

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:** 9 March 2012**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' NOTICE TO THE TRIAL CHAMBER AND PARTIES REGARDING TESTIMONY OF TCE-38 AND TCE-44

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 responds to the OCP’s Notice to Trial Chamber and Parties Regarding Testimony of TCE-38 and TCE-44.¹ This Response is made necessary because the OCP’s filing, titled a “Notice” and which begins with the title “Response,” is in substance a *request* to hear expert witness TCE-38 at a specific time through video-link technology.² Were the Trial Chamber to allow TCE-38 to testify via video-link, it would violate Mr. IENG Sary’s right to confront TCE-38 and his right to be tried in his presence, particularly considering that no credible evidence has been proffered from which the Trial Chamber can discern whether, in this instance, video-link testimony is warranted as an accommodation to TCE-38 at no risk of prejudice to Mr. IENG Sary. Because the OCP’s request affects Mr. IENG Sary’s fundamental fair trial rights, the Defence hereby responds.³ Simply, the Trial Chamber should deny the OCP’s request since there is no credible basis – at least as so far as the OCP has represented from its communications with TCE-38 (*see* paragraph 14) – to permit TCE-38 to testify via video-link. The Defence agrees with the OCP’s position that TCE-44, who is also reportedly unwilling to give evidence, should not be compelled to testify. The Defence has consistently objected to TCE-44’s appointment as an expert.⁴

¹ Notice to the Trial Chamber and Parties Regarding Testimony of TCE-38 and TCE-44, 27 February 2012, E166/1 (“OCP Notice”), para. 4.

² *See* Updated Memorandum for the Next Document Hearing (12-19 March 2012), 2 March 2012, E172/5, para. 6.

³ The right to respond flows from their rights to equality of arms and to adversarial proceedings. The principle of equality of arms mandates that “the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair.” *Case of KAING Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary’s Request to Make Submission in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, para. 4. This principle is fundamental to various international human rights instruments, including the International Covenant on Civil and Political Rights (“ICCPR”) (Article 14(1)), which the ECCC must respect in accordance with Article 31 of the Cambodian Constitution. It is also required by Rule 21(1)(a), which provides that “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties...” *See* Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Decision Refusing to Accept the Filing of the OCP’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, in which the Pre-Trial Chamber addressed this issue. The right to respond to motions filed by other parties is also linked to the right to adversarial proceedings, guaranteed by Rule 21(1)(a). The right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision.” *Lobo Machado v. Portugal*, Eur. Ct. H. R. App. no. 15764/89 (1996) para. 31. According to the European Court of Human Rights: “Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment on them.” *Öcalan v. Turkey*, Eur. Ct. H.R., App. no. 46221/99 (2005), para. 146 (emphasis added).

⁴ *See* IENG Sary’s Response to Co-Prosecutors’ Request for Appointment of Experts, 15 January 2010, D281/2; IENG Sary’s Initial Objection to the OCP Proposed Experts & Request for Leave to File Supplementary Submissions within 30 Days, 24 February 2011, E9/4/9.

I. BACKGROUND

1. On 25 October 2011, the Trial Chamber notified the parties of its intention to hear expert witness TCE-38,⁵ who had been proposed by the OCP,⁶ but objected to by the Defence.⁷
2. On 7 December 2011, the Defence was informed informally by one of the Defence teams that the Trial Chamber Senior Legal Officer had contacted the NUON Chea and KHIEU Samphan Defence teams and informed them of the next batch of experts and witnesses the Trial Chamber is considering calling, which included TCE-38. Immediately upon learning this information, the Defence emailed the Trial Chamber Senior Legal Officer, copying all the parties, to question whether this information was accurate and specifically whether she could inform the parties if TCE 38 had agreed to give evidence.⁸
3. On 15 December 2011, the Trial Chamber informed that parties that it would endeavor to hear TCE-38 during the section of the trial dealing with administrative structures and communications, but it had not been able to confirm TCE-38's availability in January or February 2012. The Trial Chamber stated that it would inform the parties as to his availability as soon as more information was available.⁹
4. On 5 January 2012, the Defence sent a list of questions to the Trial Chamber Senior Legal Officer in advance of the 6 January 2012 informal trial management meeting. The Defence requested to be informed as to whether there was any update concerning whether TCE-38 would testify during the administrative structures and communications trial segment, whether he had been summoned, when he was expected to testify, and for approximately how long.¹⁰

⁵ Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, 25 October 2011, E131/1.1.

