Making the Case for Increased Use of Remote Witness Testimony in Human Trafficking Prosecutions in Cambodia

October 2018
Disclaimer

The report contains our findings based on a desktop review of publicly available sources in English (unless otherwise indicated). Liberty Asia does not accept responsibility for the accuracy of foreign laws, or the accuracy of the translations. Users should at all times consult the full text of the relevant laws in the original language as well as seeking advice from local counsel qualified in the relevant domestic jurisdictions. This report does not constitute legal advice under any circumstance.

Acknowledgements

We would like to acknowledge and thank K&L Gates LLP for its regional research assistance. We would also like to thank International Justice Mission (IJM) for its peer review of the paper.
I. Introduction

All too often cross-border human trafficking prosecutions in Cambodia are stalled or derailed because victims are unwilling or unable to participate in the process. This lack of willingness or ability may be due to security concerns, a desire to return home to focus on recovery and rehabilitation, or other immediate needs such as earning a living. Increased use of remote witness testimony provides a solution that enables these victims to participate in the judicial process in Cambodia or elsewhere while simultaneously protecting their identity and allowing them to return home.

Remote witness testimony, also known as videolink or video-conferencing testimony, is real-time testimony of a witness through a closed-circuit camera that permits both contemporaneous sounds and images of people to appear on a screen in the courtroom. The witness does not have to be physically present in the courtroom, but rather, may be in an adjoining room, nearby location, or another country. The video connection can take the form of a one-way transmission through which the remote witness could be seen or heard by others in the courtroom but cannot see or hear them. Alternatively, it could be through a two-way transmission where the remote witness can be seen or heard by those in the courtroom and can see or hear them. In cases where it is necessary to guarantee the anonymity of witnesses, the video-conferencing technology can be combined with other digital techniques that allow for the distortion of the witness’ image or voice.

This paper makes the case for increased use of remote witness testimony in human trafficking cases involving Cambodian victims. In doing so, we will explain the benefits and challenges of this type of testimony, examine the relevant laws in Cambodia that neither explicitly prohibit nor permit this testimony, and briefly compare the legal frameworks in other ASEAN countries which use it. Although the technology for remote witness testimony may not yet be available in all provincial courts in Cambodia, where it is available (e.g. Phnom Penh), it provides a viable, safe, and legal alternative for victims of human trafficking to participate in the case. It alleviates the need for victims to choose between their security, desire to return home, and right to seek justice.

---
2 Ibid.
II. Recommendations for Way Forward

While fully adopting video-conferencing technology for remote witness testimony would involve an initial capital investment for the Royal Government of Cambodia (RGC), the possible advantages of the system are numerous. Advantages include the safeguarding of important but vulnerable witnesses, increased participation of witnesses and victims located abroad, and potential cost savings due to reduced travel expenses, interpretation costs, and overall judicial efficiency.

Although neither the Code of Civil Procedure of Cambodia 2006 (Cambodian Civil Procedure Code) nor the Criminal Procedure Code of the Kingdom of Cambodia 2007 (Cambodian Criminal Procedure Code) explicitly provide for video-link testimony, these laws do not prohibit its use. In fact, the RGC has begun to use video-conferencing technology in certain circumstances in domestic courts through collaboration with NGOs and at the Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid Cambodian-international court established by the United Nations and the RGC to prosecute former senior Khmer Rouge officials.

Furthermore, as demonstrated in Tables A and B below, at least four of the ASEAN Member States have already incorporated comprehensive laws relating to the use of video-link evidence. This type of testimony is also widely used in other jurisdictions. These laws not only safeguard vulnerable witnesses but have sufficient limitations in place to protect the rights of the accused. The laws in Singapore provide a particularly useful example, as they specify in detail who can and cannot see or hear remote witness testimony and who the witness can see or hear in the courtroom, and they allow the court to vary or suspend any limitations or conditions depending on the circumstances.

