



INTERNATIONAL
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LEGAL MEMORANDUM 2

HEARSAY EVIDENCE

AND INTERNATIONAL FAIR TRIAL STANDARDS

OCTOBER 2008

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A decorative graphic consisting of several overlapping, wavy, horizontal bands in shades of light gray, extending from the right side of the page towards the center.

® Legal memorandum – Hearsay evidence and international fair trial standards,
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LEGAL MEMORANDUM: *HEARSAY EVIDENCE AND INTERNATIONAL FAIR TRIAL STANDARDS*

INTRODUCTION

The International Commission of Jurists (ICJ) based in Geneva, Switzerland, is an independent international organization consisting of judges and lawyers who represent all regions and legal systems in the world, which aims to promote human rights through the rule of law. Its Asia-Pacific Regional office is in Bangkok.

This legal memorandum assesses whether recent amendments to provisions regarding the use of hearsay evidence in Thailand’s Criminal Procedure Code are compatible with international fair trial standards. The ICJ is concerned that the amendments reduce important safeguards required to protect individuals from unfair trials.

The ICJ believes that those who commit serious and violent crimes must be prosecuted and brought to justice. However, under international law states are also obliged to ensure fair trials, including by safeguarding the presumption of innocence. The primary aim of fair trial procedures is to enable Courts to find the truth, protect the innocent and convict the guilty, and to preserve the integrity of the judicial process. Experience from other parts of the world suggests that convictions based solely or to a decisive extent on hearsay evidence can lead to miscarriages of justice.

WHAT IS HEARSAY EVIDENCE?

The main feature of hearsay evidence is that evidence is given in court of a statement made by a person who is not actually present in court. For example, Witness X tells the court that Witness Y told him that the Defendant killed Mr Z.

In common law systems, such as the United Kingdom and the United States, historically the law has treated this kind of evidence as inadmissible in criminal proceedings. Such evidence should normally be given in person by the maker of the statement. In other words, Witness Y must give evidence in person and the court cannot rely on Witness X’s testimony. This is known as ‘the hearsay rule’.

WHY CAN HEARSAY EVIDENCE BE DANGEROUS?

The main objection to hearsay evidence is that a defendant in criminal proceedings does not have the opportunity to challenge the maker of the statement so as to contest its veracity. In our example, this means the Defendant would not have a chance to question Witness Y and for the Court to test the testimony and assess the witness’s credibility.

Hearsay is not considered “the best evidence”, because of the danger that it may be based on misunderstandings or even concocted.¹ The Court should be able to determine whether Witness Y is giving truthful evidence, in good faith, or whether Witness Y is wrong or might be untruthful for some reason.

This concern is heightened in criminal trials because the defendant’s freedom, or right to liberty, is at stake. This means that the Court has to be particularly careful that hearsay evidence does not adversely affect the defendant’s right to a fair trial.

ARE THERE ANY EXCEPTIONS TO THE HEARSAY RULE?

In common law systems there are limited and acceptable exceptions to the hearsay rule. The main examples are where the witness is genuinely unavailable to give evidence and statements made by those who are dying. However, even in these exceptional cases, the admissibility of hearsay evidence in court should not be automatic, but at the discretion of the judge and only where it is in the interests of justice and would not prejudice the fairness of the trial.

HOW DO THE RECENT AMENDMENTS CHANGE THIS?

This is the first time that the rule against hearsay evidence has appeared in the Criminal Procedure Code. Previously it was only contained in the Civil Code,² but in practice the rule was applied in criminal proceedings as well. Recent amendments to the Criminal Procedure Code, Section 226/3,³ now expressly create a general rule against hearsay evidence in criminal cases, which is welcome. However, Section 226/3 provides two exceptions to this general rule, which gives the Court broad power to consider hearsay evidence. The Court is permitted to admit hearsay evidence if the information either:

- Appears to be credible and is from a credible source;⁴ or,
- The maker of the statement “cannot appear” as a witness and there is a “reasonable cause in the interest of justice” to admit the hearsay evidence.⁵

WHAT DOES INTERNATIONAL LAW AND STANDARDS SAY ABOUT THE HEARSAY RULE?

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) (acceded to by Thailand on 29 October 1996), provides that defendants are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. It sets forth the minimum judicial guarantees for fair trial, including three provisions relevant to the hearsay rule:

Equality of arms

A key element of a fair trial is what is known as the ‘equality of arms’ as between the prosecution and defence⁶. According to the United Nations Human Rights Committee, “This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.”⁷ Given the disproportionately large resources of the state, most defendants are considered to be at a disadvantage compared to the prosecution. For this reason, various procedural guarantees are set down in national law and international law to ensure that the defendant is given a fair and genuine opportunity to challenge the prosecution evidence, in order to secure a fair trial.⁸ The rule against hearsay, as part of the rules of evidence, seeks to protect the defendant from being convicted without the opportunity to cross-examine and test the evidence of prosecution witnesses in front of the judge, who can assess the demeanour and truthfulness of the witness.