⁶ Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, 28 January 2011, E9/4.2.

⁷ IENG Sary's Initial Objection to the OCP Proposed Experts & Request for Leave to File Supplementary Submissions within 30 Days, 24 February 2011, E9/4/9.

⁸ Email from Tanya Pettay to Trial Chamber Senior Legal Officer, entitled "Next Batch of Trial Chamber Witnesses," 7 December 2011.

⁹ Trial Chamber Memorandum: Next Group of Witnesses and Experts to be Heard in Case 002/01, 15 December 2011, E155.

¹⁰ Email from Tanya Pettay to Trial Chamber Senior Legal Officer, entitled "Questions for this Friday's TMM," 5 January 2012.

5. On 6 January 2012, during an informal trial management meeting, the Trial Chamber Senior Legal Officer informed the parties that TCE-38 would not be testifying in the coming few weeks and had not yet been summoned.
6. On 13 January 2012, during an informal trial management meeting, the Trial Chamber Senior Legal Officer informed the parties that TCE-38 indicated that he is available to testify until the end of March 2012, via video-link only. No explanation was provided as to why TCE-38 could not attend in person or as to his availability later in 2012. At this meeting, international Co-Lawyer Michael G. Karnavas objected to TCE-38 testifying via video-link. The OCP agreed that it would be better if TCE-38 could testify in person.
7. On 27 January 2012, during an informal trial management meeting, the Trial Chamber Senior Legal Officer informed the parties that TCE-38 was refusing to testify in person and that the Trial Chamber, like the parties, would prefer that he testify in person and was considering the best course of action. No explanation was provided as to why TCE-38 could not attend in person.
8. On 3 February 2012, during an informal trial management meeting, the Trial Chamber Senior Legal Officer informed the parties that since TCE-38 was refusing to testify in person, it would issue a memorandum to the OCP to request the OCP to inform the Chamber whether it still wished to hear TCE-38 and what modalities it proposed.
9. On 6 February 2012, the Trial Chamber issued a memorandum delegating the questioning of TCE-38 to the OCP and requesting the OCP to “report back to the Chamber and the other parties within 3 weeks of the present date with recommendations for the timing and modalities of the hearing of” TCE-38.¹¹ The Trial Chamber authorized the OCP to contact TCE-38 for the limited purpose of determining his availability and to assist the Chamber in planning and scheduling the hearing of his testimony.¹²
10. On 27 February 2012, the OCP filed its Notice to Trial Chamber and Parties Regarding Testimony of TCE-38 and TCE-44, which stated: “TCE-38 has indicated he is unable to travel to Cambodia in 2012 to testify in person due to other professional engagements. He stated it may be possible to travel in 2013. However, TCE-38 has agreed to testify before

¹¹ Trial Chamber Memorandum: Hearing of TCE-38 and TCE-44, 6 February 2012, E166.

¹² *Id.*

the Chamber via video link in 2012.”¹³ The OCP provided no supporting evidence or documentation concerning this matter. The correspondence between the OCP and TCE-38 was not made available to the parties and is not on the Case File.

II. LAW

A. The right to confront witnesses

11. The right of an accused to confront or examine witnesses against him is a fundamental fair trial right, guaranteed by the Agreement,¹⁴ the Establishment Law,¹⁵ the Cambodian Code of Criminal Procedure,¹⁶ and the ICCPR,¹⁷ which Cambodia must respect pursuant to its Constitution, which states in Article 31: “[t]he 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.”¹⁸ This right has been described as “basic to any civilised notion of a fair trial”¹⁹ and is recognized in both Civil and Common Law jurisdictions.²⁰ In the United States²¹ and certain other countries it is a constitutional right.²² The right “can be founded on the defendant’s core right against a factually inaccurate verdict” and “is an instrumental procedure for testing evidence and enabling the court to decide how much reliance can safely be placed upon it.”²³

B. The right to be tried in one’s presence

¹³ OCP Notice, para. 3.

¹⁴ Agreement between the UN and the Royal Cambodian Government (“Agreement”), Art. 13(1).

