

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 21 February 2013**CLASSIFICATION****Classification of the document  
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**IENG SARY'S NOTICE OF OBJECTION TO TCW-624'S REQUEST TO TESTIFY  
VIA VIDEO-LINK**

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**Filed by:****The Co-Lawyers:**  
ANG Udom  
Michael G. KARNAVAS**Distribution to:****The Trial Chamber Judges:**  
Judge NIL Nonn  
Judge YOU Ottara  
Judge YA Sokhan  
Judge Silvia CARTWRIGHT  
Judge Jean-Marc LAVERGNE  
Reserve Judge THOU Mony  
Reserve Judge Claudia FENZ**Co-Prosecutors:**  
CHEA Leang  
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby notifies the Trial Chamber of his objection to the Witness and Expert Support Unit’s (“WESU”) Request for Video-Link Testimony for TCW-624.<sup>1</sup> This notice is made necessary because the Trial Chamber has yet to issue a decision on WESU’s request, and should not do so until it has heard from the parties.

## I. BACKGROUND

1. On 23 February 2011, the NUON Chea Defence proposed that TCW-624 be heard as a witness in Case 002 regarding pre-1975 conditions in the Khmer Republic.<sup>2</sup>
2. On 2 October 2012, the Trial Chamber indicated that it was including TCW-624 on a list of 25 witnesses believed to be most relevant to the population movement trial segments in Case 002/01.<sup>3</sup> The Trial Chamber indicated that the list of potential witnesses could be reduced in the interest of an expeditious trial.
3. On 6 February 2013, WESU submitted a memorandum to the Trial Chamber informing it that TCW-624 has requested to testify via video-link, rather than traveling to the ECCC. TCW-624’s principal reasons for requesting video-link testimony are his age and his state of health. WESU stated that TCW-624 is 79 years old and suffers from a cardiac condition, which means he is advised not to travel long distances.<sup>4</sup>
4. On 14 February 2013, WESU submitted a letter from TCW-624’s cardiologist. The doctor recommended that TCW-624 not travel to the ECCC to give testimony.<sup>5</sup>

## II. LAW AND ARGUMENT

5. The Trial Chamber has previously held that testimony via video-link “may only be granted in *exceptional* circumstances.”<sup>6</sup> Exceptional circumstances have *not* been

<sup>1</sup> Letter from WESU to the Trial Chamber titled “Confidential: Request for Video-Link Testimony for TCW-624”, 8 February 2013 (“WESU Letter to Trial Chamber”), E236/1/4.

<sup>2</sup> Annex D: Witness Summaries with Points of the Indictment – NUON Chea Defence Team Witnesses, 23 February 2011, E9/10.1, p. 47.

<sup>3</sup> Trial Chamber Memorandum titled “Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01”, 2 October 2012 (“2 October 2012 Memorandum”), E236/1, para. 1.

<sup>4</sup> WESU Letter to Trial Chamber.

<sup>5</sup> Letter from WESU to the Trial Chamber titled “Confidential: Medical Certificate for TCW-624”, 14 February 2013, E236/1/4/1. *See also* Letter from Robin S. Freedberg, MD to WESU, dated 11 February 2013, E236/1/4/1.1.

<sup>6</sup> Trial Chamber Memorandum titled “Proposed testimony of Benedict KIERNAN before the Trial Chamber”, 13 June 2012 (“13 June 2012 Memorandum”), E166/1/4, p. 1 (emphasis added).

demonstrated such that TCW-624's request to testify via video-link outweighs Mr. IENG Sary's fair trial rights.

6. Mr. IENG Sary has a constitutionally protected<sup>7</sup> right to confront or examine the witnesses against him. This right is guaranteed in the ECCC legal framework,<sup>8</sup> the Cambodian Code of Criminal Procedure<sup>9</sup> and by the International Covenant on Civil and Political Rights ("ICCPR"),<sup>10</sup> which must be respected in accordance with the Cambodian Constitution.<sup>11</sup>
7. Mr. IENG Sary also has the right to be tried in his presence, both before the Court *and* before the witnesses testifying against him.<sup>12</sup> This right is guaranteed by the Establishment Law<sup>13</sup> and the ICCPR.<sup>14</sup>
8. Pursuant to Rule 26(1) of the ECCC Internal Rules ("Rules"), "the testimony of a witness ... at trial shall be given *in person*, wherever possible." Although the Trial Chamber may allow testimony via video-link, such technology "shall not be used if [it] would be *seriously prejudicial to, or inconsistent with defence rights.*"<sup>15</sup>