Right to examine witnesses

Minimum fair trial guarantees expressly include the right of a criminal defendant “to examine, or have examined, the witnesses against him”.⁹ According to the UN Human Rights Committee, “As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”¹⁰ This provision is intended to ensure that the accused is placed on an equal footing with the prosecution and is a crucial element of a fair trial.¹¹ It creates a presumption that the accused has the opportunity to challenge all the evidence at a public hearing. There is not an absolute requirement for ‘live evidence’ from a witness in person, but fair trial rights may be breached if hearsay evidence is admitted in circumstances where the fairness of the trial requires the cross-examination of the witness.

Presumption of innocence

Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.¹² This means the burden of proof of the criminal charge is on the prosecution, to prove guilt beyond reasonable doubt, and that the defendant has the benefit of any doubt.¹³ A conviction based solely or to a decisive degree on hearsay evidence undermines, or may even breach, the presumption of innocence, because of the inability to properly test the credibility of the witness and the truthfulness of the evidence.

For all these reasons hearsay evidence must be treated with great caution. Failure to ensure that the defendant has an equal opportunity to submit evidence as the prosecutor, or where hearsay evidence stands alone or is the decisive factor in a conviction,¹⁴ may lead to a violation of Article 14.¹⁵

WHY ARE WE CONCERNED ABOUT THE NEW HEARSAY RULE?

The ICJ is concerned that the exceptions to the hearsay rule in Section 226/3, and the weight to be given to hearsay evidence in Section 227/1, is too broad and vague, and may undermine the right to a fair trial, including the presumption of innocence.

Hearsay evidence given to inquiry officials should not be automatically admissible

The ICJ is concerned that the first sub-paragraph of Section 226/3 might in practice be interpreted to mean that statements made to inquiry officials will be treated as inherently or presumptively “believable”, and, therefore, automatically admissible as an exception to the hearsay rule. This is a dangerous approach, as statements to inquiry officials may be obtained by coercion or other unlawful means, or be unreliable for other reasons. Rather, the Court should carefully consider the exact circumstances in which the statement was made. In assessing the “condition” and “nature” of the hearsay evidence, as required by the first sub-paragraph, it is implicit that the Court should consider whether the overall fairness of the trial requires the cross-examination of the original maker of the statement in court, and whether or not it is in the interests of justice to admit the hearsay evidence. As stated above, international fair trial standards may be breached if hearsay evidence is admitted, even from the testimony of an inquiry official, in circumstances where the fairness trial requires the cross-examination of the witness; which should normally be the case.

Hearsay evidence should not become the general rule

Under the second sub-paragraph of Section 226/3 hearsay evidence can be admitted if the witness “cannot appear” and there is a “reasonable cause in the interest of justice” to admit the evidence. The Court is given no guidance as to what will be an acceptable justification for a witness not to appear in person. The ICJ considers that the possibility to admit hearsay evidence should be limited to a small number of extreme cases, such as where a person is dead, seriously ill, or cannot be found after reasonable searches have been made. Only in these limited cases and if allowing hearsay evidence would also satisfy the “interests of justice” requirement should hearsay evidence be admissible.

What is in the ‘interests of justice’ will be question for the judge based on the facts of the individual case. The Courts of England and Wales have regard to nine factors in determining what is in the interests of justice: the probative value of the statement; what other evidence has been or can be given in the case on the same matter; the importance of the evidence in the context of the case as a whole; the circumstances in which the statement was made; how reliable the maker of the statement appears to be; how reliable the evidence of the making of the statement appears to be; whether oral evidence of the matter stated can be given, and, if not, why it cannot; the amount of difficulty involved in challenging the statement and the extent to which that difficulty would be likely to prejudice the party facing it.¹⁶ The ‘interests of justice’ is, therefore, something to be considered carefully and in detail in each case.

Any wider interpretation of the hearsay rule creates the risk that witnesses will either avoid giving evidence on weak grounds, or that lawyers will abuse the rule by not calling witnesses who they feel will not give favourable evidence in Court. Ultimately, a trend could emerge where the Courts increasingly rely on unchallenged hearsay evidence, increasing the risk of unfair trials and miscarriages of justice.

Convictions should not be based solely on hearsay evidence or ‘accomplice evidence’

Section 227 of the Criminal Procedure Code deals with the weight to be given to admissible evidence. It gives the Court discretion to weigh the evidence against the accused, and, in accordance with international standards, only to convict where it is beyond reasonable doubt that the accused is guilty.