---

For Cambodia, the following steps are recommended as a way forward to increase the use of video-link remote witness testimony:

1. **For the RGC:**
   a. Work to ensure that the video-link technology is uniformly installed and implemented in courtrooms across the country and that any amenities required for successful use (e.g., suitable high-speed internet connection) are in place;
   b. Consider the installation of video-link facilities in transit centres or long-term recovery centres so that it is available for remote witness testimony;
   c. Consider issuing updated policy guidelines allowing pre-recorded video testimony to be used as evidence in cases involving sexual assaults, sex trafficking, torture or other circumstances where the victims suffered severe mental or physical anguish. This is done in Singapore to avoid additional trauma to victims in recounting their ordeals in open court. However, it must be carefully balanced with the rights of the accused;*
   d. Consider issuing updated policy guidelines with more robust protections for vulnerable witnesses such as those set out in Singaporean law that specify who can and cannot see/hear remote witness testimony as well as who the witness can see/hear within the courtroom and that allow the court to vary or suspend any limitations or conditions as needed;
   e. Consider enacting legislation that specifically authorizes and regulates the use of remote witness testimony. Cambodia has historically taken steps to encourage the use of video-link testimony, through agreements with NGOs and at the ECCC. Enacting legislation to permit and even encourage further use of video-link evidence would allow for a more universal application throughout the country’s courts;
   f. Ensure that court officials and staff in courtrooms where video-link technology is available are aware that this technology may be used in human trafficking and other cases where there are vulnerable victims and witnesses; and
   g. With assistance from NGOs and other stakeholders, train court officials and staff on use and benefits of video-link evidence in cross-border human trafficking cases.

2. **For NGOs**
   a. Support the RGC in building awareness about the availability of video-link testimony for victims of cross-border human trafficking in Cambodia;
   b. Increase awareness of victims and partner organizations based abroad about the availability of video-link testimony in Cambodia; and
   c. Where required and in the best interest of victims, encourage victim representatives to request the use of video-link technology for their clients in court, as permitted under the law.

---

III. Understanding the Benefits and Challenges of Using Video-Link Remote Witness Testimony

The conventional practice of witnesses appearing in person at trial has become increasingly difficult, particularly in human trafficking cases where victims are often transported across borders and may be in remote locations far from the court proceedings. Many victims choose to return home as part of their own recovery and rehabilitation, and their right to justice must not be impaired because of this choice. Additionally, this choice should not cause prosecutions of traffickers to fail. Presently in Cambodia, victims are placed in a difficult situation where they must sometimes choose between their own recovery at home or participation in the justice system.

Trafficking victims also often have security and safety concerns, and they may be reluctant to testify in open court. Confronting their traffickers in person in court can be a traumatic, stressful experience that compounds the harm they have already suffered. Video-link testimony enables victims and witnesses to participate in the court proceedings and give testimony from a remote location (provided that the location has technology available to support video-conferencing technology). It limits who in the courtroom can see and hear the witness' testimony and whom the witness can see and hear in the courtroom. In the case of victims or witnesses who may be hesitant to appear in court because of security concerns, this form of testimony provides a safe alternative while still allowing the prosecution to go forward. Particularly where cases involve vulnerable or young witnesses, it can prevent the intimidation and fear associated with being in a formal courtroom setting and having to face the alleged trafficker. The vulnerable person can testify from a private, secure location.

Video conferencing technology also connects parties to the court proceedings without requiring them to travel, thereby reducing costs and increasing efficiency of proceedings. It can increase the likelihood that important witnesses in trafficking cases will be available to give evidence to the court. Another benefit of video-link testimony is the ability to connect interpreters who may be in different locations. For example, it may be challenging to locate a Khmer interpreter for Cambodian trafficking victims testifying in a Malaysian or Thai court. Video-link testimony allows these interpreters to connect remotely and be available at a lower cost.

Finally, the use of video-link testimony is not only limited to witnesses and victims seeking to testify, but it can also be used for alleged perpetrators to testify. This option can reduce costs associated with transportation of inmates and increases safety for court staff, officers and the public. Despite the many advantages, there are also some disadvantages of video-link testimony. First, the installation of the technology can be expensive, although this has markedly decreased in recent years. Second, technological problems may occur, such as lost audio, lagging feeds or inconsistent signals, which may make the witness' testimony difficult to understand. It is essential to have reliable, high speed broadband in order to transmit and receive high quality images. Defendants, witnesses and
experts included in the video conference must also be connected on the same network or with the same hardware or software as the courtroom.\textsuperscript{13}

Finally, where trafficking victims are testifying, the video-link technology is sometimes perceived as de-personalizing the individual on the screen,\textsuperscript{14} and thus, the testimony may have less impact, and judges may not gain a full understanding of the harm suffered. Nevertheless, as explained above, the benefits outweigh the challenges, especially in cross-border human trafficking cases.