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<sup>7</sup> Article 31 of the Cambodian Constitution provides: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." Article 14(3)(e) of the International Covenant on Civil and Political Rights ("ICCPR") states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

<sup>8</sup> Article 35 new of the Establishment Law states (emphasis added):

The accused shall be presumed innocent as long as the court has not given its definitive judgment. In determining charges against the accused, *the accused shall be equally entitled to the following minimum guarantees*, in accordance with Article 14 of the [ICCPR]. ... e. *to examine evidence against them...*

Article 13(1) of the Agreement states in pertinent part (emphasis added):

The rights of the accused enshrined in Articles 14 and 15 of the [ICCPR] *shall* be respected throughout the trial process. Such rights shall, in particular, include the right: ... to examine or have examined the witnesses against him or her.

<sup>9</sup> Article 297 of the Cambodian Code of Criminal Procedure states: "[i]nculpatory witnesses who have never been confronted by the accused shall be summonsed to testify at the trial hearing."

<sup>10</sup> ICCPR, Art. 14(3)(e).

<sup>11</sup> Cambodian Constitution, Art. 31.

<sup>12</sup> For the interpretation that this right includes the right to be present at the testimony of a witness, *see Zigiranyirazo v. Prosecutor*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006.

<sup>13</sup> Establishment Law, Art. 35 new (d).

<sup>14</sup> ICCPR, Art. 14(3)(d).

<sup>15</sup> Emphasis added.

9. In assessing the context in which testimony should be given, the law does not distinguish between expert witnesses, other witnesses and Civil Parties.<sup>16</sup> International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda (“ICTR”) jurisprudence establishes that three criteria must be fulfilled before allowing testimony via video-link: **a.** the witness must be unable, or have good reasons to be unwilling, to come to Court; **b.** the witness’s testimony must be sufficiently important to make it unfair to proceed without it; *and* **c.** the Accused must not be prejudiced in the exercise of his right to confront the witness.<sup>17</sup> The Trial Chamber must also determine whether testimony via video-link is in the interests of justice.<sup>18</sup>

*TCW-624’s inability, or good reason for unwillingness, to travel to the ECCC*

10. WESU has provided a letter from TCW-624’s cardiologist recommending that he not travel to Cambodia to give testimony. This letter by itself is insufficient for the Trial Chamber to grant TCW-624’s request. The Trial Chamber must also consider the importance of the witness’s testimony to the case, prejudice to Mr. IENG Sary’s fair trial rights and the interests of justice.

*The importance of TCW-624’s testimony to the case*

11. The NUON Chea Defence first proposed TCW-624 as a witness, noting that TCW-624 was one of the few journalists to remain in Phnom Penh after 17 April 1975, and that he could offer insight into pre-1975 conditions in the Khmer Republic, in particular the role of the United States.<sup>19</sup> The Trial Chamber has also proposed that TCW-624 testify regarding population movements.<sup>20</sup> Respectfully, TCW-624’s testimony is not vital to the OCP’s burden of proof or to enabling the Trial Chamber to ascertain the truth in Case 002/01. There are several witnesses who have already testified or are scheduled to testify

<sup>16</sup> The Trial Chamber did not distinguish between expert witnesses, other witnesses and Civil Parties when it found that testimony via video-link “may only be granted in exceptional circumstances.” 13 June 2012 Memorandum.

<sup>17</sup> *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 24 February 2010 (“*Stanišić* Decision on Video-Link Testimony”), para. 8. *See also Prosecutor v. Nzabonimana*, ICTR-98-44d-T, Decision on Defence Urgent Motion to Hear Testimony of Expert Witness Dr. Susan Thomson via Video-Link, 9 March 2011, para. 16. *See also* IENG Sary’s Response to the Co-Prosecutors’ Notice to the Trial Chamber and Parties Regarding Testimony of TCE-38 and TCE-44, 9 March 2012, E166/1/1.

<sup>18</sup> *Stanišić* Decision on Video-Link Testimony, para. 8.

<sup>19</sup> Annex D: Witness Summaries with Points of the Indictment – NUON Chea Defence Team Witnesses, 23 February 2011, E9/10.1, p. 47.

