

**BEFORE THE SUPREME COURT CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC-TC/SC ( ) **Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 18 December 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:**


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**IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S ORAL DECISION  
TO DENY HIS RIGHT TO BE PRESENT IN THE COURTROOM AND TO  
PROHIBIT HIM FROM BEING VIDEO RECORDED IN THE HOLDING CELL**

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**All Defence Teams****All Civil Parties**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 104 and 21 of the ECCC Internal Rules (“Rules”), hereby appeals the Trial Chamber’s oral decision to deny his right to be present in the courtroom and to prohibit him from being video recorded in his holding cell (“Impugned Decision”).<sup>1</sup> This Appeal is made necessary because the Trial Chamber erred in law and in fact and abused its discretion. Mr. IENG Sary has a right to be physically present in the courtroom, which may be restricted only under strict and limited conditions. The Defence submits three grounds of appeal. The Trial Chamber erred in law by incorrectly interpreting Rule 81(5), which sets out the modalities for any limitation of Mr. IENG Sary’s right to be physically present. The Trial Chamber erred in fact and abused its discretion in finding that Mr. IENG Sary’s presence in court had caused substantial delay and ordering that Mr. IENG Sary’s presence in the holding cell was necessary in the interests of justice. The Trial Chamber erred by abusing its discretion in refusing to allow Mr. IENG Sary to be video recorded during trial, in violation of his fundamental fair trial right to prepare a defence, which includes being able to make a record. The Impugned Decision is immediately appealable pursuant to Rules 104(4)(a), 104(4)(b) and 104(4)(d).

## **I. QUESTIONS PRESENTED**

- A.** *Mr. IENG Sary has a fundamental right guaranteed by the Cambodian Constitution, the ECCC’s legal framework and international law, to be present during the proceedings against him. Mr. IENG Sary expressed his intention to directly exercise his right to be present in the courtroom, which can be restricted only in limited circumstances pursuant to Rule 81(5). Did the Trial Chamber err in law in interpreting Rule 81(5) in such a way as to compel Mr. IENG Sary to follow the proceedings from the holding cell rather than being physically present in the courtroom?*
- B.** *Rule 81(5) permits the Trial Chamber to order participation in the proceedings via audio / visual means if the Accused cannot be present, if there is a substantial delay and if such participation is in the interests of justice. Mr. IENG Sary was able to be present in the courtroom and there had not been a substantial delay in the proceedings. Did the Trial Chamber err in fact and abuse its discretion in applying*

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<sup>1</sup> Transcript, 4 December 2012, E1/147.1, p. 17-19.

*Rule 81(5) so as to compel Mr. IENG Sary to follow the proceedings from the holding cell rather than being physically present in the courtroom?*

**C.** *Mr. IENG Sary has a fundamental right, guaranteed by the Cambodian Constitution, the ECCC's legal framework and international law, to prepare a defence. An integral part of preparing a defence, and a due diligence obligation of the Co-Lawyers in order to protect Mr. IENG Sary's fair trial rights, is making a record on which the Trial Chamber and any appellate bodies may make a decision. Did the Trial Chamber err by abusing its discretion in prohibiting the Defence from making a record of Mr. IENG Sary's condition by videotaping him while he is in the holding cell?*