\section*{IV. An Overview of the Laws in Cambodia Related to Video-Link Testimony}

At present neither the Cambodian Civil Procedure Code nor the Cambodian Criminal Procedure Code specifically address the use of audio or video testimony in the courtroom. Likewise, these laws do not explicitly bar the use of such evidence.

However, the existing language and tone of both Codes indicate that the accused’s right to confront their accusers will be maintained\textsuperscript{15} and that the physical presence of a witness (be it in civil or criminal proceedings) will be required unless the witness is incapacitated or unable to appear on justifiable grounds.\textsuperscript{16}

While Cambodian law may not expressly provide for video-link testimony, the lack of clarity does not mean that video-link evidence cannot or should not be used in Cambodia. On the contrary, the concept is not unfamiliar in Cambodia and has already been used in the country in several instances:

First, video-link testimony has been used at the ECCC, a hybrid tribunal established in Cambodia to prosecute the former Khmer Rouge officials. According to the ECCC Internal Rules, the testimony of a witness or expert during a judicial investigation or at trial should be given in person where possible.\textsuperscript{17} However, a witness may be allowed to give testimony by means of audio or video technology, provided that the witness can be interviewed by judges or the parties at the time of testimony.\textsuperscript{18} There is also a specific provision that the technology should not be used if it would be seriously prejudicial to or inconsistent with defence rights.\textsuperscript{19} Moreover, where the judges believe that the appearance of victims or witnesses in court is likely to place these individuals’ life or health or that of their family members in serious danger, the judges may order protective measures including hearings in camera or the presentation of evidence by electronic or other special means, which may include video-link technology.\textsuperscript{20}

Second, in 2007, several departments of the Cambodian Government entered into an agreement with various NGOs working in Cambodia that established guidelines for working together to specifically target human trafficking.\textsuperscript{21} The agreement included the following provisions:

a. Court hearings related to trafficking can work in “closed session to respect the best interests, dignity and privacy of the victim”;

b. The court may allow the victim to give testimony from a separate place, using a video-link;

\textsuperscript{15} Cambodia Criminal Code, art.133.
\textsuperscript{16} Cambodia Civil Code, arts.132 and 136(1)(a); Cambodia Criminal Code, arts. 153 and 158.
\textsuperscript{17} ECCC Internal Rules, Rev. 9, 16.01.2015, rule 26.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid., rule 29(4)(e).
c. The court may allow the victim to give evidence by a video recording; and

d. If necessary, the court may allow a support person to be with the victim during testimony.\textsuperscript{22}

Finally, in 2016, the Ministry of Justice instructed provincial courts to implement a child-friendly judicial program to facilitate child victim testimony.\textsuperscript{23} This involved barring direct cross-examination of the child victim in front of the accused and the use of video conferencing for child victim testimony.\textsuperscript{24} However, the U.S. State Department Anti-Trafficking in Persons Report, 2018 (Cambodia Country Narrative) noted that the provincial courts did not universally implement the program.\textsuperscript{25}

V. Comparing the Use of Video-Link Testimony in Other ASEAN Countries

As seen below in Tables A and B, video-link evidence is already widely used in other ASEAN countries. These legal frameworks are informative for Cambodia, which may wish to further develop the Cambodian Civil Procedure Code or the Cambodian Criminal Procedure Code to specify details about the use of video-link testimony. At the moment, however, Cambodian law is sufficient for allowing video-link testimony in human trafficking cases.

\textsuperscript{22} Ibid. ch.8, art.21.
\textsuperscript{23} U.S. State Department Anti-Trafficking in Persons Report, 2017: Cambodia Country Narrative, p.115
\textsuperscript{24} Ibid, p.115.
\textsuperscript{25} U.S. State Department Anti-Trafficking in Persons Report, 2018: Cambodia Country Narrative, p.127.
Table A: Use of video-conferencing evidence in other ASEAN jurisdictions.