¹⁵ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“Establishment Law”), Art. 35 new.

¹⁶ Article 297 of the Cambodian Code of Criminal Procedure states that “[i]nculpatory witnesses who have never been confronted by the accused shall be summonsed to testify at the trial hearing.”

¹⁷ Article 14(3) of the 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...”

¹⁸ See 1993 Constitution, as amended in 1999, Art. 31.

¹⁹ *R. v. Hughes*, 2 N.Z.L.R. 129, 148, as quoted in Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, CRIM. L.R. 255, 255 (2010). The right “is widely agreed to be a fundamental element of a fair trial, rather like the presumption of innocence.” *Id.*

²⁰ See Article 6(3)(d) of the European Convention on Human Rights (“ECHR”), which contains a provision identical to Article 14(3)(d) of the ICCPR. The ECHR has been ratified by nearly all European States and applies across a range of judicial systems, including Romano-Germanic systems of criminal procedure.

²¹ See U.S. CONST. amend. VI.

²² STEFANO MAFFEI, *THE EUROPEAN RIGHT TO CONFRONTATION IN CRIMINAL PROCEEDINGS: ABSENT, ANONYMOUS AND VULNERABLE WITNESSES* 9 (Europa Law Publishing 2006), citing the Albanian and Italian constitutions.

²³ Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, CRIM. L.R. 255, 259 (2010).

12. The right of an accused to be tried in his presence is the fundamental fair trial right to be physically present at his trial, before the Court *and* the witnesses testifying against him.²⁴ This right is guaranteed by the Establishment Law²⁵ and the ICCPR,²⁶ which Cambodia must respect pursuant to its Constitution.²⁷

C. The Rule that witness testimony must be given *viva voce* whenever possible

13. Rule 26(1) of the ECCC Internal Rules (“Rules”) states:

The testimony of a witness or expert ... at trial *shall be given in person, whenever possible*. However, 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 Chambers, and the parties, at the time the witness so testifies. Such technologies shall not be used if they would be seriously prejudicial to, or inconsistent with defence rights.²⁸

III. ARGUMENT

A. TCE-38 must testify in person at the ECCC. His reasons for non-attendance fail to meet any of the Rule 26(1) criteria to be considered when authorizing video-link testimony

14. The Trial Chamber has chosen TCE-38 to testify as an expert witness in Case 002/01.²⁹ He is expected to testify about a number of issues which are directly relevant to the case against Mr. IENG Sary.³⁰ TCE-38, through representations made by the OCP, claims to be unavailable to testify in person throughout 2012, though he “may” be available to testify in person in 2013.³¹ The only justification / excuse that TCE-38 provides (as can be gleaned from the OCP’s pithy representations) for his unavailability in 2012 is “other professional engagements.”³² Though there may be more (or even less) to TCE-38’s professed unavailability, it can only be determined by the Trial Chamber ordering the OCP to fully disclose all emails or letters and notes from any oral communications it has

²⁴ 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, discussed *infra*.

²⁵ Establishment Law, Art. 35 new(d).

²⁶ ICCPR, Art. 14(3)(d).

²⁷ See 1993 Constitution, as amended in 1999, Art. 31.

²⁸ Emphasis added.

²⁹ Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, 25 October 2011, E131/1.1.

³⁰ Witness, Civil Party and Expert Summaries with Points of Indictment – OCP, 23 February 2011, E9/13.1.

³¹ OCP Notice, para. 3.

³² *Id.*

had with TCE-38. To this end, and particularly in light of the OCP's posturing concerning TCE-38, the Defence, as an aside, takes the opportunity to request that the Trial Chamber issue an order forbidding any further *ex parte* communications between the OCP and TCE-38. This would ensure the integrity of the proceedings, especially in dealing with TCE-38.