## **II. SUMMARY OF ARGUMENTS**

1. In accordance with the Cambodian Constitution, the ECCC legal framework and international jurisprudence, Mr. IENG Sary has the fundamental right to be physically present at trial. Rule 81(5) recognizes this fundamental right and defines the criteria by which the Trial Chamber may order Mr. IENG Sary to participate in the proceedings via audio-visual means: **a.** when the Accused cannot attend in person; **b.** when there is a substantial delay in the proceedings; and **c.** if audio-visual participation is in the interests of justice. Here, Mr. IENG Sary was able to attend the proceedings in person, and desired to do so. Moreover, there had not been a substantial delay in the proceedings. Since these two requirements had not been met, the Trial Chamber should not have considered that it was in the interests of justice to deny Mr. IENG Sary's right to directly participate in the trial proceedings by being present in the courtroom and, instead, order him to the holding cell. Mr. IENG Sary should have been permitted to be present in the courtroom.
2. Mr. IENG Sary's medical condition does not require him to participate in the proceedings from the holding cell, nor is it more expeditious to keep Mr. IENG Sary in the holding cell. All of Mr. IENG Sary's medical needs that are provided for in the holding cell can also be provided in the courtroom. Moreover, in the courtroom, the Trial Chamber, the Defence and the ECCC doctors could constantly monitor Mr. IENG Sary's condition and timely react to any changes in his condition. Having Mr. IENG Sary in the courtroom would ensure that a contemporaneous record of his condition is kept.

3. Mr. IENG Sary has the fundamental right to prepare a defence. An integral part of preparing a defence is making a record from which to appeal to the Supreme Court Chamber, if necessary. If Mr. IENG Sary is not in the courtroom, the Co-Lawyers cannot monitor his condition or ensure that he is following the proceedings. If the Defence is not permitted to video record Mr. IENG Sary while he is in the holding cell, the Co-Lawyers similarly cannot monitor his condition or ensure that he is following the proceedings. Videotaping Mr. IENG Sary is a nonintrusive measure. It would not disrupt the proceedings or cause prejudice to any party. Videotaping Mr. IENG Sary would enable the Co-Lawyers to fulfill their duty to defend Mr. IENG Sary as it would allow them to keep a contemporaneous record of his condition. A contemporaneous, objective and verifiable record is necessary to ensure that the Defence preserves for appeal any errors by the Trial Chamber regarding Mr. IENG Sary's health, fitness to stand trial and actual ability to meaningfully follow the proceedings and enjoy all his fair trial rights.
  
4. The Trial Chamber has erred in law and fact and has abused its discretion by prohibiting Mr. IENG Sary's physical presence in court and prohibiting the Defence from making a record by video recording Mr. IENG Sary while he is in the holding cell, thereby preventing a contemporaneous record of his condition and the preservation of errors for appellate review. In so doing, the Trial Chamber has violated Mr. IENG Sary's fundamental rights to be present in court and to prepare a defence. The Supreme Court Chamber should grant this appeal, annul the Impugned Decision and order the Trial Chamber to allow Mr. IENG Sary to be physically present in court. If the Supreme Court Chamber declines to permit Mr. IENG Sary to be present in the courtroom, it should order the Trial Chamber to either: **a.** display Mr. IENG Sary on the courtroom monitor if he is relegated to the holding cell; or **b.** allow Mr. IENG Sary to be videotaped while in the holding cell by the Defence if he is relegated to the holding cell and order the Trial Chamber to accept the filing of these video tapes so they can be placed on the Case File.

### III. BACKGROUND

#### A. Circumstances leading to the Impugned Decision

5. Mr. IENG Sary is an 87-year old man, in weak physical condition, with a documented history of heart problems, urological problems and arthritis.<sup>2</sup>
6. On 7 September 2012, Mr. IENG Sary was hospitalized due to extreme fatigue and weakness.<sup>3</sup> Mr. IENG Sary remained hospitalized for just over two months, until 8 November 2012, when he was returned to his cell at the ECCC Detention Facility.<sup>4</sup> During his time at the Khmer-Soviet Friendship Hospital and subsequently, Mr. IENG Sary has experienced dizziness, shortness of breath, numbness in his limbs and he is unable to walk, or even sit up or stand, unassisted.<sup>5</sup>
7. On 21 September 2012, while Mr. IENG Sary was still hospitalized, Drs. Lim Sivutha and Ky Bousuor, representing the Khmer-Soviet Friendship Hospital Governing Board for the Examination of the Health of the Accused at the ECCC Detention Facility (“treating doctors”), appeared before the Trial Chamber to update it and the parties as to Mr. IENG Sary’s medical status.<sup>6</sup> Dr. Lim Sivutha testified that a CT scan performed on Mr. IENG Sary revealed that he suffers from vertebrobasilar insufficiency syndrome. This is a condition in which insufficient blood reaches the head, causing dizziness, fatigue and numbness.<sup>7</sup>
8. On 24 September 2012, the Trial Chamber announced that it would send the 21 September 2012 trial transcript and Mr. IENG Sary’s medical reports to Professor A. John Campbell, a geriatrician who has examined Mr. IENG Sary in the past, to “advise as