<table>
<thead>
<tr>
<th>Country</th>
<th>Video-link permitted?</th>
<th>Leave of court required for live video testimony?</th>
<th>Accused allowed to testify via live video or TV link?</th>
<th>Other?</th>
<th>Details of legislation</th>
<th>Allows testimony of child via video-link?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>Yes</td>
<td>Yes</td>
<td>No, except in certain circumstances&lt;sup&gt;26&lt;/sup&gt;</td>
<td>No</td>
<td>See details in the Appendix</td>
<td>Yes</td>
</tr>
<tr>
<td>Laos</td>
<td>There is no specific legislation relating to video conferencing.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Malaysia</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>See details in the Appendix</td>
<td>Yes</td>
</tr>
<tr>
<td>Myanmar</td>
<td>There is no specific legislation relating to video conferencing.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>Yes&lt;sup&gt;27&lt;/sup&gt;</td>
<td>No</td>
<td>No</td>
<td>Yes. Before authorizing testimony by electronic means, the court shall determine the necessity for its use.&lt;sup&gt;28&lt;/sup&gt;</td>
<td>See details in the Appendix</td>
<td>Yes</td>
</tr>
<tr>
<td>Singapore</td>
<td>Yes</td>
<td>Yes, application must be made as soon as possible&lt;sup&gt;29&lt;/sup&gt;</td>
<td>No, except certain circumstances&lt;sup&gt;30&lt;/sup&gt;</td>
<td>Yes. In all cases, the court may allow use of video-link evidence if: (a) witness is under 16 years old; (b) offence is one of a number of specified crimes;&lt;sup&gt;31&lt;/sup&gt; (c) court is satisfied that it is in the interests of justice; or (d) Minister certifies that it is in the public interest.&lt;sup&gt;32&lt;/sup&gt; S.62(A)(1) of the Evidence Act contains similar provisions with some additional requirements.&lt;sup&gt;33&lt;/sup&gt;</td>
<td>See details in the Appendix</td>
<td>Yes</td>
</tr>
</tbody>
</table>

26 Criminal Procedure Code, Laws of Brunei, Ch.7, s.236(B)(2).
27 Refer to the decision of Ang v Court of Appeals (see the Appendix to this Report) in relation to the applicability of the Rules on Electronic Evidence to criminal cases.
29 Singapore State Courts Practice Directions, § 129(2).
30 Criminal Procedure Code, S.281(2).
31 The relevant crimes are specified in the Criminal Procedure Code, S.281(2) available at https://sso.agc.gov.sg/Act/CPC2010#pv281 (accessed on 31 Aug. 2018). They include certain specified offences under (i) the Penal Code, (ii) Children and Young Person's Act (relating to protection of children and young persons), (iii) the Organised Crime Act 2015, and (iv) Part XI of the Women's Charter (offences against women and girls).
32 Criminal Procedure Code, S.281(1).
33 Singapore's Evidence Act (Chapter 97), S.62(A)(1). The provisions in S.62(A)(1) apply in any proceedings except those in a criminal matter.
Table B: Compares possible limitations in relation to use of video-link evidence in other ASEAN jurisdictions.\(^{34}\)

<table>
<thead>
<tr>
<th>Country</th>
<th>Support person available for witnesses</th>
<th>Privacy of witness</th>
<th>Who in courtroom can / cannot be heard / seen by witness</th>
<th>Who in courtroom can see / hear witness</th>
<th>Minimum technical standards for video-link system</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Philippines</td>
<td>No specific provisions, except that Rule 10 of the Rules on Electronic Evidence provide that in relation to presentation of testimonial evidence by electronic means, the court shall prescribe terms and conditions as may be necessary under the circumstances, including the protection of the rights of the parties and witnesses concerned.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes: (a) any other order the court considers necessary; (b) the court can also revoke, suspend, or vary any order made in relation to video-link evidence.(^{35})</td>
</tr>
</tbody>
</table>

\(^{34}\) We have excluded Laos and Myanmar from Table B given that neither jurisdiction has specific legislation concerning video-link evidence.