A recent amendment, Section 227/1, provides how the Court is to assess the value of admissible hearsay evidence and ‘accomplice witness’ evidence.¹⁷ It provides that the Court must “carefully” consider the “believableness” of such evidence and should not rely on uncorroborated evidence, unless there is a “strong reason” or “special circumstance”. The hearsay evidence or accomplice evidence must also be from a source that is independent from the evidence it is used to support.¹⁸

The ICJ welcomes the inclusion of safeguards in Section 227/1, in particular that the Court should look for corroborating evidence. We are, however, concerned that allowing uncorroborated hearsay evidence on such vague grounds as a “strong reason” or “special circumstance” might encourage convictions on hearsay evidence alone, or to allow such evidence to be accorded undue weight. As stated above, violations of the right to a fair trial can occur when convictions are based solely, or to a decisive extent, on hearsay evidence. In this context, the ICJ is concerned at a recent criminal judgment, relating to the conflict in the southern border provinces, which relied on a combination of hearsay and accomplice witness evidence to convict for murder and terrorist-related offences. In that case, accomplice evidence was obtained during interrogation and then admitted as second-hand hearsay evidence to the Court in the testimony of the inquiry official, who had interrogated the accomplice witness. The judgment gave no explanation why the Court did not hear evidence in person from the accomplice witness.

Special care should also be taken with “confessions” or admissions made during periods of detention; in particular, where not supported by corroboration from an independent first hand source. The burden of proof should be on the prosecution to show that confession evidence was not obtained under duress or coercion.¹⁹ In this context, it is important that the Court does not place greater reliance on statements made to investigating authorities than subsequent statements in which they are denied by the witness. Where allegations of ill-treatment are made, the Court should carry out a careful review of the circumstances in which the confession was made.²⁰

May encourage reliance on 'unsafe' evidence in security related cases

The ICJ is particularly concerned that the Courts may be tempted to relax the hearsay rule in security-related cases, and to accept hearsay evidence obtained under interrogation from intelligence or inquiry officials, without the Court hearing directly from the witness. Fair trial rights should be guaranteed even in states of emergency and times of conflict²¹.

The ICJ has previously expressed its concern to the Royal Thai Government that detention under Martial Law and the Emergency Decree²² in the Deep South²³ is not being used solely as a preventive measure, which is the primary ground of detention under these laws, but rather for the purpose of interrogation for intelligence gathering and to obtain evidence for use in criminal proceedings.²⁴ Neither Martial Law nor the Emergency Decree contain essential legal safeguards normally provided to detainees under the Criminal Procedure Code, and required by international law and standards applicable to Thailand.²⁵

Under Martial Law, persons can be detained incommunicado (without access to the outside world) for up to seven days, then for a further 30 days under the Emergency Decree, with severely limited or no physical access to family, lawyers or the courts, in contravention of international standards. Experience from around the world over many years strongly indicates that these conditions significantly increase the risk of unlawful ill-treatment of detainees, and undermine the right to a fair trial. Accordingly, statements obtained from defendants and witnesses under these circumstances should be treated with great caution.

The ICJ is concerned that the exceptions to the hearsay rule will increase the likelihood of the use of statements obtained under duress or by coercion, and removes the opportunity for the witness to give testimony directly to the Court. The ICJ is concerned that confessions and other witness evidence, obtained during interrogation under emergency laws, will subsequently be relied on as hearsay evidence in criminal proceedings, in the form of witness statements or inquiry reports from interrogation officials; indeed, the ICJ has already seen one judgment from the southern border provinces where this practice was adopted.

Where detention and questioning have taken place outside of the normal protections of the Criminal Procedure Code, the Public Prosecutor and the Court should exercise particular caution as to the circumstances in which evidence is obtained. In this context, the public prosecutor and the Courts have a positive duty to investigate any allegations of physical or mental abuse in detention.²⁶ Evidence obtained under torture or other ill-treatment is not only inherently unreliable, but must also be excluded in accordance with Thai law²⁷ and international law and standards.²⁸

HOW CAN THE HEARSAY RULE BE PROTECTED IN THAILAND?

- Hearsay evidence should not be admissible, save in the most exceptional cases: (i) where the witness is genuinely not available to give evidence, and (ii) only where it is in the interests of justice, and (iii) it would not prejudice the overall fairness of the trial.
- The burden should be on the party seeking to have hearsay evidence admitted to prove that it is strictly in the ‘interests of justice’.
- The Court should carefully and strictly consider the interests of justice in each case, with a view to protecting the accused’s rights and the overall requirements of a fair trial.
- There should be no presumption by prosecutors or the Court that evidence given to inquiry officials, or other state officials, is admissible.
- Convictions should not be based solely or to a decisive extent on uncorroborated statements where witnesses have not given evidence publicly in open court.
- Where hearsay evidence is relied on in security-related cases, the Public Prosecutor and the Court should take particular care as to the circumstances under which evidence was obtained, in particular where the statement was made whilst in detention under Martial Law or the Emergency Decree.