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<sup>2</sup> See, e.g., Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, paras. 1-2.

<sup>3</sup> Email from Senior Detention Liaison Officer Claude Bouchard, 7 September 2012; Transcript, 21 September 2012, E1/125.1, p. 12.

<sup>4</sup> Transfer of IENG Sary to ECCC Detention Facility for 8 November 2012 Hearing, 7 November 2012, E239/2.

<sup>5</sup> See Mr. IENG Sary’s daily medical reports submitted by the Khmer Soviet Friendship Hospital (e.g., E1/86.1); Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4; Transcript, 21 September 2012, E1/125.1, p. 12, 14, 62-63; Transcript, 8 November 2012, E1/142.1, p. 78, 106.

<sup>6</sup> Transcript, 21 September 2012, E1/125.1.

<sup>7</sup> *Id.*, p. 19-20, 48-49.

to what further medical expertise is required in relation to the Accused IENG Sary, should this be necessary.”<sup>8</sup>

9. On 8 October 2012, after Professor Campbell indicated that he found it difficult to be certain of the reasons for a change in Mr. IENG Sary’s diagnosis since he last examined him, the Trial Chamber appointed Professor Campbell to return to Cambodia to examine Mr. IENG Sary.<sup>9</sup>
10. On 5 and 6 November 2012, Professor Campbell examined Mr. IENG Sary and prepared a report.<sup>10</sup> In this report, Professor Campbell concluded that Mr. IENG Sary was not suffering from vertebrobasilar insufficiency syndrome, but was instead experiencing benign paroxysmal positional vertigo.<sup>11</sup> Professor Campbell noted that dizziness was common in the elderly and found that Mr. IENG Sary was competent to stand trial, recommending only minor modifications in his care.<sup>12</sup>
11. On 7 November 2012, after receiving permission from the Trial Chamber,<sup>13</sup> the Defence immediately contacted Dr. Harold Bursztajn, a forensic neuropsychiatric expert,<sup>14</sup> to see if he could review Professor Campbell’s report and provide assistance in preparing for Professor Campbell’s examination the following day.<sup>15</sup> Dr. Bursztajn briefly (due to time constraints and inherent limitations)<sup>16</sup> examined Professor Campbell’s 6 November 2012 report and provided a brief analysis.<sup>17</sup> Dr. Bursztajn found Professor Campbell’s methodology unacceptable and pointed out that Professor Campbell:

1. [Failed to p]rovide a competency specific mental status examination relative to [Mr. IENG Sary’s] capacity to assist counsel such as a check of his autobiographical memory.

<sup>8</sup> Directions to the Parties Following Hearing of 21 September 2012, 24 September 2012, E233, para. 2.

<sup>9</sup> Re-appointment of Professor John A. Campbell (IENG Sary), 8 October 2012, E238.

<sup>10</sup> Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4.

<sup>11</sup> *Id.*, p. 3-5.

<sup>12</sup> *Id.*, p. 2-6.

<sup>13</sup> See Email from Trial Chamber Legal Officer Roger Phillips, “Re: Request to share expert report E238/4”, 7 November 2012.

<sup>14</sup> Dr. Bursztajn is a Harvard Medical School-trained specialist in the field of forensic neuropsychiatry and has extensive experience in this area. See Dr. Bursztajn’s *curriculum vitae*, E115.2.2.

