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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' URGENT RESPONSE TO IENG SARY'S REQUEST
CONCERNING VIDEO-LINK TESTIMONY FOR TCCP-1, WITH ANNEX**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 2 October 2012, the Trial Chamber (“Chamber”) notified the Parties that it considered a Civil Party, TCCP-1, 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.”¹ By memorandum dated 19 October 2012, and classified as *strictly confidential*, the Witness and Expert Support Unit (“WESU”) reported on its communications with TCCP-1 and advised the Chamber of her request to be heard “via audio-visual means” (“Video-Link Request”).² This memorandum was subsequently reclassified as *confidential* and notified to the Parties on 22 November 2012, after the Chamber had decided to authorise the testimony of TCCP-1 by video-link (“Decision”).³
2. On 23 November 2012, as averred in the Request,⁴ the Defence advised the Trial Chamber Senior Legal Officer of its intention to take instructions from the Accused on potential objections to a video-link. The record indicates that no objection was forthcoming from the Defence over the next 10 days. On 3 December 2012, the Senior Legal Officer advised the Parties of the scheduling of the testimony of TCCP-1 for 12 and 13 December 2012.⁵ The Defence for Accused Ieng Sary (“Defence”) now requests the Chamber to provide additional reasons for its Decision; or, in the alternative, to reverse its Decision and summon TCCP-1 to testify in person before the Chamber (“Request”).⁶
3. In view of the scheduled commencement of TCCP-1’s testimony on 12 December 2012, and in order to place before the Chamber accurate submissions on the applicable law in advance of the start of testimony, the Co-Prosecutors submit this response now. The Co-Prosecutors respectfully requested the Chamber to authorize submission in English only, with the Khmer version to be filed with the Chamber at the first opportunity, in accordance with Article 7.2 of the applicable Practice Direction.⁷ This request was granted, and the

¹ **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.

² **E236/1/1** Memorandum from the Coordinator, WESU to the Senior Legal Officer in the Trial Chamber, “Confidential: Request for Video-Link Testimony for TCCP-1 [NAME REDACTED]”, 19 October 2012 at para. 3.

³ **E236/1/1/1** Memorandum to the Parties, “Request for Video-Link for TCCP-1 [NAME REDACTED]”, 21 November 2012.

⁴ **E236/1/1/2** Ieng Sary’s Request that the Trial Chamber present adequate reasons for its decision allowing TCCP-1 to testify via video-link or, alternatively, reverse its decision and summon TCCP-1 to testify in person, 7 December 2012 at para. 19.

⁵ Email from Trial Chamber Senior Legal Officer to the Parties, “Witness schedule for December”, 3 December 2012.

⁶ **E236/1/1/2** Request, *supra* note 4 at para. 19.

⁷ Practice Direction ECCC/01/2007/Rev.8, “Filing of documents before the ECCC”, 7 March 2012.

Trial Chamber indicated the matter would be dealt with as a matter of urgency.⁸ The Co-Prosecutors further request that this submission be classified as *public* as it contains no confidential information concerning the Civil Party and is concerned primarily with addressing the applicable law on a matter concerning the efficiency and transparency of the proceedings.

4. The Co-Prosecutors submit that the Request should be dismissed in full and that the video-link testimony of TCCP-1 should proceed as scheduled. In line with other procedural rules established at the international level, Internal Rule 26(1) affords the Chamber a discretion to order testimony by video-link. A survey of International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence in **Annex 1** establishes that such decisions should be made in the interests of justice, and that the ill-health or emotional distress of a victim-witness will be relevant factors in this assessment. It is not the *fact* of ill-health that will be of direct concern to the Chamber; rather, the *inability or unwillingness* of the witness to travel to give testimony in person may be substantiated on broader grounds such as their ill-health, emotional distress or a range of other personal, family or security concerns.
5. These grounds may be substantiated by medical certificates, reports of specialised witness support units, or even the witness' own declarations. ICTY Chambers have also found, consistently, that testimony by video-link in no way violates an accused's right to confrontation and cross-examination, does not occasion prejudice for the accused, and should be accorded the same probative value as in-court testimony. Indeed, recourse to video-link testimony to advance the truth-seeking function of the courts is widely supported in domestic justice systems from all principal legal traditions of the world.

