



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON NUON CHEA'S REQUEST FOR A RULE 35 INVESTIGATION REGARDING INCONSISTENCIES IN THE AUDIO AND WRITTEN RECORDS OF OCIJ WITNESS INTERVIEWS

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1. INTRODUCTION

1. The NUON Chea Defence requests the Trial Chamber to conduct an investigation pursuant to Internal Rule 35(2)(b) to determine whether investigators from the Office of the Co-Investigating Judges (“OCIJ”) knowingly and wilfully obstructed the investigation in Case 002 by unlawfully tampering with evidence.¹ In support of this request, the Chamber is also seised of a letter by the IENG Sary Defence of 11 December 2011, requesting that the full transcripts of each OCIJ interview of witnesses scheduled to testify in Case 002 be provided to the parties, as well as their translation into English and Khmer.²

2. On 20 December 2011, the Chamber addressed in a memorandum the trial management impact of these requests for the Court Management Section (“CMS”) and the Interpretation and Translation Unit (“ITU”).³ The present decision determines the merits of these requests. The Chamber will address, in a pending decision, the impact of alleged discrepancies between audio recordings and written statements which the Co-Prosecutors instead seek to put before the Chamber in absence of in-court testimony by the authors of these statements.⁴

2. SUBMISSIONS

3. The NUON Chea Defence alleges that a sample of written records and audio recording of interviews previously undertaken by OCIJ investigators “suggests a troubling pattern of inconsistencies” which “undermine the credibility of the entire judicial investigation.”⁵ They submit that a review of the written records and audio recordings of 6 witnesses showed omissions and divergences in meaning between the Khmer transcripts and their English statements, as well as incompleteness in the audio recordings.⁶ They allege, for example, that the OCIJ transformed innocuous statements into incriminating ones, thereby “transforming acquiescence to the investigators’ leading questions into statements of affirmative

¹ NUON Chea Defence Team’s Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, E142, 17 November 2011 (“NUON Chea Request”).

² IENG Sary Defence Letter Concerning Transcripts of Witness Interviews, E142/1, 11 December 2011.

³ Trial Chamber Memorandum entitled “Translation Requests in Support of NUON Chea Motion E142 and IENG Sary Letter to the Trial Chamber Senior Legal Officer of 11 December 2011 (E142/1), E142/2, 20 December 2011 (“Trial Chamber Memorandum of 20 December 2011”).

⁴ See Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber, E96, 15 June 2011..

⁵ NUON Chea Request, paras 3, 17.

⁶ NUON Chea Request, paras 2, 4-7.

knowledge”, and summarized witness’ remarks out of sequence in order to produce a coherent narrative and impression of certainty where one might not otherwise have existed.⁷

4. In consequence, the NUON Chea Defence requests the Chamber to “actively and effectively” conduct an investigation pursuant to Internal Rule 35(2)(b) to determine whether “any [OCIJ] investigators knowingly and wilfully obstructed the Case 002 investigation by unlawfully tampering with evidence.”⁸ They request that the verbatim transcripts of interviews of all significant witnesses be provided to the parties, and that the records of testifying witnesses be investigated before each witness is called at trial, in addition to “further measures [the Chamber] may deem appropriate, based on the results of its investigation.”⁹

5. In its request, the NUON Chea Defence also opposes the Co-Prosecutors’ request that witnesses be permitted to refresh their memory by reading their prior statements in advance of their testimony before the Trial Chamber.¹⁰ On 23 November 2011, the Trial Chamber explained the rationale for the showing of prior statements in advance of testimony at trial, and provided guidelines to the Witness and Expert Support Unit in relation to this task.¹¹

3. FINDINGS

6. The Internal Rules contain procedures aimed at safeguarding the integrity of the investigation and the truthfulness of the record.¹² While the Co-Investigating Judges may directly interview any victim or witness and record their statements in a written record of interview, they may also delegate through a Rogatory Letter the conduct of such interviews to investigators from their Office. The investigators shall act under the supervision of the Co-Investigating Judges and shall draw up a written record of their investigations and findings.¹³

⁷ NUON Chea Request, para. 4 (referring to a total of 13 written records).

⁸ NUON Chea Request, para. 25 (a).

⁹ NUON Chea Request, para. 25 (b)-(c).

¹⁰ NUON Chea Request, paras 22-24.

¹¹ Trial Chamber memorandum entitled “Provision of prior statements to witnesses in advance of testimony at Trial,” E141/1, 23 November 2011 (“Trial Chamber Memorandum of 23 November 2011”) (indicating that the provision of prior statements is intended to avoid waste of court time should witnesses need to re-acquaint themselves with their prior statements or attest that they made these statements).

¹² See e.g. Internal Rules 55, 62, (providing the following principles concerning the conduct of investigations: “the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory” (Internal Rule 55(5)) and, in relation to the issuance of rogatory letters, Internal Rules 55(9) and 62(2)).