<sup>15</sup> See Email exchange between the Defence and Dr. Bursztajn, E238/6.2.

<sup>16</sup> See Transcript, 8 November 2012, E1/142.1, p. 49; Transcript, 12 November 2012, E1/143.1, p. 8, where International Co-Lawyer Michael G. Karnavas noted that Dr. Bursztajn’s letter to the Defence was not an expert report, since Dr. Bursztajn was not provided with all the necessary information or time in which to prepare an expert medical report.

<sup>17</sup> Letter from Dr. Bursztajn to the Defence, 7 November 2012, E238/6.

2. [Failed to p]rovide a systematic assessment of the limits of [Mr. IENG Sary's] attention, concentration, language and executive functions relative to his endurance in relation to fatigue and pain as the trial progresses and information complexity increases.

3. [Engaged in a] blanket dismissal of potential medication side effects based on the ipse dixit assumption that since [Mr. IENG Sary's] medications have not been changed, a gradual emergence of subtle yet significant medication related neurotoxicity can simply be pulled out or would be noticed by his treating clinicians.<sup>18</sup>

12. On 8 November 2012, Professor Campbell testified in court.<sup>19</sup> His testimony was consistent with his 6 November 2012 report, i.e. that Mr. IENG Sary, although physically frail, was fit to participate in the proceedings as long as minor recommendations, such as wearing a soft neck collar, were implemented. Professor Campbell did not see a problem with Mr. IENG Sary sleeping during trial, explaining: "Now, I have dozed through a good few lectures, it doesn't mean I'm not capable of concentrating on them. And so, from my examination of Ieng Sary, I have not found any evidence that he is not capable of concentrating. That doesn't meant [sic] that he may not doze off at times, as I've said, many of us do, if there's not much that's actually maintaining our interest at the time."<sup>20</sup> After Professor Campbell's testimony concluded, the parties were informed that on 12 November 2012 they would be provided a brief opportunity to provide remarks and observations concerning Professor Campbell's report.<sup>21</sup>

13. On 12 November 2012, the Defence orally requested that the Trial Chamber appoint an additional expert to examine Mr. IENG Sary to assess his fitness to stand trial because of Dr. Bursztajn's criticism of Professor Campbell's methodology and because the Defence team's observations concerning Mr. IENG Sary's fitness were in sharp contrast to Professor Campbell's.<sup>22</sup> The Defence submitted that submissions on competency at that point would be premature.<sup>23</sup> The Defence stated that Mr. IENG Sary was currently unfit for trial, but that the trial could go forward with the witnesses for whom Mr. IENG Sary had waived his presence, in the hope that Mr. IENG Sary's health could improve.<sup>24</sup> The

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<sup>18</sup> *Id.*

<sup>19</sup> Transcript, 8 November 2012, E1/142.1.

<sup>20</sup> *Id.*, p. 56.

<sup>21</sup> *Id.*, p. 140.

<sup>22</sup> Transcript, 12 November 2012, E1/143.1, p. 7-11.

<sup>23</sup> *Id.*, p. 5-6. "[Y]ou must not lose sight of the fact that we -- that is the Ieng Sary defence, have not made submissions calling for the termination of the proceedings against Mr. Ieng Sary." *Id.*, p. 5.

<sup>24</sup> *Id.*, p. 11-12.