II. VIDEO-LINK TESTIMONY IS FULLY CONSISTENT WITH THE RIGHTS OF THE ACCUSED

6. Internal Rule 26 provides:

The testimony of a witness or expert during a judicial investigation or at trial shall be given in person, whenever possible. However, the Co-Investigating Judges and the Chambers may allow a witness to give testimony by means of audio or video technology, provided that such technology permits the witness to be interviewed by the Co-Investigating Judges or the Chambers, and the parties, at the time the witness so

⁸ Email from Trial Chamber Legal Officer to the Parties, "Re: courtesy copy of a filing related to TCCP-1 - to be filed as soon as translation is complete", 10 December 2012, which notes the Trial Chamber intends to deal with this issue as a matter of urgency."

testifies. Such technologies shall not be used if they would be seriously prejudicial to, or inconsistent with defence rights.

7. Internal Rule 26 reflects other procedural rules adopted at the international level in recognising both a preference for testimony in person and a judicial discretion to authorise testimony by video-link. Under ICTY Rule 81 *bis*, for example, “at the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that the proceedings be conducted by way of video-conference link.”
8. As the Defence correctly identifies,⁹ ICTY jurisprudence establishes three criteria to guide the Chamber when deciding whether a witness should be allowed to give testimony via video-link: (1) the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal; (2) the witness's testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and (3) the accused must not be prejudiced in the exercise of his or her right to confront the witness.¹⁰ However, the Request does not consider that in addition to these criteria and the relevant factors in a particular case, the Chamber’s ultimate determination is whether the testimony via video-link is in the interests of justice.¹¹
9. The Co-Prosecutors concur with the Defence that *ad hoc* Tribunal jurisprudence is relevant to the proper interpretation of Internal Rule 26, and that Civil Parties are similarly-situated to expert and ordinary witnesses in this regard.¹² The Co-Prosecutors further submit that a correct reading of Internal Rule 26 – in light of the fundamental principles of safeguarding the interests of Parties and victims,¹³ preserving “balance between the rights of the parties”,¹⁴ and respect of victims’ rights throughout the proceedings¹⁵ – warrants due regard to the “interests of justice” factors considered in ICTY jurisprudence on testimony by video-link.

⁹ **E236/1/1/2** Request, *supra* note 4 at para. 10.

¹⁰ *Prosecutor v. Jovica Stanišić*, Case No. IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link (ICTY Trial Chamber I), 24 February 2010 at para. 8 (citing *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Reason for decision granting Prosecution’s Motion to Cross-Examine Four Proposed Rule 92bis Witnesses and Reasons for Decision to Hear the Evidence of Those Witnesses via Video-Conference Link (ICTY Trial Chamber I), 3 November 2009 at para. 7)

¹¹ *Ibid.*

¹² **E236/1/1/2** Request, *supra* note 4 at para. 10.

¹³ Internal Rule 21(1).

¹⁴ Internal Rule 21(1)(a).

¹⁵ Internal Rule 21(1)(c).

10. However, the Defence's assertions regarding the impact of video-link testimony on the right to confront the witness¹⁶ are incorrect in law. ICTY jurisprudence on the third criterion, concerning the right to confront the witness, has remained consistent (despite notable technological developments) in the decade from 1997 to 2006. In the early case of *Delalić et al.*, the Trial Chamber established that:

*Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that testimony given by video-link conferencing is a violation of the right of the accused to confront the witness. Article 21(4)(e) [of the ICTY Statute]¹⁷ is in no sense violated.*¹⁸

11. The *Delalić* decision also followed the earlier ruling in *Tadić* that the evidentiary value of video-link testimony is not as weighty as testimony given in the courtroom,¹⁹ but with circumspection, maintaining that weight was a “matter for the assessment of the Chamber when evaluating the evidence as a whole, to determine how credible each witness is.”²⁰ In this respect, however, ICTY jurisprudence has evolved significantly to 2006. In *Milutinović*, for example, the Trial Chamber summarised the state of the applicable law as follows:

*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 measures do not violate the rights of the accused to cross-examine the witness and to confront the witness directly.*²¹

12. On this basis, the Co-Prosecutors submit that there is no legal basis for the Defence's assertion that “Allowing TCCP-1 to testify via video-link would prejudice Mr Ieng Sary's right to confront this Civil Party in person.” According to the applicable law, and in contrast to the practice in the United States of America and its constituent jurisdictions,

¹⁶ E236/1/1/2 Request, *supra* note 4 at paras. 10, 14-18.