15. Due to TCE-38's professed unavailability during 2012, the OCP requests that TCE-38 testify via video-link.³³ This is inconsistent with Rule 26(1), at least with respect to the excuses TCE-38 provides as represented by the OCP. Rule 26(1) requires that a witness testify in person *whenever possible*. It only allows for video-link testimony where such testimony would not be prejudicial to, or inconsistent with, defence rights. Live, in-court testimony is the norm and the witness or the party moving for video-link technology must demonstrate, according to Rule 26(1): **a.** that it is impossible for the witness to give live, in-court testimony; and **b.** that video-link testimony is not prejudicial to, or inconsistent with, defence rights. The OCP fails to demonstrate that TCE-38's in-court testimony would be *impossible*. It further fails to demonstrate that video-link testimony would not cause prejudice to or be inconsistent with Mr. IENG Sary's fair trial rights guaranteed to him by Article 31 of the Cambodian Constitution.

1. The OCP has failed to demonstrate that it is impossible for TCE-38 to give live, in-court testimony

16. The OCP does not demonstrate, as mandated by Rule 26(1), that it is impossible to hear TCE-38's testimony in person. The OCP does not establish, let alone adduce any good reason, that TCE-38 is unable to come to the ECCC. The OCP admits that TCE-38 has "stated it may be possible to travel in 2013,"³⁴ hence, there is no conclusive evidence that TCE-38 is unavailable or even unwilling to travel to Cambodia to give his evidence before the Trial Chamber and to be subjected to confrontation by the parties in person, as is the process with all other witnesses, save for in very exceptional circumstances. Additionally, there is no documentation supporting TCE-38's claim that he has professional engagements throughout 2012 that simply make it impossible for him to

³³ *Id.*, para. 4.

³⁴ *Id.*, para. 3.

appear in person to give evidence in Case 002.³⁵ While it may be inconvenient to his professional or personal life, inconvenience is not a valid or acceptable excuse.

17. TCE-38 is purportedly a Cambodia expert. He has travelled to Cambodia on numerous occasions. He is not a person for whom such travel is particularly arduous or unfamiliar. He may have professional engagements which prevent him from coming to Cambodia on a whim, but with proper advance notice (and it bears recalling that in light of the communications with the Trial Chamber Senior Legal Officer, TCE-38 would have been aware as early as the Fall of 2011 that his testimony was being sought), it is highly implausible that TCE-38 has absolutely no availability to come to Cambodia at any time during 2012. What appears more likely is that TCE-38 simply does not wish to testify in person. He has provided no proof, to the knowledge of the Defence, that his live testimony in 2012 is impossible.³⁶ Klan Fit and Romam Yun, who are elderly and in ill-health, were required to travel from a remote part of Ratanakiri to Phnom Penh overland in order to give their testimony as Civil Parties in December 2011 and again in January 2012. Such travel would have taken nearly as long as TCE-38's flight and was certainly more grueling. TCE-38 should not be afforded special treatment simply because he claims, without furnishing any documentary proof, that he is unable or has good reason to be unwilling to testify.

18. Furthermore, TCE-38 indicates that he may be available in 2013. This is less than nine months later than the OCP's proposed date of testimony in April 2012. It appears, from the currently available list of witnesses and the known Trial Chamber recesses, that Case 002/01 is unlikely to conclude prior to this time. Moreover, since Case 002 is being tried before professional judges, it matter not when any of the designated witnesses appear; it is not as if the Trial Chamber will be unable to follow the narrative that evolves from the evidence adduced unless presented in a specific order. To claim otherwise is nonsense.

2. The OCP has failed to demonstrate that video-link testimony is not prejudicial to or inconsistent with Mr. IENG Sary's rights

³⁵ *Id.*

³⁶ This may be contrasted to the situation of witness Long Norin, who was evaluated and found unable to travel due to serious medical concerns. *See* Transcript, 6 December 2011, E1/17.1, p. 31, where the Trial Chamber notes that Long Norin will testify via video-link because he is elderly, frail, in very poor health, and lives in a remote location.

