

Trial Debate over “Procedural Defects” in the Investigation
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During Case 002 trial proceedings, Defense teams have raised repeated concerns about the witness interview practices of the Office of the Co-Investigating Judges (OCIJ). In accordance with the civil law procedure applied by the Extraordinary Chambers in the Courts of Cambodia (ECCC), this office has primary responsibility for investigating both inculpatory and exculpatory evidence on behalf of all parties. Counsel have noted inconsistencies between written and audio records, instances where witnesses have been interviewed off the record one day and re-interviewed on the record the next, and at least one occurrence where a witness was audio recorded reading prepared answers. They argue that such practices undermine the reliability of witness statements, and suggest that some testimony may have been stage-managed.¹ The teams have therefore been probing witnesses during cross-examination to learn how interviews were conducted and why some initial interviews were not recorded.

The Trial Chamber has ruled orally several times that these impeachment efforts are inappropriate and should be discontinued, all motions on this topic should be submitted in writing, and teams should limit their questioning to issues related to the charged offenses. In support, the Chamber points to Internal Rule 76(7), which provides, “Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”²

The Prosecution says that this rule makes it “crystal clear that procedural challenges to investigative acts are limited to the pre-trial phase.”³ However, the Defense is not seeking to nullify the investigation but instead to undermine the credibility of the witnesses and the weight of their testimony and to cast doubt on the numerous witness statements the Prosecution seeks to enter into evidence in lieu of witness testimony.⁴ The Ieng Sary team in particular says it is seeking to “show and thus make the record why the Trial Chamber cannot rely upon the OCIJ summaries as accurate and complete witness statements, and that it cannot totally rely upon the witnesses’ testimony, particularly when memories are ‘refreshed’ or even substituted by referring to these summaries taken under dubious conditions.”⁵

¹ See “Critical” Irregularities in Interview Procedures Highlighted during Witness Testimony, at <http://www.cambodiatribunal.org/blog/2012/08/“critical”-irregularities-interview-procedures-highlighted-during-witness-testimony>.

² ECCC Internal Rule 76(7) (Rev. 8), at <http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8>.

³ Co-Prosecutors’ Response to “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,” ¶ 7 (Sept. 7, 2012).

⁴ See, e.g., Transcript of Trial Proceedings—Case 002, at 3-4, 37-38 (Sept. 6, 2012). See *Admissibility of Witness Statements In Lieu of Oral Testimony*, at <http://www.cambodiatribunal.org/blog/2012/07/expert-commentary-legal-filings-admissibility-witness-statements-lieu-oral-testimony>.

⁵ Press Release by the IENG Sary Defence (Sept. 12, 2012), available at <http://www.cambodiatribunal.org/press-release-ieng-sary-defence>.

The Trial Chamber has previously found that the OCIJ investigation has a presumption of integrity and therefore, “any concerns about the methods or the subject matter traversed during the investigation must be raised during the investigation.”⁶ Similarly, it has said that any allegations of knowing and willful distortion of witness statements by the OCIJ should have been brought before the Pre-Trial Chamber (PTC), whereas the Trial Chamber will only consider such matters “where the parties can demonstrate that they did not have an opportunity to detect the alleged distortion before the opening of the trial or if it appears necessary to safeguard the fairness of trial proceedings.”⁷

Both the Chamber and the Prosecution emphasize that the written records the Defense seeks to impeach have been on the Case File for many years and accessible to the accused. During Defense Counsel Michael Karnavas’s efforts to probe these issues at trial, Judge Lavergne asked: “What have the defence lawyers been doing over the course of the many years of the judicial investigation?”⁸ The Prosecution added:

Having not raised any of these issues or inconsistencies with the Co-Investigating Judges, having failed to request follow-up investigative action that would have been appropriate in light — had the Defence considered there to be any inconsistency, they now come before you, some three years after the interview, to raise these issues. They do not come before you in good faith — that is our respectful submission.⁹

Responding to a question from the Chamber President as to whether he had read the witness statements during the investigative phase, Karnavas responded in part:

Did I read them? Yes, I read them. There were thousands of them. And — but the question is: Did I have time to go over all of the transcripts or all of the tapes? And the answer to that is absolutely not. And the better question is: Did the entire Bench have the opportunity to read everything? And the answer to that would be no. It's physically and humanly impossible.¹⁰

During the investigation, the Ieng Sary Defense doggedly sought information about the OCIJ’s methodology but was rebuffed.¹¹ The Nuon Chea team likewise complained about flaws and omissions in witness testimony. It stressed “the importance of conducting the requisite reliability assessment *during the investigative stage* of these proceedings” and argued that “[e]xamination of the witness at trial is not a proper substitute for the implementation of the [requested] measures.”¹²

However, the PTC agreed with the CIJs that, if an investigative request by one of the parties—

⁶ Transcript of Trial Proceedings—Case 002, 43 (Sept. 6, 2012).

⁷ Decision on Nuon Chea’s Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, ¶ 7 (March 13, 2012).

⁸ Transcript of Trial Proceedings—Case 002, 36 (Sept. 6, 2012).

⁹ *Id.* at 40-41.

¹⁰ *Id.* at 33.

¹¹ See Ieng Sary’s Third Request for Investigative Action (May 21, 2009); Memorandum from the CIJs regarding Your “Request for Investigative Action” Concerning *inter alia* the Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation (Dec. 11, 2009).

¹² Decision on Appeal and Further Submissions in Appeal Against OCIJ Order on Nuon Chea’s Request for Interview of Witnesses, ¶¶ 5, 52 (D318, D319, D320, D336, D338, D339 & D340) (Sept. 20, 2010) (emphasis in original).

such as to interview or re-interview a witness—were refused, “the trial stage affords the Defence ‘every opportunity to contest the evidence,’ including the possibility to ‘request the Trial Chamber to summon any of the witnesses the Co-Investigating Judges have decided not to interview (or re-interview).’” Notably, it agreed with the CIJs that “the trial stage is an additional and alternate forum for the Defence to contest the reliability of evidence.”¹³

The Trial Chamber believes that “most concerns about what a witness might have said during an investigation and what he or she is saying now in evidence can be dealt with quite simply by asking the witness.”¹⁴ Confrontation allows the Defense teams to test whether or not a witness’s oral testimony is consistent with his/her previous written statements, and provides them some opportunity to demonstrate how the interview process may have influenced its substance. However, the Trial Chamber’s oral rulings prohibit the teams from directly questioning witnesses about the circumstances under which their interviews were conducted.

The Prosecution says the whole affair is overblown. It argues that no fair trial rights are implicated by the alleged irregularities because the witnesses’ in-court testimony—which the Defense has had an opportunity to challenge—has been consistent with their prior statements, and the Defense is attempting to “falsely create a sense of controversy.”¹⁵

A sense of controversy has indeed been created about the quality of OCIJ witness statements. An opportunity for Defense teams to raise publicly the bases of their misgivings—during their allotted time for questioning—could undercut any false suspicions and facilitate Prosecution efforts to secure Trial Chamber recognition of the probative value of witness statements admitted into evidence without the opportunity for confrontation. Most importantly, the willingness of the Trial Chamber to hear and consider the issue would establish an important example for domestic Cambodian courts, which all too frequently undercut defense rights by rigidly emphasizing legal formalities over substantive fair trial rights.

A ruling by the Trial Chamber on multiple Defense motions on this issue is expected in due course.

¹³ *Id.* at ¶ 57.

¹⁴ Transcript of Trial Proceedings—Case 002, at 43 (Sept. 6, 2012).

¹⁵ *Id.* at 41.