¹³ See Internal Rule 62(3)(a). While NUON Chea Defence argues in its Request (para. 14) that as Internal Rule 62(3)(a) imposes compliance “with the provisions of Internal Rule 51(8) as appropriate,” it mandates the Co-

The Internal Rules further provide that a written record shall be made of every interview,¹⁴ while envisaging the possibility that the interview in some circumstances be audio or video recorded.¹⁵ Therefore, it is not mandatory to make an audio or video recording of an interview with a witness or a Civil Party. Although most OCIJ interviews were audio-recorded, the Internal Rules do not require that audio recording be transcribed or translated. Both the audio recordings and the written records were, however, placed in the Case File on a rolling basis over the course of the judicial investigation and have therefore been available to the parties (all of whom have competence in both Khmer, as well as English and/or French) for several years. The Case File presently contains more than 750 written records of witness interviews conducted by the OCIJ during the investigation phase of Case 002.¹⁶

7. Where written record of interviews are alleged to have been tampered in order to knowingly and wilfully distort the content of the statements and obstruct the investigation, the parties should have seized the Pre-Trial Chamber with a request for annulment of the written records or of the whole investigation, pursuant to Internal Rule 76. It follows that the Trial Chamber will not at this stage consider issues that should have been addressed at the investigative phase and will only do so 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.¹⁷

8. During the investigation phase, all parties had access to the case file, including the audio recordings. The NUON Chea Defence did not satisfy the Chamber that it was not possible to assess the existence of a credible practice of tampering of the written records before the opening of the trial. Nonetheless, due to the seriousness of the allegations raised by the NUON Chea Defence and the impact that these allegations may have on the fairness of the trial, the Chamber has evaluated whether there are grounds to further consider the NUON Chea request.

Investigating Judges to “record the duration of any interview, and the duration of any breaks between interview periods,” the reference to the provisions of Internal Rule 51(8) is of limited relevance as it concerns only the procedure for a report on the arrest of a person taken into police custody. Such measures apply only to “a person suspected of having participated in a crime within the jurisdiction of the ECCC”. Reference to these provisions is therefore inappropriate in relation to the interview of a witness.

¹⁴ See Internal Rule 55(7).

¹⁵ See Internal Rule 25.

¹⁶ See also Trial Chamber Memorandum of 20 December 2011, page 2.

¹⁷ Decision on IENG Sary’s Motion for a Hearing on the Conduct of the Judicial Investigations, E71/1, 8 April 2011.



9. The present request seeks an investigation into the entirety of the judicial investigation in Case 002 pursuant to Internal Rule 35(2)(b). This sub-rule empowers the Trial Chamber to carry out an investigation “[w]hen [... a Chamber has] reason to believe that a person may have knowingly and wilfully interfered with the administration of justice.”¹⁸ The Trial Chamber has previously outlined the legal framework applicable to requests for investigation pursuant to Internal Rule 35.¹⁹ The threshold for intervention under this rule is a reasonable belief that a person “knowingly and wilfully” interfered in the administration of justice. The relevant jurisprudence has emphasised that requests sought under this sub-rule must be based upon good cause, and that investigative requests cannot instead be utilized in order to ascertain whether or not such cause might exist.²⁰

10. It follows that where the propriety of the conduct of OCIJ investigators is challenged or allegations of evidence manipulation or tampering made, the applicant will bear the burden of showing that the presumption of regularity attached to the OCIJ’s acts in question should no longer apply. This presumption was recently rebutted, for example, by a minority decision of the Pre-Trial Chamber (concerning the deliberate and improper alteration of documents)²¹, but has been upheld where motions were instead considered to be speculative or unsubstantiated.²²

11. The Trial Chamber observes that in accordance with the practice followed under Cambodian law, interviews before the OCIJ are not verbatim records but a report made by the Co-Investigating Judges of the relevant statements made by a witness, a Civil Party or Accused.²³ Further, each written record, including those reviewed by the NUON Chea

¹⁸ Decision on Appeal against the Co-Investigating Judges Order on the Charged Person’s Eleventh Request for Investigative Action, D158/5/1/15, 18 August 2009, para. 29.

¹⁹ Decision on NUON Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), E116, 9 September 2011, paras 21-22.

²⁰ See e. g., Decision on Motions for Disqualification of Judge Silvia Cartwright, E137/5, 12 December 2011, para. 14 (indicating that requests for investigations are not the proper mechanism to procure evidence in support of motions for disqualification).

²¹ See Case 003/07-09-2009-ECCC/OCIJ (PTC 02), Consideration of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, D11/2/4/4, 24 October 2011, Opinion of Judges Lahuis and Downing (identifying various procedural defects in the conduct of the judicial investigation, including notification of charges, information to potential victims and Civil Party applicants, delays in the filing of documents and their notification); see also Decision on NUON Chea and IENG Sary’s Appeal against OCIJ Order on Requests to Summon Witnesses, D314/2/7, 8 June 2010, para. 38 (“Rule 35 was incorporated into the Internal Rules as a mechanism to preserve the integrity of the judicial process at both the investigative and trial stages. Integrity of the process is guaranteed through the judicious application of this Rule when the CIJs or the Chamber consider action taken by an individual threatens the administration of justice. The application of this provision [...] acts as a deterrent to others that may consider influencing the process.”)