¹⁷ Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc S/RES/827 (25 May 1993), Article 21(4)(e): “The accused shall be entitled to the following minimum guarantees, in full equality: [...] 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.”

¹⁸ *Prosecutor v. Zejnil Delalić et al (now Mucić et al.)*, Case No. IT-96-21, Decision on the Motion to Allow Witnesses K,L, and M to Give their Testimony by Means of Video-Link Conference (ICTY Trial Chamber), 28 May 1997 at para. 15.

¹⁹ *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 at para. 21.

²⁰ *Delalić et al.*, ICTY Trial Decision on VCL, *supra* note 25 at para. 18.

²¹ *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.

confrontation by video-link according to the modalities usually ordered by the Chamber is tantamount to confrontation in person.

13. Whilst the “exceptional” character of testimony by video-link is referred to in a prior decision of the Chamber;²² the Defence would appear to suggest that the term “wherever possible” in Internal Rule 26 imposes the unduly stringent threshold of the marshalling of objective medical evidence to the satisfaction of the Defence in its capacity as self-appointed reviewer of the propriety of the Chamber.²³ The exceptional character of video-link evidence is not justified on the basis that it somehow impinges upon the rights of the Accused and should therefore be used sparingly. Rather, this acts as a protection “against the abuse of the grant of the expedient”,²⁴ in line with concerns for the “virtualisation”²⁵ of solemn proceedings.
14. As to the relative importance of the witness’ testimony as a factor relevant to assessing the interests of justice, the Defence suggests that the Chamber “made *no* finding as to the importance of TCCP-1’s expected testimony.”²⁶ Whilst there is no such finding in the text of the Decision itself, the procedural record demonstrates clearly that the Chamber considered TCCP-1 to be an individual “most relevant” to the current trial segment.²⁷ The Defence also maintains that “TCCP-1’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”,²⁸ whilst concurrently asserting that TCCP-1 is likely to inculcate Accused Ieng Sary.²⁹
15. An initial survey of ICTY Trial Chamber decisions on video-link testimony is provided in **Annex 1**. This analytical chart demonstrates that of 31 decisions surveyed (comprising 23 Prosecution requests and 8 Defence requests), the Chambers concerned authorised the use of video-link (for some or all witnesses requested) in 30 instances, and rejected one request. A number of these decisions concern applications to testify via video-link on grounds of ill-health and emotional distress.³⁰ These are considered below.

²² E166/1/4 “Proposed testimony of Benedict Kiernan before the Trial Chamber”, 13 June 2012 at p. 1

²³ E236/1/1/2 Request, *supra* note 4 at para. 17 (“Simply, the Trial Chamber has not demonstrated that exceptional circumstances exist to support TCCP-1’s request for video-link testimony”).

²⁴ *Delalić et al.*, ICTY Trial Decision on VCL, *supra* note 25 at para. 17.

²⁵ See Ministry of Justice (New Zealand), “Audio Links and Audio Visual Links in Proceedings” Discussion Paper CLW-38-17, 28 November 2008 at para. 97.

²⁶ E236/1/1/2 Request, *supra* note 4 at para. 13.

²⁷ E236/1 Memorandum, *supra* note 1 at para. 1.

²⁸ E236/1/1/2 Request, *supra* note 4 at para. 13.

²⁹ *Ibid.* at para. 15.

³⁰ See *Stanišić*, ICTY Trial Chamber Decision on VCL, *supra* note 17; *Delalić et al.*, ICTY Trial Decision on VCL, *supra* note 25.