19. Rule 26(1) does not provide specific guidance concerning the circumstances under which video-link testimony would be prejudicial to or inconsistent with Defence rights. The preference for live testimony and the need to protect the rights of the Accused have led the *ad hoc* tribunals to create stringent criteria in this regard, which should be considered when assessing whether video-link testimony is permissible.³⁷ As will be demonstrated *infra*, TCE-38 and the OCP fail to demonstrate that TCE-38 meets any of the criteria necessary to authorize video-link testimony.
20. At the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the *Tadić* Trial Chamber was the first Chamber to address this issue in 1996. It stated that “[i]t cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal.”³⁸ The *Tadić* Trial Chamber determined that video-link would only be allowed where two criteria were met: first, the testimony of the witness must be shown to be sufficiently important to make it unfair to proceed without it; and second, it must be established that the witness is unable or unwilling to come to the tribunal.³⁹ It further found that “[t]he evidentiary value of testimony provided by video-link, although weightier than that of testimony given by deposition, is not as weighty as testimony given in the courtroom.”⁴⁰
21. After this decision was issued, the ICTY Rules of Procedure and Evidence were amended to allow video testimony. Current Rule 81*bis* of the ICTY Rules of Procedure and Evidence, which was adopted on 12 July 2007, states: “At the request of a party or *proprio motu*, a Judge or a Chamber may order, *if consistent with the interests of justice*, that proceedings be conducted by way of video-conference link.”⁴¹ Recent ICTY cases, decided after the adoption of this Rule, have set out three criteria to determine whether allowing video-link testimony would be in the interests of justice. The *Stanišić & Simatović* Trial Chamber, for example, required that:

³⁷ Article 33 new of the Establishment Law states that guidance may be sought in procedural rules established at the international level where there is uncertainty regarding the interpretation or application of existing procedure.

³⁸ *Prosecutor v. Tadić*, IT-94-I-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (“*Tadić* Video-Link Decision”), para. 18.

³⁹ *Id.*

⁴⁰ *Id.*, 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: “The testimony of witnesses heard through electronic media runs the risk of being less weighty than that of in-court testimony if the quality of the transmission impairs the Chamber’s assessment of the witness.”

⁴¹ Emphasis added.

- i. the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal;
- ii. the witness's testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and
- iii. the accused must not be prejudiced in the exercise of his or her right to confront the witness.⁴²

22. At the International Criminal Tribunal for Rwanda ("ICTR"), the *Nzabonimana* Trial Chamber recently identified three similar criteria:

Such criteria include an assessment of: (a) the importance of the evidence; (b) the inability or unwillingness of the witness to travel to Arusha; and (c) whether a good reason has been adduced for that inability and unwillingness. The party making the request bears the burden of proof to demonstrate that the conditions set out above have been met. Hearing testimony via video-link is an exceptional measure, granted only upon sound and legitimate justification based on proper documentation.⁴³

23. In *Nzabonimana*, the Defence had requested that an expert witness testify via video-link from the United States or The Hague due to security concerns, including death threats should she return to Arusha. The Trial Chamber found "each of the allegations advanced by Dr. Thomson in her statement to be extremely serious,"⁴⁴ but it nonetheless denied the request for video-link testimony, as it was not convinced that the expert witness's circumstances were exceptional and because the Trial Chamber received no documentation supporting the claimed security concerns.⁴⁵

24. In the present case, the OCP does not establish any of the criteria allowing for video-testimony. First, as discussed, *supra*, TCE-38 fails to demonstrate that his live testimony is impossible; that he is unable or has good reason to be unwilling to testify in person at the ECCC. Second, while TCE-38 appears to be an important expert witness for the OCP,⁴⁶ the OCP has provides no indication that his testimony is so important that it

⁴² *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 24 February 2010, para. 8.

⁴³ *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.

⁴⁴ *Id.*, para. 21.

⁴⁵ *Id.*, paras. 22, 25. See also *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion to Subpoena Berko Zečević, 20 January 2011, para. 19 which required documentation to be provided: "On the request for the Witness's testimony to be given by video-conference link, the Chamber has not received any medical documentation to support the contention that the Witness is physically unable to travel to the seat of the Tribunal to give his evidence. It will therefore postpone its decision on this aspect of the Motion..."; *Prosecutor v. Ndingiyimana et al.*, ICTR-00-56-T, Decision on Bizimungu's Request for witness DE 4-12 to testify via Video-link, 2 November 2007.

