



Decision on Defense Allegations of Irregularities during the Judicial Investigation

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December 13, 2012

All Defense teams in Case 002 at the Extraordinary Chambers in the Courts of Cambodia have raised repeated challenges at trial to the interviewing practices of the Office of the Co-Investigating Judges (OCIJ), citing irregularities in the consistency of and methodology for recording interviews.¹ On December 7, 2012, the Trial Chamber issued a consolidated ruling on four Ieng Sary requests joined by other teams:²

- Request to call the interpreter present during OCIJ interviews with witness Phy Phuon to give evidence because “the recording of [this witness’s] second interview appears to have been ... a staged interview where questions and answers were prepared based on a prior unrecorded interview and then read into a recording device, creating the illusion that the recording reflects the actual interview.”³
- Request for clarification from the OCIJ if any record exists of the first day of questioning of witnesses Oeun Tan and Norng Sophang by its investigators and, if not, why this is the case. Moreover, the team seeks to learn who was present during the interviews, how long the interviews lasted, and what documents, if any, were shown to the witnesses.⁴
- Request for “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” due to an additional 12 instances found by the Defense of unrecorded witness interviews in statements the Co-Prosecutors seek to admit in lieu of witness testimony.⁵

The Ieng Sary team’s overarching argument is that the OCIJ practice of “meeting informally with witnesses to hear what the witnesses had to say before returning later to record formal interviews” has prevented its client from meaningfully exercising his “fundamental fair trial rights to examine the evidence against him and to mount a defence.”⁶

In response, the Co-Prosecutors have denied that the OCIJ has an obligation to record every

¹ See discussion in “Expert Commentary on Legal Filings: Trial Debate over ‘Procedural Defects’ in the Investigation” (Sept. 28, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

² Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1) (Dec. 7, 2012) [hereinafter Dec 7 Decision].

³ Ieng Sary’s Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuon’s Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge (Aug. 23, 2012).

⁴ 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 (Aug. 29, 2012); Ieng Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview (Sept. 27, 2012).

⁵ 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 (Nov. 2, 2012) [hereinafter Ieng Sary 4th Request].

⁶ *Id.* ¶¶ 12-13.

interview or that its interview practices warrant investigation. They also have emphasized that Defense had ample opportunity to raise procedural defects during the investigation and the Internal Rules bar them from doing so during trial. Moreover, the Defense had the opportunity in court to cross-examine the three named witnesses “on both the substance of [their] testimony and the procedure followed in [their] OCIJ interview[s]” and no indications arose indicating impropriety by the OCIJ or inconsistency in these witnesses’ testimony.⁷ Furthermore, the Defense may challenge the probative value of any OCIJ statements admitted into evidence in lieu of oral testimony.⁸

In its decision, the Trial Chamber reaffirms that neither audio nor video recording is mandatory for witness interviews, and finds this to be in accord with the standards followed by international courts.⁹ However, unlike the ECCC, the international courts cited by the Trial Chamber have party-driven investigations with the opportunity for robust cross-examination at trial. In contrast, at the ECCC, the CIJs have near-total investigative discretion,¹⁰ and opportunities for impeachment during trial are limited. Thus the fairness of the entire process is largely dependent on OCIJ independence and impartiality. Indeed the Trial Chamber decision notes that “the procedural safeguards applicable before the ECCC during the investigation phase ... derive from the independence and impartiality of the Co-Investigating Judges[.]” Concomitantly, because witness statements are prepared under the judicial supervision of the CIJs with “safeguards as to their authenticity and reliability,” they are “entitled to a presumption of reliability” that “may be rebutted only where cogent reasons are provided by the parties, supported by clear evidence that the statements in question are unreliable or inaccurate.”¹¹

Although audio or video recording of witness statements is not mandatory, the Court’s Internal Rules explicitly require that “[a] written record shall be made of every interview.”¹² Because the OCIJ did not transcribe witness interviews verbatim, but instead created written summaries and read them back to witnesses for verification, unless interviews were also audio or video recorded, it is impossible to tell if all relevant information about an interview—or series of interviews—was incorporated into a statement. Arguably, these OCIJ procedures are inherently prone to error, even if unintentional. However, the Trial Chamber has repeatedly emphasized that any challenge to investigative procedures must have been brought during the investigative phase. In its new decision, it again notes that the case file, which contains all evidence, is immediately available to the lawyers of persons charged by the Court and parties have “several opportunities ... to test the information gathered during the investigation[.]” such as by requesting investigative actions, challenging and seeking the annulment of “any part of the proceedings,” and appealing OCIJ orders to the Pre-Trial Chamber. Because of these “substantial procedural

⁷ See, e.g., Co-Prosecutors’ Response to Ieng Sary’s Request to Hear Evidence from the Interpreter Concerning Witness Phy Phoun’s Second OCIJ Interview, ¶¶ 5, 9-14 (Sept. 4, 2012).