<sup>20</sup> 2 October 2012 Memorandum.

about population movements, pre-1975 conditions in the Khmer Republic and the role of the United States.<sup>21</sup> Moreover, TCW-624 would have no substantive testimony to add to that of Mr. Rockoff, who recently testified to being with TCW-624 on several occasions during and after 17 April 1975.<sup>22</sup> Case 002/01 can proceed without TCW-624's testimony.

*Prejudice to Mr. IENG Sary's rights*

12. Allowing TCW-624 to testify via video-link would prejudice Mr. IENG Sary's right to confront the witness in person.<sup>23</sup> As the ICTR's Trial Chamber II has recognized, testimony via video-link affects a Chamber's ability to observe and assess the witness's testimony and demeanor.<sup>24</sup> If TCW-624 were to testify via video-link, neither the Trial Chamber, Mr. IENG Sary or the other parties could assess his appearance, attitude, behavior or demeanor to the same extent that they could with live, in-court testimony. The Trial Chamber has itself implicitly recognized that video-link technology is not a substitute for live examination by finding that video-link testimony should be allowed only in "exceptional circumstances."<sup>25</sup>
13. Simply, WESU has not demonstrated that exceptional circumstances exist to support TCW-624's request for video-link testimony. TCW-624's testimony is not sufficiently important to Case 002/01 that it would be unfair to proceed without it. To the contrary, permitting video-link testimony would violate Mr. IENG Sary's fair trial rights. It is not

<sup>21</sup> TCW-624 is one of 25 individuals considered by the Trial Chamber to be witnesses relevant to population movements. See 2 October 2012 Memorandum. Al Rockoff recently testified about events before, during and after 17 April 1975 and authenticated photographs he had taken of the events. Transcript, 28 January 2013, E1/165.1; Transcript, 29 January 2013, E1/166.1. Similarly, TCW-536, who is scheduled to testify before the Trial Chamber at a date yet to be determined, is expected to testify to events that occurred during and after the fall of Phnom Penh. See Co-Prosecutors' Witness, Civil Party and Expert Summaries, 23 February 2011, E9/13.1, p. 6. Meas Saran, Or Ry, Toeung Sokha and Kim Vandy have all recently testified about population movements. Transcripts, 21 November 2012, E1/144.1; 22 November 2012, E1/145.1; 23 November 2012, E1/146.1; 4 December 2012, E1/147.1; 7 December 2012, E1/150.1.

<sup>22</sup> See, e.g., Transcript, 28 January 2013, E1/165.1, p. 18, 21, 38, 40, 42, 48, 53-54, 59, 65.

<sup>23</sup> The Trial Chamber must make such a finding as part of its assessment of a request for video-link testimony. See *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 24 February 2010, para. 8. See also *Prosecutor v. Nzabonimana*, ICTR-98-44d-T, Decision on Defence Urgent Motion to Hear Testimony of Expert Witness Dr. Susan Thomson via Video-Link, 9 March 2011, para. 16.

<sup>24</sup> See *Zigiranyirazo v. Prosecutor*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 4, referring to the Trial Chamber's denial of a request that a witness testify via video-link because of the Trial Chamber's "concern about its ability 'to effectively and accurately assess the testimony and demeanour'" of the witness if he testified via video-link. See also *Aguiar-Ayala v. Ruiz*, 973 F.2d. 411, 419 (5<sup>th</sup> Cir. Tex. 1992).

<sup>25</sup> 13 June 2012 Memorandum.

in the interests of justice to permit TCW-624 to testify via video-link. The Trial Chamber should either decline to hear TCW-624's testimony at all or require him to appear in court to testify. If the Trial Chamber nevertheless allows TCW-624 to testify via video-link, the Trial Chamber should give less weight to this testimony than it might have given to his in-court testimony.<sup>26</sup>

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- A. Decline to summon TCW-624 to testify at all; or
- B. Reject WESU's request that TCW-624 be permitted to testify via video-link; and
- C. Summon TCW-624 to appear before the Trial Chamber to testify in person.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **21<sup>st</sup>** day of **February, 2013**

<sup>26</sup> *Prosecutor v. Tadić*, 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, para. 21. See also *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT via Video-Link, 8 October 2004, para. 15.