



Status of Defense Efforts to Call Government Witnesses at Trial
Anne Heindel, Legal Advisor – Documentation Center of Cambodia
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During the investigation of the surviving Khmer Rouge senior leaders, defense teams repeatedly sought to have King Father Norodom Sihanouk and several high-level Cambodian officials who held assorted positions during the Democratic Kampuchea era interviewed by the Co-Investigative Judges (CIJs). The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) give the CIJs power to issue summons and “take statements from any person whom they consider conducive to ascertaining the truth.”¹ The Trial and Supreme Court Chambers have similar authority.²

Former international CIJ Marcel Lemonde, acting without his national counterpart, found that it would be “conducive to ascertaining the truth” to interview the King Father and all of the requested officials except for the Prime Minister. He therefore summoned the officials,³ requesting that they appear at the ECCC in closed session on a date subject to their availability; however, none responded. Judge Lemonde did not attempt to enforce the summonses, stating that “coercive measures is [*sic*] fraught with significant practical difficulties, and, in the best-case scenario, would unduly delay the conclusion of the judicial investigation, contrary to the need for expeditiousness,” instead leaving it to the Trial Chamber to decide if coercive measures are warranted.⁴ On appeal, the Pre-Trial Chamber (PTC) agreed that due to the potential for significant delay to the start of trial, the issue should be deferred to the Trial Chamber, preserving the right of the accused to seek exculpatory evidence at a later date.⁵

At the same time, acknowledging a bevy of combative government statements reported in the press, the PTC directed the CIJ to assess “whether or not a nexus exists between [government] discouragement and the actual failure of the summoned witnesses to provide statements.”⁶ As just one example, government spokesperson Khieu Kanharith reportedly said, “[T]hough the individuals could appear in the court voluntarily, the government’s position was that they should not give testimony, [...and] foreign officials involved in the court could ‘pack their bags and return home’ if they were not satisfied with the decision.”⁷

¹ ECCC Internal Rules, R.60(1).

² *Id.* at R.87(4), R.104*bis*.

³ Judge Lemonde summoned Senate and Cambodia People’s Party President Chea Sim, National Assembly President Hang Samrin, Minister of Economy and Finance Keat Chhon, Senator Ouk Bunchhoeun, Senator Sim Ka, and Minister of Foreign Affairs Hor Namhong. He did not summon the King Father, but requested that he voluntarily participate in an interview.

⁴ Note of International Investigating Judge Marcel Lemonde, at 3 (Jan. 11, 2010).

⁵ Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses, ¶¶ 69-71 (June 8, 2010).

⁶ *Id.* at ¶ 68.

⁷ Sebastian Strangio & Cheang Sokha, *Govt Testimony Could Bias KRT: PM*, PHNOM PENH POST (Oct. 9, 2009).

On review, the CIJs determined that an investigation into government interference was not warranted.⁸ The defense appealed. The three Cambodian PTC judges found, in part, that the statements of a government spokesperson could not intimidate higher-level officials from testifying.⁹ Conversely, the two international PTC judges determined that after considering all of the allegations and their sequence, no reasonable trier of fact could fail to find it reasonable to believe that “one or more members of the [government] may have knowingly and willfully interfered with witnesses who may give evidence before the CIJs.”¹⁰ They therefore believed an investigation was warranted. In accordance with the ECCC’s unique decision-making rules, due to the lack of a PTC supermajority (four-judge) decision, by default the CIJ determination to not pursue the allegations remained in force.

After the senior leaders were indicted and Case 002 moved toward trial, the Nuon Chea team again filed several motions alleging government interference in the investigation, including a request that the Trial Chamber itself examine whether there is a reason to believe that government officials interfered with CIJ efforts to secure the testimony of the summoned witnesses in violation of Rule 35. The Trial Chamber’s rejection of this request¹¹ was appealed to the Supreme Court Chamber (SCC), whose April 2012 decision has now been made public.

Although the SCC agreed with the Trial Chamber that generally “an investigation pursuant to Rule 35 ‘can only be meaningfully ... conducted by the judicial body seised of the case,’” it did not find this restriction absolute:

[N]ormally, whereas the instances of interference emerging during the pre-trial phase are more properly dealt with by the ECCC's organs presiding over the investigation — namely the Co-Investigating Judges and Pre-Trial Chamber —, those arising at the trial or final appeal stages fall within the competence of the Trial and Supreme Court Chambers. There are limited circumstances, however, in which the demand for efficacy and impartiality in examining allegations of interference with justice may prevail over the general allocation of competence among the ECCC's judicial organs. It follows that any judicial organ seised of a case — presently the Trial Chamber in Case 002 — cannot but withhold a residual power to guarantee that the proceedings comport with the international standards of justice, regardless of when the alleged instances of interference occurred.¹²

Nevertheless, noting that the allegations of witness interference had undergone “extensive litigation and consideration” by the CIJs and the PTC, the SCC found that the Trial Chamber

⁸ Order in Response to the Appeals Chamber’s Decision on Nuon Chea and Ieng Sary’s Requests to Summon Witnesses, ¶ 5 (June 11, 2010).

⁹ Second Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Requests to Summon Witnesses, Opinion of Judges Prak, Ney, and Huot, ¶ 9 (Sept. 9, 2010).

¹⁰ *Id.* at Opinion of Judges Downing and Marchi-Uhel, ¶ 6.

¹¹ Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigations (E51/3, E82, E88 and E92) (Sept. 9, 2011) (addressing additional interference allegations).

¹² Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber’s Decision on Fairness of Judicial Investigation, ¶ 31 (April 27, 2012).

had acted appropriately in not reviewing the rulings of these bodies, over which it has no appellate authority.¹³

[Moreover], the Supreme Court Chamber sees no reason to disturb the Trial Chamber's implicit rejection of the submission that the aforementioned press-reported circumstances have an actual bearing on the proceedings before it. The question that remains relevant to the Accused's rights concerns the availability of certain Defence witnesses who were not heard in the investigative stage. This question is to be determined during the ongoing trial in Case 002, in which a broad range of options is still open to address the concerns that exculpatory evidence might be improperly prevented from entering the trial. This depends, for example, on whether the Defence persists in its requests for evidence, whether such requests are admissible..., whether the facts for which the testimonies are proposed are disputed, whether the called witnesses appear and, if they fail to do so, whether the facts upon which they had been called to testify may be established otherwise.¹⁴

There is no doubt that the Nuon Chea team will doggedly pursue the testimony of the summoned government witnesses, as demonstrated by its indefatigable efforts to invoke their names during proceedings thereby creating a trial record of their indispensability. The Trial Chamber, which is antithetically seeking to reduce the total number of persons to be called at trial in the pursuit of expeditiousness, is currently evaluating which witnesses are “essential” for the remaining phases of trial and has said it will issue a decision “in due course.”

¹³ Under the Court’s rules, PTC decisions are final and thus not appealable to either the Trial Chamber or the SCC.

¹⁴ SCC April 27 Decision, ¶ 32 (citation omitted).