

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors
Filed to: Trial Chamber **Original Language:** English
Date of document: 27 February 2013

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



**CO-PROSECUTORS' RESPONSE TO IENG SARY'S OBJECTION CONCERNING
VIDEO-LINK TESTIMONY FOR TCW-624**

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RESPONSE

1. On 2 October 2012, acting on a request from the Defence for Accused Nuon Chea,¹ the Trial Chamber (“Chamber”) notified the Parties that it considered TCW-624 to be among those individuals “most relevant” to the trial segments concerning forced movement of the population and thus “most likely to be heard at trial.”² The Chamber subsequently placed on the Case File a book authored by TCW-624 which it considered to be “conducive to ascertaining the truth” and to satisfy all criteria for admissibility in Internal Rule 87(3).³
2. By memorandum dated 8 February 2013, the Witness and Expert Support Unit (“WESU”) reported on its communications with TCW-624 and advised the Chamber of his request to be heard “via audio-visual conferencing” (“Video-Link Request”).⁴
3. On 15 February 2013, as directed by the Chamber,⁵ the Co-Prosecutors advised the Parties which specific pages of a book authored by TCW-624 they considered to be relevant to his testimony, and requesting that an electronic copy of this book be provided to the witness as soon as possible.⁶
4. On 21 February 2013, the Defence for Accused Ieng Sary (“Defence”) lodged its objection to the Video-Link Request, asking the Chamber to decline to summon TCW-624 at all; or, in the alternative, to hear his testimony in person (“Request”).⁷ The Defence requests, in addition, that should TCW-624 be heard via video-link, that his testimony be given “less weight”.⁸
5. In view of the significant legal and factual inaccuracies in the Request, and its marked disregard for the prior rulings of this Chamber, the Co-Prosecutors submit this response. The Co-Prosecutors further request that this submission be classified as *public* as it has been redacted to remove any confidential information concerning the witness.

¹ E9/10.1 Annex D: Witness Summaries with Points of the Indictment – NUON Chea Defence Team Witnesses, 23 February 2011 at p. 47.

² E236/1 Memorandum to the Parties, “Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01”, 2 October 2012 at para. 1.

³ E260 Memorandum to the Parties, “Response to Internal Rule 87(4) Requests to place new documents on the Case File concerning the testimonies of witnesses [NAMES REDACTED]”, 18 January 2013 at para. 6.

⁴ E236/1/4 Memorandum from the Coordinator, WESU to the Senior Legal Officer in the Trial Chamber, “Confidential: Request for Video-Link Testimony for TCW-624 [NAME REDACTED]”, 8 February 2013 at para. 2.

⁵ E260 *supra* note 3 at para. 6.

⁶ Email from the Deputy Prosecutor to the Senior Legal Officer, “Co-Prosecutors Response to E260 Regarding Pages of [NAME REDACTED]’s Book to Be Used During his Testimony”, 15 February 2013.

⁷ E236/1/4/2 Ieng Sary’s notice of objection to TCW-624’s request to testify via video-link, 21 February 2013 at p. 5.

⁸ E236/1/4/2 *Ibid.* at para. 13.

6. The Co-Prosecutors submit that the Request should be dismissed in full and that the video-link testimony of TCW-624 should proceed.
7. First, the Co-Prosecutors incorporate by reference and respectfully refer the Chamber to their previous detailed submissions on the applicable law in response to the substantially similar objections of Accused Ieng Sary to the video-link testimony of TCCP-1⁹ and TCE-38.¹⁰
8. Second, the Co-Prosecutors reaffirm their previous position that the Defence's assertions regarding the impact of video-link testimony on the right to confront the witness¹¹ or that such testimony should be accorded "less weight"¹² are *wholly incorrect in law*.¹³ According to the applicable law – and in contrast to practice in the United States of America – confrontation of a witness by video-link according to the modalities usually ordered by the Trial Chambers of international criminal tribunals *amounts to confrontation in person* and fully satisfies this fundamental fair trial right. The Defence variously relies upon the cases of *Tadic* (1996),¹⁴ *Bagosora et al.* (2004)¹⁵ and *Zigiranyirazo* (2006)¹⁶ in support of the propositions that allowing testimony by video-link would deny Accused Ieng Sary his "right to be tried in his presence, both before the Court and before the witnesses testifying against him",¹⁷ and that such testimony, if allowed to proceed, should be given "less weight".¹⁸ These exceptional decisions tend to reflect variances in jurisprudence coming to terms with new technology and do not accurately reflect the overall state of the law as reviewed and summarised, for example, in *Milutinović's* case, also dating from 2006:

The jurisprudence of the Tribunal supports the arguments that the testimony of witnesses by video-link conference should be given as much probative weight as testimony presented in the courtroom, and that such

⁹ E236/1/1/3 Co-Prosecutors' urgent response to Ieng Sary's request concerning video-link testimony for TCCP-1, with Annex, 11 December 2012 at paras. 4-21.

¹⁰ E236/1/4/2 Request, *supra* note 7 at paras. 5-9 and 12-13

¹¹ E236/1/4/2 *Ibid.* at paras. 5-9 and 12-13.

¹² E236/1/4/2 *Ibid.* at para. 13.

¹³ E236/1/1/3 *Ibid.*, Section II.