¹ See e.g. Law Commission Report No. 245, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, 1997, The Stationery Office, paras. 31-33B, United Kingdom.

² Section 95 (2), Civil Code.

³ Introduced by Section 11 Criminal Procedure Code Amendment Act (No. 28) B.E. 2551 (2008).

⁴ Section 226/3 (1), Criminal Procedure Code. "Condition, nature, source of derivation and minor fact of such hearsay witness are believable that the fact is provable or [...]".

⁵ Section 226/3 (2), Criminal Procedure Code. "It is necessary because a person who has seen, heard or known the statement concerned with case in which a statement shall be directly made in person is a witness, can not appear as a witness and there is reasonable cause in the interest of justice to admit such a hearsay evidence."

⁶ See e.g. *John Campbell v Jamaica* (307/88) 24/3/93, para. 6.4: "Article 14 of the Covenant gives everyone the right to a fair and public hearing in the determination of a criminal charge against him; an indispensable aspect of the fair trial principle is the equality of arms between the prosecution and the defence."

⁷ UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2008, Para. 13.

⁸ See e.g. *Richards v Jamaica* (535/93) 31/3/97, UN Human Rights Committee, opinion of Mr. Ando.

⁹ Article 14 (3) (e), ICCPR: "to examine, or have examined, the witnesses against him and to obtain attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

¹⁰ UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2008, Para. 39.

¹¹ See e.g. *Gordon v Jamaica* (237/87) 5/11/92, UN Human Rights Committee; *Bonisch v Austria*, European Court of Human Rights, (1987) 9 EHRR 191.

¹² See Section 39, Constitution of Thailand B.E. 2550 (2007) and Article 14 (2), ICCPR.

¹³ General Comment 13, UN Human Rights Committee, para. 7.

¹⁴ See also Article 6 (3) (d) of the European Convention on Human Rights and *Kostovski v Netherlands* (1990) 12 EHRR 434; *Van Mechelen and Others v Netherlands* (1998) 25 EHRR 647; *Luca v Italy* (2003) 36 EHRR 46, ECtHR.

¹⁵ See e.g. *Grant v Jamaica* (353/88) 31/3/94, UN Human Rights Committee.

¹⁶ Section 114(2) of the Criminal Justice Act 2003 (England and Wales). See also *R v Taylor* [2006] 2 Cr. App. R. CA.

¹⁷ 'Accomplice evidence' is understood to mean where an accomplice or co-defendant to the same criminal charge gives testimony implicating the defendant. This is translated in Section 227/1 of the Criminal Procedure Code as 'implicated evidence'.

¹⁸ Section 227/1, Criminal Procedure Code: "In consideration of carrying weight of a hearsay evidence, an implicated evidence, the evidence without a chance for the accused person to give a cross-examination or the evidence with any other defection which may have an impact on believableness of evidence, the Court must do it carefully and should not believe only such an evidence for punishing the accused person, unless there is a strong reason, a special circumstance of case or other supporting evidence.

The appurtenant evidence, according to the first paragraph, means other admissible evidence of which source is free from the evidence requiring such appurtenant evidence and it must have a provable value supporting other appurtenant evidence to become more believable."

¹⁹ See e.g. UN Human Rights Committee Concluding Observations on Romania (1999) UN Doc. CCPR/C/79/Add.111.

²⁰ See e.g. UN Human Rights Committee concluding observations on Mexico (1993), A/48/44, para. 208-229.

²¹ See e.g. UN Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11, paras. 11, 16 (2001); *Heaney and McGuinness v Ireland*, ECtHR, 21 December 2000, paras. 57-59.

²² Emergency Decree on Government Administration in States of Emergencies, B.E. 2548.

²³ The three southern most provinces of Pattani, Yala and Narathiwat.

²⁴ ICJ *Legal Memorandum: The Implementation of Thailand's Emergency Decree*, July 2007, pp.9-19.

²⁵ *More Power, Less Accountability: Thailand's New Emergency Decree*, ICJ, August 2005 and ICJ *Legal Memorandum: The Implementation of Thailand's Emergency Decree*, July 2007.

²⁶ See e.g. UN Human Rights Committee General Comment No. 13, paras. 14-15; *K. K. v Switzerland*, UN Committee against Torture (2003).

²⁷ Section 226, Criminal Procedure Code.

²⁸ See e.g. UN Convention against Torture, Article 15; *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

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