



THE AUTHORITY OF THE CO-INVESTIGATING JUDGES TO CALL FOR WITNESS TESTIMONY

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On October 7, 2009, the ECCC publicly released several letters issued by the Co-Investigating Judge Marcel Lemonde that were sent to six high ranking government officials summoning them to the court to provide their testimony as witnesses in Case 002. Early indications suggest that the government is opposed to the requests from the Co-Investigating Judge. According to government spokesperson Khieu Kanharith, the government's position is that only officials who volunteer are obliged to appear before the court, regardless of whether or not they are called as witnesses.¹ He continued to say that foreign officials involved in the court could "pack their clothes and return home" if they were not satisfied with the decision.² Furthermore, the Prime Minister recently argued that the government officials should not testify because they were involved in establishing the tribunal and therefore their testimony as "plaintiffs" could prejudice the court.³

It is imperative at this stage that there be a clear understanding by all concerned as to the law being applied by the ECCC and why government witnesses could be of interest to the Co-Investigating Judges as neither plaintiffs nor defendants but as witnesses who might assist with ascertaining the truth while evidence is being collected against the four suspects being investigated in Case 002.

¹ [Govt testimony could bias KRT: PM, Phnom Penh Post, 09 October 2009](#)

² [Govt testimony could bias KRT: PM, Phnom Penh Post, 09 October 2009](#)

³ Just because a party may be an interested party does not mean that they cannot or should not testify. For example, it is common practice for victims as civil parties to testify against an accused. The six government officials would still be under an obligation to tell the truth pursuant to an oath they must take, and the Judges can assess their credibility or perceived bias to determine the probative value of their testimony.

ECCC Statutory Authority to Hear Witness Testimony

The Agreement between the United Nations and the Royal Government of Cambodia on the Establishment of the ECCC specifies that procedure shall be in accordance with Cambodian law.⁴ Guidance from international procedural law can be sought when Cambodian law is inconsistent with international standards or when there is uncertainty regarding the interpretation of a relevant procedural rule under Cambodian law.⁵ The 2004 Law on the Establishment of the Extraordinary Chambers grants the Co-Investigating Judges the power to hear witnesses in accordance with existing procedures in force.⁶ Furthermore, the ECCC's constitutional documents provide that the Co-Investigating Judges, in discharging their duties (such as hearing witness testimony), may seek assistance from the Royal Government of Cambodia, in which case such assistance must be given.⁷

The Pre-Trial Chamber determined that it is the Internal Rules (IR), rather than the Cambodian Criminal Procedure Code (CPC), that form the authoritative source of procedural law at the ECCC.⁸ The Pre-Trial Chamber held that the Internal Rules form a self-contained regime of procedural law which is required in the case of the ECCC because the tribunal's focus differs substantially from the normal operation of Cambodian criminal courts.⁹ However, it is noteworthy that both the Internal Rules as well as the CPC are largely consistent on this issue and both grant broad authority to Co-Investigating Judges to call witnesses to testify before them in the course of their investigation.

The Internal Rules provide that the Co-Investigating Judges can take statements from any person whose testimony they consider will be "conducive to ascertaining the truth."¹⁰ Any person summoned as a witness must appear before the Co-Investigating Judges.¹¹ In case of refusal to appear, the Co-Investigating Judges may issue an order requesting the Judicial Police to compel the witness to appear.¹² Furthermore, a refusal to testify, without just excuse, will be considered to be an interference with the administration of justice.¹³ In such cases, the Co-Investigating Judges may conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings or they may refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United

⁴ [Agreement between the UN and the RGC on the Establishment of the ECCC, Article 12](#)

⁵ [Agreement between the UN and the RGC on the Establishment of the ECCC, Article 12](#)

⁶ [Law on the Establishment of the ECCC, Article 23 new](#)

⁷ [Agreement between the UN and the RGC on the Establishment of the ECCC, Article 12](#); [Law on the Establishment of the ECCC, Article 23 new](#)

⁸ [Nuon Chea, PTC, Decision on Appeal Against Order Refusing Request For Annulment, 26 August 2008, Para 14](#); [Khieu Samphan, PTC, Decision on Supplemental Application for Release, 24 Dec 2008, Para 16](#)

⁹ [Nuon Chea, PTC, Decision on Appeal Against Order Refusing Request For Annulment, 26 August 2008, Para 14](#); [Khieu Samphan, PTC, Decision on Supplemental Application for Release, 24 Dec 2008, Para 16](#)