OCP submitted that the trial should proceed with Mr. IENG Sary attending from his holding cell, and further submitted that the Trial Chamber must decide on Mr. IENG Sary's fitness to stand trial at this point, rather than waiting to see if his health improved.<sup>25</sup> The OCP submitted that it was unnecessary to call additional experts.<sup>26</sup> The Civil Parties supported the OCP.<sup>27</sup>

14. On 26 November 2012, the Trial Chamber issued a written decision, finding Mr. IENG Sary fit to stand trial and rejecting the Defence's request to appoint an additional medical expert.<sup>28</sup> In this decision, the Trial Chamber considered whether it may order Mr. IENG Sary to participate in the proceedings from his holding cell. It noted that Mr. IENG Sary's physical frailty had created a number of trial management challenges and had directly resulted in the partial or total adjournment of 12 trial days.<sup>29</sup> It "further note[d] the determination of the Expert Geriatrician that [Mr. IENG Sary] is best able to concentrate when lying down and that in view of his increased frailty, [Mr. IENG Sary's] medical needs are most appropriately provided for in the holding cell."<sup>30</sup> The Trial Chamber did not consider video recording of the holding cell to be necessary since the holding cell is accessible at all times by the Defence and the ECCC Medical Unit.<sup>31</sup> The Trial Chamber concluded that it may order Mr. IENG Sary's audiovisual participation "in the interests of justice" and provided notice to the parties that it may do so where his presence in the courtroom would be contrary to his medical interests and / or to the expeditious conduct of trial.<sup>32</sup>

15. On 3 December 2012, Mr. IENG Sary notified the Trial Chamber of his withdrawal of the waivers<sup>33</sup> of his right to be present during the testimony of certain witnesses and Civil Parties, which he had signed during his hospitalization. He further notified the Trial

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<sup>25</sup> *Id.*, p. 25-30.

<sup>26</sup> *Id.*, p. 36-37.

<sup>27</sup> *Id.*, p. 39-42.

<sup>28</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9.

<sup>29</sup> *Id.*, para. 35.

<sup>30</sup> *Id.*, para. 36.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, para. 37.

<sup>33</sup> IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 18 September 2012, E229; IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 1 October 2012, E237; IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 30 October 2012, E237/1.

Chamber that he intended to exercise his right to be present in the courtroom during all witness testimony.<sup>34</sup>

### **B. Impugned Decision**

16. On 4 December 2012, trial proceedings resumed. Mr. IENG Sary was not brought into the courtroom as he had requested, but was instead brought to his holding cell. A report prepared by the ECCC doctor that morning stated that, in the doctor's opinion, Mr. IENG Sary could not follow the proceedings in the courtroom and should remain in the holding cell due to extreme fatigue upon slight movement, chest pain, and the fact that he had not been able to sleep or eat and had vomited.<sup>35</sup> International Co-Lawyer Michael G. Karnavas requested that Mr. IENG Sary be brought into the courtroom, or at a minimum, video recorded in the holding cell by either the Audio Visual Unit or at least by his Defence team so that the Trial Chamber could observe his condition.<sup>36</sup> He stated:

As a defence lawyer, I've always maintained that it is counsel's duty and responsibility to protect their client's rights. So, how do we monitor, from moment-to-moment, hour-to-hour, day-to-day, whether our client is capable and, indeed, able to follow the proceedings? It is not sufficient to say he's downstairs, he's in the presence of the building, we have a television monitor there and therefore, he's able - he is present and he's following the proceedings. That is insufficient. It's like me, on my couch asleep with the television on; I'm not watching what's on the television. Am I present in the living room? Yes, but that's [not] what we're talking about.<sup>37</sup>

The Trial Chamber deliberated and Judge Cartwright read out the Impugned Decision:

The Trial Chamber has as its starting point the decision on the fitness of Ieng Sary to participate in the trial. That decision was based on consideration of all the relevant expert testimony and evidence and after having granted the parties an opportunity to present submissions. With that as its starting point, however, the expert indicated that Ieng Sary's physical condition may well change from time to time and the Trial Chamber is conscious of that and of its responsibility to keep his physical condition under constant consideration. With that in mind, the doctor treating Ieng Sary issued a medical report this morning to the Trial Chamber based on his examination of the accused today, and in English the summary is that Ieng Sary cannot follow the proceedings from the courtroom. The doctor went on to request that he be permitted to follow proceedings from the holding cells which

<sup>34</sup> IENG Sary's Withdrawal of Waivers of Right to be Present, 3 December 2012, E237/2; IENG Sary's Notice of Withdrawal of Waivers of Right to be Present During the Testimony of Certain Witnesses and Civil Parties, 6 December 2012, E249.