\(^{35}\) Criminal Procedure Code, S.281(7).
### Brunei

Brunei’s legal system is based on British common law with a parallel Sharia law system. Since 2013, Brunei has gradually been implementing Sharia law. Phase I of the new Sharia Penal Code 2013 (Brunei SPC) governs cases generally punishable by fines or imprisonment. It operates in parallel with the existing common law based criminal law system. The secular Criminal Procedure Code (Brunei CPC) continues to apply to all criminal proceedings in Sharia court unless expressly covered by Phase I of the Sharia Penal Code. Phase II of the SPC took a step closer to implementation in early in 2018 but, at the date of this paper, has not yet been implemented.

The existing Brunei CPC contains robust provisions relating to video-link testimony. S.236B(1) of the CPC provides that with the leave of the court any person (other than the accused) can give evidence through a live video/TV link in any inquiry, trial appeal or other proceedings. This may be permitted whether the witness is abroad or in Brunei. As detailed in Table B above, in Brunei the court can control the circumstances of any video-link testimony, such as who hears and sees the witness and who the witness can see or hear.47

### Malaysia

Legislation was introduced in 2012 addressing video testimony through the Malaysian Evidence (Amendment) (No.1) Act 2012 which amended the Evidence Act 1950. The amendment provided that where testimony has been made by means of video or other means which permit the virtual presence of a person in Malaysia, that testimony is deemed to have been made in Malaysia. This is designed to allow evidence via video conferencing or even by telephone.

In addition, under the Malaysian Criminal Procedure Code, a person (other than the accused) may, with leave of the court, give video or live evidence through a live video or live television link, if it is expedient in the interests of justice to do so. The court has a great deal of power to dictate how such evidence is presented if leave is granted. (see Malaysia: Additional Powers of the Court Relating to Video Evidence in the Comparison Table above).

---

37 Criminal Procedure Code, Laws of Brunei, Ch. 7, S.236 (B)(3).
38 Laws of Malaysia, Act 56, Evidence Act 1950, § 90E(8).
39 Malaysia Act 593, Criminal Procedure Code § 272(B)(1).
Philippines

The Rules on Electronic Evidence (2001) provide that “…the court may authorize the presentation of testimonial evidence by electronic means. Before so authorizing the court shall determine the necessity for such presentation and prescribe terms and conditions as may be necessary in the circumstances, including the protection of the rights of the parties and witnesses concerned.”

Initially the Rules on Electronic Evidence applied to civil, quasi-judicial and administrative cases. A Philippines Supreme Court Resolution in 2002 (2002 Resolution) extended the Rules on Electronic Evidence so that they also covered criminal cases. In Ang v Court of Appeals, the Supreme Court stated that “[t]he Rules on Electronic Evidence applies only to civil cases, quasi-judicial proceedings and administrative proceedings”. Some argue that the 2002 Resolution was overruled. At present it is still not completely clear what the position is. However, the most likely scenario is that the court's statement inferring that the Rules do not apply in criminal cases was a harmless error for the case.

| Page 12 |

Singapore

S.62(A)(1) of Singapore’s Evidence Act (Ch.97) applies to both criminal and civil trials. It allows the use of video-link evidence (as an exception to in-person testimony) as long as certain conditions have been complied with. For details of the conditions please refer to Singapore: Limitations (Other) in Table A above.

Further, Section 129(1) of Singapore State Courts Practice Directions, provide that: “A person in Singapore (other than the accused person) may, with leave of the court, give evidence through a live video/TV link in any trial, inquiry, appeal or other proceedings specified in S.281(1) and (2) of the Criminal Procedure Code 2010.” For details of the offences referred to in S.281(1) and (2) please refer to footnotes 32 and 33 above.

Many of Singapore's courts are already equipped with video-link equipment to allow witnesses to give remote evidence. If video-link testimony is to be used, there is power to relocate the trial to ensure that the courtrooms have proper technology to accommodate the testimony. As with other ASEAN jurisdictions, the court has comprehensive powers to govern video-link evidence.

Proposed changes to Singapore’s Criminal Procedure Code would also allow courts to consider pre-trial video recorded interviews conducted by prosecutors. For vulnerable victims, courts would be able to consider whether their video-recorded statements were made voluntarily or were coerced.

---

40 Rules on Electronic Evidence Rule 10 (Examination of Witnesses).
41 Rules on Electronic Evidence, Section 2, Rule 1.
43 Ang v Court of Appeals, GR 182835, 20 April 2010; Second Division, Abad [J], Philippine Supreme Court.
47 Ibid.