



## **“Critical” Irregularities in Interview Procedures Highlighted During Witness Testimony**

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During the testimony of Ton Rochoem, *alias* Phy Phuon, *alias* Vycheam, the Ieng Sary team pointed out irregularities in the recording of his second interview with Office of Co-Investigating Judges (OCIJ). The team is now asking the Trial Chamber to call the interpreter present at the interview to testify about the circumstances under which it was conducted, arguing that it “appears to have been an act of subterfuge: 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.”<sup>1</sup> This development has the potential to impact both the Trial Chamber’s perception of the credibility of Phy Phuon — a key insider witness who may have dissembled when asked about the interview procedure<sup>2</sup> — and the weight the Trial Chamber accords to any OCIJ interview summary unaccompanied by oral testimony.

Unique among mass-crimes courts, the Extraordinary Chambers in the Courts of Cambodia (ECCC) follows the French-based civil law preference for giving judges the primary investigatory role. In theory, this should result in a long investigation and a short trial. An impartial investigating judge “seeks the truth” by gathering both inculpatory and exculpatory evidence in a written dossier including all information necessary for the trial judges to reach judgment, with only a very few witnesses orally testifying to the acts or conduct of the accused at trial. Likewise, because the OCIJ is independent and neutral, its witness statements should be presumptively reliable and thus suitable for admission as evidence without the necessity of calling most witnesses to appear a second time during trial hearings.

As noted in my previous commentary, “Admissibility of Witness Statements In Lieu of Oral Testimony,”<sup>3</sup> the prosecutors are seeking admission of numerous OCIJ summaries without calling the witnesses to testify orally, 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. They argue:

[W]ritten records of interviews produced by investigators working under the supervision of the CIJ clearly have probative value and a strong indicia of reliability in that they were given under oath, recorded by Court officials signed by the witnesses and accompanied by audio recordings.<sup>4</sup>

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<sup>1</sup> 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).

<sup>2</sup> ECCC Transcript of Trial Proceedings – Case 002, at 69-72 (July 25, 2012).

<sup>3</sup> July 31, 2012, <http://www.cambodiatribunal.org/blog/2012/07/expert-commentary-legal-filings-admissibility-witness-statements-lieu-oral-testimony>.

<sup>4</sup> Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, ¶¶ 2(c), 38 (June 15, 2011).

Although the Trial Chamber previously granted OCIJ statements a “presumption of relevance and reliability,” it has recently been less supportive of OCIJ work product, finding that unless there is an opportunity for parties to confront a witness, the written summary of his or her interview may be entitled “to little, if any probative value or weight.”<sup>5</sup> At least in part, this is likely because CIJ practice has been to audio record witness interviews and then to create written summaries rather than transcribe the entire recording.

All parties acknowledge that some witness summaries contain some defects. The prosecution asserts that these errors do not impact the inherent reliability of the witness summaries.<sup>6</sup> In contrast, defense teams allege that potentially exculpatory evidence has been excluded.<sup>7</sup> The Nuon Chea team has argued that “material inconsistencies between the written and audio records ... stand to undermine the credibility of the entire judicial investigation, suggest a troubling pattern of inconsistencies in the record and are sufficient to give this [Trial] Chamber ‘reason to believe’ that evidence may have been tampered with.”<sup>8</sup> According to its analysis of thirteen summaries, in addition to missing and distorted information:

The written records often transmute innocuous statements into incriminating testimony by characterizing mere acquiescence to investigators’ leading questions as clear, affirmative statements of knowledge. This effect is also accomplished when the investigators summarize the witness’ remarks out of sequence in order to produce a seamless, straightforward narrative, which can give the false impression of certainty where there is none.<sup>9</sup>

The team also highlighted instances of investigators interviewing witnesses “off the record” — without creating a transcript in either audio or written form,<sup>10</sup> despite the explicit requirement of the ECCC Rules that “[a] written record be made of every interview.”<sup>11</sup> This week the Court published an example of this practice. Toward the beginning of the transcript, the witness says, “I spoke all about that yesterday,” and the interviewer responds, “But I want you to enumerate them again because yesterday I did not make any audio recording.”<sup>12</sup>

Thus far, the Trial Chamber has said that challenges to interview summaries will only be entertained where alleged defects “are identified with sufficient particularity and have clear relevance to the trial.”<sup>13</sup> However, the Trial Chamber President notably called the recent Ieng Sary allegations “very critical.”<sup>14</sup> The team’s written filing buttressing its oral allegations is

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<sup>5</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, ¶¶ 26-28 (June 20, 2012).

<sup>6</sup> *See id.* at ¶ 16.

<sup>7</sup> *See, e.g.*, Ieng Thirith Defence Response to “Co-Prosecutors” Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, ¶ 16 (July 22, 2011); Memorandum from Ieng Sary Defense Team to Susan Lamb, Senior Legal Officer, *Objections to Witness Statements* (July 9, 2012).

<sup>8</sup> Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, ¶ 1 (Nov. 17, 2011).

<sup>9</sup> *Id.* at ¶ 4.

<sup>10</sup> *Id.* at ¶¶ 6(a), 7(a).

<sup>11</sup> Internal Rules, R. 55(7).

<sup>12</sup> Partial Transcription of Audio File D107/2R, Interview granted by Mr. OEUN Tan, at 4 (Oct. 9, 2008).

<sup>13</sup> Trial Chamber June 20, 2012 Decision, ¶ 26.

<sup>14</sup> ECCC Transcript of Trial Proceedings – Case 002 at 86 (Aug. 1, 2012).

likely to generate further concern about the underlying reliability of the OCIJ summaries. In asking the Trial Chamber to hear the interpreter's testimony, it states:

On 1 August 2012, the Defence spoke to the interpreter who was present during the OCIJ interview of Phy Phuon. The interpreter indicated that the OCIJ investigators did conduct a lengthy interview with Phy Phuon that was not recorded. Written questions and answers were then prepared by the OCIJ investigators based on this unrecorded interview, and those questions and answers were read into a recording device. The interpreter stated that he read out the questions and Phy Phuon read out the answers. A written record of interview was then prepared based on these recorded questions and answers.<sup>15</sup>

When the Ieng Sary team first raised this issue prior to Phy Phuon's testimony, the prosecution responded, "What I would simply say is we're going to question this witness. If there are any issues, it will come up in his testimony."<sup>16</sup> Oral confrontation may overcome most procedural irregularities in the creation of OCIJ witness summaries. However, this solution begs the question: what value has a lengthy judicial investigation added to the ECCC process if substantial witness testimony must be heard again at trial?

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<sup>15</sup> Ieng Sary's Aug. 23 Request, ¶ 8.

<sup>16</sup> ECCC Transcript of Trial Proceedings – Case 002 at 64 (July 25, 2012).