¹⁴ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link, 25 June 1996.

¹⁵ *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution request for testimony of Witness BT via Video-Link, 8 October 2004.

¹⁶ *Zigiranyirazo v. Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006.

¹⁷ E236/1/4/2 Request, *supra* note 7 at para. 10.

¹⁸ E236/1/4/2 *Ibid.* at para. 13.

measures do not violate the rights of the accused to cross-examine the witness and to confront the witness directly.¹⁹

9. Third, the Co-Prosecutors concur with the Defence that provision of a medical certificate does not absolve the Chamber from considering all factors relevant to the “interests of justice” test for allowing testimony via video-link.²⁰ However, as demonstrated by the Co-Prosecutors’ recent survey of 31 ICTY decisions, available on the Case File,²¹ there is *not a single decision on record* at that tribunal where testimony by video-link was refused on the basis of a up-to-date medical certificate. TCW-624 has provided, by the Defence’s own acknowledgment, “a letter from [his] cardiologist recommending that he not travel to Cambodia to give testimony”.²² This understates the medical opinion of the treating specialist, who found that “travel to Asia could be *detrimental to his health* and an unwise undertaking *now and in the foreseeable future*”.²³ In addition, the Co-Prosecutors observe that the treating specialist has provided the underlying “diagnoses” that account for medical recommendation against travel.²⁴ Such detailed medical information, while available to the Chamber, has been properly redacted prior to circulation to the Parties. There can be no doubt in these circumstances that the criterion of inability to give testimony in person²⁵ is amply satisfied.
10. Fourth, while TCW-624 was not proposed by the Co-Prosecutors, we respectfully submit that the Chamber has already determined that the testimony of TCW-624 would satisfy the criterion of sufficient importance.²⁶ The Chamber has considered a book authored by this witness, including a series of his contemporaneous newspaper articles, to be “conducive to ascertaining the truth”²⁷ and placed this document on the Case File. The Request discloses no basis for the Chamber to reconsider its previous decision. In addition to this book, not less than 10 additional documents on the Case File are either authored by TCW-624 or refer to his activities in Phnom Penh.²⁸

¹⁹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Protective Measures and for Testimony to be heard via Video-Conference Link, 15 August 2006 at para. 3.

²⁰ E236/1/4/2 Request, *supra* note 7 at para. 10; E236/1/1/3 TCCP-1 Response, *supra* note 9 at para.9.

²¹ E236/1/13.2.1 Annex 1: Analytical table of decisions of ICTY Trial Chambers concerning video-link testimony, 11 December 2012.

²² E236/1/4/2 Request, *supra* note 7 at para. 10.

²³ E236/1/4/1.1 Letter from Robin S Freedburg MD to WESU, 14 February 2013 [emphasis added].

²⁴ E236/1/4/1.1 *Ibid.*

²⁵ E236/1/4/2 Request, *supra* note 7 at para. 9; E236/1/1/3 TCCP-1 Response, *supra* note 9 at para.8.

²⁶ E236/1/4/2 Request, *ibid.* at para. 9; E236/1/1/3 TCCP-1 Response, *supra* note 9 at para.8.

²⁷ E260 Memorandum to the Parties, “Response to Internal Rule 87(4) Requests to place new documents on the Case File concerning the testimonies of witnesses [NAMES REDACTED]”, 18 January 2013 at para. 6.

²⁸ D108/28.29, D199/26.2.220, D313/1.2.44, D313/1.2.52, D313/1.2.64, D313/1.2.65, D313/1.2.68, D365/1.1.23, E131/1/13.4, E131/1/13.5 [titles not included to protect identity of witness].

11. Finally, the Defence asserts that the testimony of TCW-624 would “have no substantive testimony” to add to the testimony of Mr Al Rockoff.²⁹ There is no factual basis for this assertion. Mr Rockoff is a photographer while TCW-624 is a journalist who wrote extensively about Cambodia before, during and after the period of Democratic Kampuchea. While TCW-624 may have been in the company of Mr Rockoff at various points of time around 17 April 1975, there is no indication that they were together during all relevant periods. TCW-624 would have travelled to various parts of Phnom Penh, for instance, to conduct interviews and gather information for published news articles. It would be reasonable to assume that TCW-624’s knowledge of the events and relevant conditions in the country would be even more detailed than that of Mr Rockoff’s. These facts alone provide a basis to assert that while the testimonies of these two witnesses may be *mutually corroborative* at times, they would not be *repetitive* as asserted by the Defence. In *Naletilić and Martinović* (2000), for example, an ICTY Trial Chamber characterised “evidence of a repetitive nature” as “many witnesses giv[ing] evidence of similar facts”.³⁰ Such a characterisation cannot apply in this instance.
12. For these reasons, the Co-Prosecutors respectfully request the Chamber to **reject** the Request in full; and **proceed** to hear the testimony of TCW-624 by video-link.

Respectfully submitted,

Date	Name	Place	Signature
27 February 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

²⁹ E236/1/4/2 Request, *supra* note 7 at para. 11.

³⁰ *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decisions on Prosecution Amended Motion for Approval of Rule 94ter Procedure (Formal Statements) and on Prosecutor’s Motion to take Depositions for Use at Trial (Rule 71), 10 November 2000 (ICTY Trial Chamber I), Judicial Supplement 20.