⁸ 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, ¶ 8 (Nov. 15, 2012).

⁹ Dec 7 Decision, ¶ 17.

¹⁰ See Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, ¶ 22 (Pre-Trial Chamber, Nov. 18, 2009) (affirming that the CIJs “are independent in the way they conduct their investigation”).

¹¹ Dec 7 Decision, ¶¶ 17, 22.

¹² Internal Rules, r.55(7).

safeguards,” Internal Rule 76(7) prohibits parties from raising challenges relating to procedural defects during the investigation before the Trial Chamber. The Trial Chamber therefore is not “envisaged” to examine the procedural correctness of the judicial investigation or review the decisions of the Pre-Trial Chamber.¹³

In fact, during the investigation, the Nuon Chea Defense argued to the Pre-Trial Chamber that “the CIJs’ approach to witness interviews has been marred by several flaws and omissions, including the failure to address witnesses’ sources of knowledge” and to provide information about “[t]he conditions under which the various interviews have been conducted[.]” including whether documents were exchanged. It also emphasized the difficulties it faced in attempting to verify the accuracy of the witness summaries due to the lack of verbatim transcripts. Among other remedies, it sought to have some witnesses re-interviewed, arguing that their examination at trial would not be a proper substitute for assessing the reliability of witness testimony and rectifying shortcomings in their witness statements “*at the investigative stage[.]*” The Pre-Trial Chamber, however, agreed with the CIJs that, should a request to re-interview a witness be refused, “the trial stage is an additional and alternate forum for the Defence to contest the reliability of evidence.”¹⁴

The Trial Chamber’s new decision notes the OCIJ determination “to remit consideration of certain challenges to witness interviews to the Trial Chamber for resolution” and says that, as a consequence, the Chamber will allow

specific and reasoned challenges to the testimony of witnesses at trial, where relevant inconsistencies between their written record and audio recording of interview during the investigation phase are alleged, provided that the parties did not have an opportunity to detect the irregularity before the trial commenced and these inconsistencies are relevant to assessing the probative value of the evidence or necessary to safeguard the fairness of proceedings.¹⁵

This ruling, although leaving a small window open for targeted Defense challenges, specifically excludes challenges when no audio recording exists—precisely the lacunae the Ieng Sary Defense is questioning. Moreover, it prohibits challenges to irregularities that, in theory, could have been detected before trial—again covering all of the Defense challenges. Notably, the Pre-Trial Chamber ruling discussed above appears to say the converse: that parties may re-challenge the reliability of witness testimony at trial when their requests for re-examination were rejected during the pre-trial phase.

Instead of allowing challenges to reliability of the impugned witness statements, the Trial Chamber will consider all irregularities in witness interviews when determining their probative value and weight.¹⁶ Previously, the Chamber has found that, unless a witness testifies at trial, his or her CIJ witness statement may be entitled “to little, if any probative value or weight”—greatly

¹³ Dec 7 Decision, ¶¶ 18, 20-22.

¹⁴ Decision on Appeal and Further Submissions in Appeal Against OCIJ Order on Nuon Chea’s Request for Interview of Witnesses, ¶¶ 5-6, 52, 57 (D318, D319, D320, D336, D338, D339 & D340) (Sept. 20, 2010).

¹⁵ Dec 7 Decision, ¶ 26.

¹⁶ *Id.* ¶ 28.

limiting the potential value of all witness statements submitted in lieu of oral testimony.¹⁷ The new Trial Chamber decision highlights the Defense’s opportunity to question the three challenged witnesses about their OCIJ interviews during their trial testimony, and notes that no improprieties or contradictions arose.¹⁸

With regard to the audio recording of Phy Phuon, which “consists of the investigators and the witness reading the written record of the interview,” the Trial Chamber agrees with the Ieng Sary team that it “is puzzling and defeats the purpose of producing an audio recording of an interview with a witness.” Nevertheless, the Chamber ruled that the irregularity should have been raised during the investigative phase of proceedings and moreover does not “jeopardize the fairness of the proceedings” as it was discussed by all parties and the witness during trial. As a consequence, the Chamber rejected the request to call the interpreter present during the interview to determine why this “puzzling” procedure was followed, and instead reprimanded the Ieng Sary team for “investigating” this matter by speaking directly to a “potential” witness.¹⁹

Although the Defense teams did question the three witnesses about their CIJ interviews at trial, they were unable to question them at length. During their testimony, the Chamber issued repeated oral rulings cutting short Defense efforts to delve into OCIJ procedures, calling them inappropriate attempts to revisit “procedural irregularities.” As a consequence, the Defense will no doubt argue on appeal that it had insufficient opportunity to challenge not the interviewing procedures but the credibility of the resulting testimony.

¹⁷ Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, ¶¶ 26-27 (June 20, 2012).

¹⁸ Dec 7 Decision, ¶ 32.

¹⁹ *Id.* ¶¶ 33-38.