²² See e. g., Decision on Motions for Disqualification of Judge Silvia Cartwright, E137/5, 12 December 2011.

²³ See further Internal Rule 24 (obligating witnesses to take an oath prior to being interviewed) and Internal Rules 28(2) and 25(1)(a) (entitling witnesses to be informed of their right against self-incrimination and that their interviews are audio recorded).

Defence, indicates that it was at the time read back to the author of the statement, who confirmed the accuracy of its contents by providing a signature or a thumbprint.²⁴

12. The Chamber has previously indicated that it will consider on a case-by-case basis challenges to the testimony of witnesses at trial based on inconsistencies between their prior statements and audio recordings of interview, where relevant.²⁵ However, it will entertain allegations of inconsistency between the audio recording and written records of interview only where these are identified with sufficient particularity and pertain to alleged discrepancies on the substance which have clear relevance to the trial. Any party raising such a challenge further bears the burden of clearly identifying the alleged inconsistency and give timely advance notice to the Chamber and the other parties of these allegations and the documents relevant to them.²⁶ In order to avoid overwhelming the CMS and ITU with requests for the translation and transcription of large volumes of material whose relevance to the trial has not been demonstrated, the Chamber has previously advised that transcription and translation requests in support of these objections must specifically identify and be limited to the portions of the relevant statement and audio recording containing the alleged inconsistency. Blanket requests for transcription and translation of entire, voluminous audio recordings or transcripts will therefore not be entertained.²⁷

13. The Chamber further notes that where witnesses are called before the Chamber, any party may directly question a witness on these and any other allegedly relevant discrepancies between a witness' statement and its audio recording. The Chamber otherwise rejects the relief sought by the NUON Chea Defence. In alleging discrepancies between audio recordings and written statements, they do not demonstrate, nor seek to demonstrate, that OCIJ personnel knowingly and wilfully falsified the investigative record (for example, by negating the possibility that any alleged distortions could have resulted instead from human error or the inevitable selectivity entailed in reducing a lengthy audio recording into a written, summarized account). To the contrary, the NUON Chea Defence requests the Trial Chamber itself to "ascertain whether there are sufficient grounds to institute proceedings against any

²⁴ As previously indicated by this Chamber, a copy of the written record of their interviews was then provided to each witness (Trial Chamber Memorandum of 23 November 2011); *see also* Internal Rules 25(2) and 55(7).

²⁵ *See* Trial Chamber Memorandum of 20 December 2011, page 2.

²⁶ *Ibid.*

²⁷ *See* Trial Chamber memorandum entitled "Witness lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibits, and response to motion E109/5", E131/1, 25 October 2011.

OCIJ investigators”²⁸ – in contravention of the threshold for intervention by a Chamber required by Internal Rule 35(2)(b).

14. Nor is any basis provided for the assertion that alleged discrepancies within the limited number of statements reviewed by the NUON Chea Defence suggest that the impartiality of the entire three-year judicial investigation in Case 002 should be called into question. To contrary, the fact that all witnesses ultimately attested to the veracity and accuracy of their statements in the form ultimately produced would suggest the opposite conclusion, absent evidence to the contrary. In addition, the fact that most of the OCIJ interviews were audio recorded and that the audio-records were placed in the case file is inconsistent with a deliberate practice of obstructing the investigation. Further, and as noted above, the NUON Chea Defence will in any event have the further safeguard of being able to question any witness at trial on these alleged discrepancies, where these alleged inconsistencies are demonstrably relevant either to assessing the probative value of the evidence or necessary to safeguard the fairness of trial proceedings.

15. The Trial Chamber accordingly finds that the NUON Chea Defence has failed to show sufficient grounds to initiate proceedings pursuant to Internal Rule 35 against any named or unnamed Co-Investigating Judge or staff member, still less a basis to justify scrutiny of the entirety of the judicial investigation in Case 002.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REJECTS the NUON Chea Defence Request for an investigation pursuant to Internal Rule 35(2)(b) on its merits;

INFORMS the parties that should the witnesses identified in paragraphs 4-7 of the NUON Chea Defence Request be called to testify before the Trial Chamber in Case 002, they may be confronted with the discrepancies identified in these paragraphs by any party or the Chamber at trial, where necessary to assess the probative value of their testimony or to safeguard the fairness of trial proceedings;

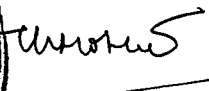
FURTHER INDICATES that any witness called to testify at trial in Case 002 may similarly be confronted with alleged discrepancies between their prior statements to the Co-Investigating Judges or the oral recording of their interviews, provided these alleged discrepancies are necessary to assess the probative value of their testimony or to safeguard the fairness of trial proceedings, and are identified to the Chamber and parties with sufficient particularity and timeliness in accordance with paragraph 12 of this decision; and

²⁸ NUON Chea Request, para. 1.

RECALLS its decision of 23 November 2011 regarding the showing of prior statements to witnesses in advance of their testimony at trial (E141/1).



Phnom Penh, 13 March 2012
President of the Trial Chamber



Nil Nonn