¹⁰ [ECCC Internal Rules: Rule 60](#), Rule 55

¹¹ [ECCC Internal Rules: Rule 60](#)

¹² [ECCC Internal Rules: Rule 60](#)

¹³ [ECCC Internal Rules: Rule 35](#)

Nations.¹⁴ Sanctions imposed for interfering with the administration of justice are determined by Cambodian law.¹⁵

Even though the Internal Rules take primacy over the Cambodian Criminal Procedure Code, it is important to note that the two are largely consistent on this issue. Specifically, an investigating judge may question any person whose response is deemed useful in the revelation of the truth.¹⁶ Any person summonsed as a witness must appear before the investigating judge.¹⁷ If that person refuses to appear, then the investigating judge may ask the public force to force the witness to appear, and such public force must act according to the instructions of the investigating judge.¹⁸ Any failure to appear before the court or to provide information as a witness shall be punished according to the law.¹⁹ Penalties for refusal to testify will likely be prescribed in the new Cambodian Penal Code whose draft articles were approved by the National Assembly on October 12. The Penal Code that was adopted in 1992 by the United Nations Transitional Authority in Cambodia subjected those who failed to appear before the court to a fine.²⁰

ECCC Standard for Hearing Witness Testimony

The Internal Rules statutorily grant the Co-Investigating Judges the power to receive witness testimony under a very broad standard of “conducive to ascertaining the truth.” Other international criminal tribunals have held that even if a witness is able to give relevant and admissible evidence, a subpoena should only be issued if it is likely to elicit evidence material to an issue in the case which cannot be obtained without judicial intervention or through other means.²¹ However, this “last resort” requirement and standard for identifying, with heightened specificity, the content of a witness testimony is borne out of the Rules of Procedure and Evidence of those international tribunals which are notably different from the Internal Rules of the ECCC with respect to compelling witness testimony.

The Rules of Procedure and Evidence for the International Criminal Tribunals for the Former Yugoslavia and Rwanda and for the Special Court for Sierra Leone provide, in relevant part, that a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.²² The “last resort” requirement, or the requirement that the information sought cannot be obtained through

¹⁴ [ECCC Internal Rules, Rule 35](#)

¹⁵ [ECCC Internal Rules, Rule 35](#)

¹⁶ Cambodian Criminal Procedure Code, Article 153

¹⁷ Cambodian Criminal Procedure Code, Article 153

¹⁸ Cambodian Criminal Procedure Code, Article 153, Article 239

¹⁹ Cambodian Criminal Procedure Code, Article 477

²⁰ [UNTAC Law of 1992, Article 24](#)

²¹ [Prosecutor v. Norman, Decision on Interlocutory Appeals Against the Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, Para 9, 20](#) ; [Prosecutor v. Halilovic, Decision on the Issuance of Subpoenas, 21 June 2004, Para 6, 7](#)

²² [ICTY Rules of Procedure and Evidence, Rule 54](#); [ICTR Rules of Procedure and Evidence, Rule 54](#); [SCSL Rules of Procedure and Evidence, Rule 54](#)

other means, has been introduced into the international jurisprudence because of the statutory requirement that summonses be *necessary* for the purposes of an investigation or the preparation or conduct of the trial.²³ The ECCC statute is much more liberal and gives the Co-Investigating Judges the authority to hear witness testimony when it is *conducive* rather than *necessary* in ascertaining the truth. Furthermore, the ECCC statute gives the Co-Investigating Judges more flexibility in compelling witness testimony even when information sought has not been specifically linked to a clearly identified issue in the investigation or forthcoming trial.

Moreover, at the investigative stage, given that it is so early in the process, there is even a greater imperative to grant the Co-Investigating Judges great latitude in collecting all evidence that may elucidate the facts surrounding their investigation. A broad reading of the power of the Co-Investigating Judges to hear witness testimony would be consistent with the International Covenant on Civil and Political Rights which is enshrined in the ECCC's constitution documents and states, in part, that the accused has a right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.²⁴

Exemptions from testifying

The court shall only issue a summons if the testimony of the witness is conducive to ascertaining the truth. A testimony sought for other reasons, such as for a political purpose to embarrass a public official, would amount to an abuse of process and would be an improper exercise of the summons power.²⁵ However, once a witness has been *properly* summonsed, that witness must testify unless he or she has a "just excuse." Furthermore, the obligation to appear as a witness when summonsed extends to government officials.²⁶

