecutor's Request to Admit Witness Statements Relevant to Population Movement Phases 1 and 2 (E208 and E208/2) and Ieng Sary Response (E208/1)* (July 19, 2012).