III. ICTY JURISPRUDENCE ADMITS VIDEO-LINK TESTIMONY IN CASES OF ILL-HEALTH WITH OR WITHOUT MEDICAL CERTIFICATION

16. ICTY jurisprudence surveyed in **Annex 1** establishes that ill-health or emotional distress of a victim-witness will be relevant factors in assessing the interests of justice in authorising testimony by video-link. It is not the *fact* of ill-health that will be of direct concern to the Chamber; rather, the *inability or unwillingness* of the witness to travel to give testimony in person may be substantiated on grounds such as their ill-health, emotional distress or a range of other personal, family or security concerns. These grounds may be substantiated by medical certificates, reports of specialised witness support units or even the witness' own declarations.
17. In *Stanišić*, the Prosecution submitted a request for three witnesses to testify via video-link as the witnesses were unable to travel to the seat of the Tribunal on account of their advanced age, ill-health, or reasonable unwillingness to travel. The Prosecution contended one witness was unable to travel due to high blood pressure, and a fear of flying which would aggravate the high blood pressure. The second witness had a heart condition, and was also in a “very challenging emotional state” due to the loss of the witnesses' partner. The third witness was unable to travel due to old age and frail physique as well as the condition of the witness's partner.³¹ For each application the Prosecution provided some medical record supporting the submission that the witness was unable or reasonably unwilling to travel to The Hague.³²
18. The Chamber assessed the substantiating material for each application.³³ For the first application, the court found that a doctor's report as well as other information about the personal circumstances of the witness supported the application. In the second application, the Chamber noted an outdated letter on the medical condition of the witness was not appropriate for use in the application, but found the personal circumstances and elderly age of the witness supported the application.³⁴ In regard to the third witness, the court again noted that the medical evidence provided was outdated and did not substantiate the medical claims, but still found that it had “no reason to doubt the concerns expressed by the witness to the Prosecution” and granted the application.³⁵

³¹ *Stanišić*, ICTY Trial Chamber Decision on VCL, *supra* note 17 at para. 4.

³² *Ibid.* at paras. 12-14.

³³ *Ibid.* at para. 12.

³⁴ *Ibid.* at para. 13.

³⁵ *Ibid.* at para. 14.

19. In *Mucić et al.*, the ICTY Trial Chamber found that based on medical evidence provided by the prosecution that two witnesses were unable to travel to the Hague because of medical conditions that were “serious and would not substantially improve even with treatment over a period of time.”³⁶ Although the defence objected that the medical evidence provided was not sufficient, the Chamber was “satisfied with the submission of the Prosecution that the medical conditions alleged” would render it impracticable to travel to The Hague.³⁷
20. In *Gotovina et al.*, the Chamber initially found that the medical reports did not indicate a condition serious enough to justify a video-link in lieu of testimony in court.³⁸ Soon after the Prosecution made a renewed motion with a second updated medical report stating the witness had been diagnosed with a condition requiring pressing surgery. Considering this information, the Chamber granted the request for the witness to testify via video-link.³⁹
21. In sum, the initial survey of jurisprudence in **Annex 1** would tend to support the proposition that medical certification is preferred, but not determinative, in cases of authorisation of video-link testimony due to ill-health. It is rather the subjective effect of ill-health on the ability or willingness of the witness to travel to the seat of the Court that is an overriding factor in granting testimony by video-link. Nonetheless, the Co-Prosecutors would recommend that medical evidence be sought as a means of enhancing the transparency of the proceedings.

³⁶ *Delalić et al.*, ICTY Trial Decision on VCL, *supra* note 25 at para. 2

³⁷ *Ibid.* at para. 20

³⁸ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Reasons for Decision on Prosecution’s Renewed Motion for Evidence of Witness 82 to be Presented via Video- Conference Link from Zagreb and Reasons for Decisions on the Request of the Markax Defence to Conduct Cross-Examination in Zagreb (ICTY Trial Chamber I), 26 February 2009 at para. 3.

³⁹ *Ibid.* at para. 21


IV. RELIEF SOUGHT

22. For these reasons, the Co-Prosecutors respectfully request the Chamber to:

(a) **reject** the Request in full; and

(b) **proceed** to hear the video-link testimony of TCCP-1 as scheduled.

Respectfully submitted,

Date	Name	Place	Signature
11 December 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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