The only excuse that is provided for directly in the Internal Rules is the universally recognized right against self-incrimination.²⁷ Specifically, no witness can be forced to make statements that might tend to incriminate him or her.²⁸ To be sure, the six government officials would be under an obligation to testify only as witnesses and not as suspects. They may refuse to answer any questions that would tend to incriminate them. Apart from this right, international jurisprudence recognizes several other "just causes"

²³ [Prosecutor v. Halilovic, Decision on the Issuance of Subpoenas, 21 June 2004, Para 7](#)

²⁴ [Agreement between the UN and the RGC on the Establishment of the ECCC, Article 13](#); [Law on the Establishment of the ECCC, Article 33 new](#); [International Covenant on Civil and Political Rights, Article 14\(e\)](#)

²⁵ [Prosecutor v. Milosevic, Decision on Assigned Counsel Application for Interview of Tony Blair and Gerhard Schroder, 09 December 2005](#)

²⁶ [Prosecutor v. Milosevic, Decision on Assigned Counsel Application for Interview of Tony Blair and Gerhard Schroder, 09 December 2005, Para 28](#); [Prosecutor v. Krstic, Decision on Application for Subpoenas, 1 July 2003](#); [Prosecutor v. Bagasora, Decision on Request for a Subpoena for Major Jacques Biot, 14 July 2006, Para 4](#)

²⁷ [ECCC Internal Rules, Rule 28](#)

²⁸ [ECCC Internal Rules, Rule 28](#)

that the ECCC may draw upon in its determination that a witness who has been summonsed may still be exempt from testifying.

For example, several decisions coming from international criminal tribunals have recognized that witnesses who have been subpoenaed may be exempt from testifying where their testimony may have a serious detrimental effect on their mental or physical health. According to these decisions, the harmful effect on the health of the witness is an overriding concern that weighs against allowing the court to execute the subpoena.²⁹ There is no public information suggesting that the testimony of the six government officials in this case would have a serious detrimental effect on their health.

Furthermore, many witnesses at the other international criminal tribunals have refused to testify because they feared for their safety or reprisals against their family. However, concerns for the safety of witnesses or their relatives do not automatically override the duty to testify.³⁰ In such cases, the tribunals must address the security concerns of the witness and implement protective measures such as providing for, among other measures, *in camera* proceedings or testimony by video-conference.³¹ There is no public information suggesting at this point that the testimony of the six government officials in this case would put them or their families at risk.

In limited circumstances international criminal tribunals have found that certain public policy concerns serve as significant factors against compelling witness testimony. For example, war correspondents enjoy a heightened level of protection from testifying because compelling them to testify would adversely affect their ability to carry out their work which is deemed an important public interest.³² While that particular public policy concern is not germane to this case, the ECCC has the authority to assess its own public policy concerns. However, the public policy concern must be serious, and it is for the court, and not the witness, to decide whether the public policy concern should serve to exempt the witness from testifying.

Conclusion

Despite the objections raised from key government officials, the ECCC may properly exercise its authority to summon witnesses so long as the testimony sought is deemed to be conducive in ascertaining the truth. When properly summonsed, witnesses, including government officials, have an obligation to appear before the court unless they can show just cause. The six government officials have yet to specify whether they will comply with the letters from the Co-Investigating Judge and the basis of their decisions should they decide not to comply. Therefore, until such time as they can specify and

²⁹ [Prosecutor v. Bagosora, Decision on Prosecutor's Motion to Allow Witness DBO to Testify by Means of Deposition, 25 August 2004, Para 9; Prosecutor v. Haradinaj, Decision on Prosecution's Motion to Have Witness 25 Subpoenaed to Testify, 30 October 2007, Para 2](#)

³⁰ [Judgment Summary for Dragan Jokic, 27 March 2009](#)

³¹ [ICTR, Decision on Prosecution Request for Testimony of Witness BT via Video Link, 8 October 2004, Para 1, 13](#)

³² [Prosecutor v. Brdjanin, Decision on Interlocutory Appeal, 11 December 2002](#)

demonstrate just cause, they have an obligation to appear before the Co-Investigating Judges to provide their testimony as witnesses. Moreover, if they fail to appear without just cause, there is the possibility that they may be subject to penalty under Cambodian law. It remains instructive that international criminal tribunals outside Cambodia have held several witnesses in contempt for refusing to testify and have issued sentences including prison terms.³³

³³ [Judgment Summary for Dragan Jokic, 27 March 2009](#); [Third witness in Kosovo trial faces charges at UN tribunal over refusal to testify, UN News Center, 14 November 2007](#).