⁴⁶ The OCP has previously proposed that he be questioned by the OCP for 10 hours. See Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes, E9/4.2.

would be unfair to proceed without it. Indeed, there are other witnesses scheduled to testify in Case 002/01 who possess the same level and type of expertise and who are expected to testify on the same topics.⁴⁷

25. Finally, TCE-38's testimony via video-link would be prejudicial to Mr. IENG Sary: it would interfere with his ability to properly confront Mr. IENG Sary. This is because video-link technology is simply no substitute for live examination of a witness. Video-link testimony does not allow the Chamber or the parties the opportunity to observe and assess the witness's appearance, attitude, behavior, and demeanor to the same extent as live, in-court testimony. As observed by one US court:

[o]nly through live cross-examination can ... [one] fully appreciate the strength or weakness of the witness' testimony, by closely observing the witness' demeanor, expressions, and intonations. Videotaped deposition testimony, subject to all of the rigors of cross-examination, is as good a surrogate for live testimony as you will find, but it is still only a substitute. Even the advanced technology of our day cannot breathe life into a two-dimensional broadcast.⁴⁸

These reasons for live, in-court testimony are especially relevant to experts, considering that the subject matter is usually of a technical nature, which will be more difficult to follow via video-link (particularly if technical problems are encountered during the video-link testimony).

26. Live, in-court testimony also brings a degree of gravity to the proceedings that does not exist when one testifies remotely, far removed from the courtroom and the trial participants.⁴⁹ Live testimony encourages a witness to take care with his words: a witness may make a statement remotely that he would not make if facing the Accused. He may also be more inclined to testify truthfully due to the solemnity of the Court. As explained by the famed legal scholar Sir William Blackstone, on the importance of live testimony rather than written depositions: "a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal."⁵⁰

B. TCE-38 must testify in person at the ECCC in order to respect Mr. IENG Sary's fundamental right to be tried in his presence

⁴⁷ TCE-11, for example, has the same profession and level of education as TCE-38.

⁴⁸ *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 419 (5th Cir. Tex. 1992).

⁴⁹ This can be observed by contrasting the live testimony which has occurred in this trial thus far with the video-link testimony of Long Norin, who was frequently interrupted by loud music from nearby.

⁵⁰ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (VOLUME 3, 1768).

27. In addition to being prejudicial to Mr. IENG Sary's right to confront witnesses, video-testimony also interferes with another of Mr. IENG Sary's fundamental fair trial rights. At the ICTR, the right to examine witnesses through in-court testimony has also been linked to the right to presence at trial. Concretely, the ICTR Appeals Chamber in *Zigiranyirazo* found that testimony taken via video-link violated Zigiranyirazo's fundamental right to presence at trial,⁵¹ which he had alleged included the right to be tried in the presence of witnesses against him.⁵² In that case, the Trial Chamber moved the seat of proceedings from Arusha to The Hague to hear in person the testimony of an important prosecution witness. Zigiranyirazo was video-linked into the proceedings from Arusha, since logistical concerns prevented him from attending the proceedings in The Hague. The Trial Chamber moved the seat of proceedings to The Hague to hear this particular witness because of the importance of "the proper assessment of an important prosecution witness"⁵³ and apparently because of its "misgivings about its ability to adequately follow the testimony of a key witness through the use of video-link."⁵⁴ The Appeals Chamber held that this was a violation of Zigiranyirazo's right to be tried in his presence, finding that although this right was not absolute, its restriction was unwarranted and excessive under the circumstances.⁵⁵ It excluded the testimony of the witness taken in this manner, finding that prejudice to Zigiranyirazo could be presumed.⁵⁶

28. In the present case, Mr. IENG Sary's right to be tried in his presence, guaranteed by the Cambodian Constitution,⁵⁷ the Establishment Law⁵⁸ and the ICCPR,⁵⁹ would be violated if TCE-38 testifies via video-link since it is not possible, due to his age and ill-health, for Mr. IENG Sary to travel to be in TCE-38's presence during his video-link testimony. The OCP demonstrates no compelling reasons – let alone sufficiently compelling reasons – warranting the restriction of Mr. IENG Sary's fair trial right to confront this witness in his presence.

⁵¹ *Zigiranyirazo v. Prosecutor*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006.

⁵² *Id.*, para. 10.

⁵³ *Id.*, para. 17.

⁵⁴ *Id.*, para. 19.

⁵⁵ *Id.*, paras. 15-22.

⁵⁶ *Id.*, paras. 24-25.

⁵⁷ Through Article 31, which requires that human rights set out in the ICCPR be respected.

⁵⁸ Establishment Law, Art. 35 new(d).

⁵⁹ ICCPR, Art. 14(3)(d).

C. TCE-38's testimony via video-link presents legal difficulties and logistical problems which make such testimony unfeasible and which require that it be afforded little weight

29. Even if the Trial Chamber should find that there are sufficiently compelling reasons to limit Mr. IENG Sary's fundamental fair trial rights to confront witnesses against him and to be tried in his presence, it is unclear whether the ECCC has the jurisdiction to conduct video-link testimonies from outside Cambodia. According to the *Stanišić & Simatović* Trial Chamber, "a VCL [video conference link] that allows a witness to be physically present in a location other than the Tribunal whilst testifying *should be seen as an extension of the courtroom to the location of the Witnesses.*"⁶⁰ The founding documents of the ECCC do not permit it, unlike the ICTY,⁶¹ ICTR,⁶² International Criminal Court,⁶³ or Special Court for Sierra Leone,⁶⁴ to operate outside of its seat. Rule 5(1) provides that the ECCC may "invite" States who are not parties to the Agreement to provide judicial assistance. Inviting judicial assistance is not equivalent to conducting ECCC judicial operations abroad; however the Defence recognizes that the OCIJ has conducted judicial operations in France in the past.
30. Were the ECCC permitted to extend its courtrooms outside of Cambodia for the purpose of hearing TCE-38 via video-link, there are a number of logistical considerations which would make TCE-38's testimony via video-link unfeasible. Video-link testimony causes delay and wastes courtroom time, as experienced with witness Long Norin's testimony – courtroom time was wasted after the video connection failed on one occasion. Indeed, even when the connection was functioning, there were delays and noise feedback during questions and answers.

⁶⁰ *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 24 February 2010, para. 11 (emphasis added).

⁶¹ Article 29(2) of the ICTY Statute requires that "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: ... (b) the taking of testimony and the production of evidence..." UN Security Council Resolution 827 (S/RES/827 (1993), 25 May 1993) states that the Security Council "Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions..."

⁶² UN Security Council Resolution 955 (S/RES/955 (1994), 8 November 1994) states that the Security Council has "regard to the fact that the International Tribunal may meet away from its seat when it considers necessary for the efficient exercise of its functions..."

⁶³ ICC Statute, Art. 3.

⁶⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Art. 10.

31. More importantly, however, there are several issues which must be considered by the Trial Chamber. For example, where would TCE-38 testify?⁶⁵ Would United States or Cambodian officials administer the oath? If TCE-38 should give false testimony while under oath, would he be liable under United States or Cambodian law? If he would be liable under Cambodian law, would the ECCC or Cambodian courts have any means to give effect to such a law? The Defence submits that considering these concerns, TCE-38's testimony by video-link must, at the very least, be accorded less weight than if he were to testify under oath at the ECCC.⁶⁶

D. Should the Trial Chamber decide that TCE-38 may testify via video-link, members of the Defence must be permitted to examine him at the location where he testifies

32. In order to protect Mr. IENG Sary's rights to the maximum extent possible and to abridge these rights no more than is considered absolutely necessary, some members of the Defence team must be permitted to conduct the cross-examination of TCE-38 at the location where he testifies, should the Trial Chamber decide that TCE-38 may testify via video-link. This will help to protect Mr. IENG Sary's rights because it will assist the Defence team in assessing TCE-38's appearance and demeanor, allowing the cross-examination questions to be tailored based on these assessments. As the *Bagosora* Trial Chamber has previously noted: "[r]epresentation by the parties at the point of transmission ensures that the conditions of testimony are impartial and fair."⁶⁷

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to: ORDER that the OCP desist from conducting any further *ex parte* communications with TCE-38; REJECT the OCP's Request for TCE-38 to testify via video-link, or in the alternative, AUTHORIZE Defence team members to travel to TCE-38's location to conduct his examination.

Respectfully submitted,

⁶⁵ See *Tadić* Video-Link Decision, para. 22, which requires that if video-link testimony is to occur, the solemnity of the proceedings at the location must be guaranteed, and states a preference for an embassy, consulate, or court facility to be used when conducting video-link testimony.

⁶⁶ *Id.*, para. 21.

⁶⁷ *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. 11.



ANG Udom





Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 9th day of **March, 2012**