<sup>35</sup> E1/147.2. Note that this report is classified as strictly confidential despite Mr. IENG Sary's notice that his health issues could be addressed in public. See IENG Sary's Consent to Public Discussion of his Health, 8 November 2012, E1/142.2.

<sup>36</sup> Transcript, 4 December 2012, E1/147.1, p. 12-15.

<sup>37</sup> *Id.*, p. 13.

would enable the doctor to more readily monitor Ieng Sary's physical condition. In considering the applications made today by international counsel, the Trial Chamber must make the preliminary point that in assessing Ieng Sary's fitness to stand trial it can rely only on medical opinion. It has decided that in accordance with the provisions of Rule 81.5, the difficulties caused by having Ieng Sary come to the courtroom or his -- the difficulties in allowing -- in providing that Ieng Sary come to the courtroom would reach a level that might cause substantial delay to the trial and for that reason it has decided to direct Ieng Sary to participate from the holding cells. In making this decision, it also takes into account that all technical support to facilitate his participation is available in the holding cells, including a direct telephone line to his counsel. The Trial Chamber also bears in mind that participation from the holding cell was recommended by the expert for that reason, namely that there are the technical facilities to enable him to participate, but as importantly that the physical facilities recommended by the expert make the holding cell more appropriate, given Mr. Ieng Sary's physical circumstances, more appropriate than the courtroom itself. As to its ongoing obligation to monitor Ieng Sary's fitness, the Trial Chamber will rely on the treating doctor to alert it to any substantial change in Ieng Sary's physical condition, and it needs to be emphasized that it is medical monitoring that is required, not monitoring by the judges or defence counsel personally or by the public. For that reason, the Court declines to rule that Ieng Sary be videotaped while he is in the holding cells. It will rely on his treating doctor to bring any concerns about Ieng Sary's physical condition to its attention.<sup>38</sup>

Judge Cartwright later clarified:

The primary issue for the Trial Chamber is the medical assessment of Ieng Sary's fitness to participate at trial. Therefore, medical monitoring by his treating doctor is important as a means of keeping the Trial Chamber and the Parties informed of Ieng Sary's medical condition, should it change. That is the reason -- that is one of the reasons why it's more appropriate for him to remain in the holding cells where the doctor is better able to keep him under careful review. The Ieng Sary team may, if it chooses, have a staff member of its defence team in the holding cell. That staff member is entitled, should he or she think it appropriate, to draw any concerns about Ieng Sary's physical condition to the treating doctor. However, no videotaping will be permitted.<sup>39</sup>

### C. Relevant events subsequent to the Impugned Decision

17. On 4 December 2012, after the Trial Chamber's ruling, the Defence embedded its Case Manager, Mr. So Mosseny (who has been a member of the Bar Association of the Kingdom of Cambodia since December 2003 and has substantial legal experience),<sup>40</sup> in Mr. IENG Sary's holding cell. Mr. So Mosseny has stayed in the holding cell every day,

<sup>38</sup> *Id.*, p. 17-19.

<sup>39</sup> *Id.*, p. 27-28.

<sup>40</sup> Prior to joining the ECCC, Mr. So Mosseny was the deputy manager of the Court Watch Project for the Center for Social Development. He is currently listed on the Defence Support Section's list of Cambodian lawyers who are qualified to appear as Co-Lawyers before the ECCC.

recording his observations of Mr. IENG Sary in daily logs and, when necessary, engaging with the medical doctors.

18. On 5 December 2012, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.<sup>41</sup> At the start of the trial proceedings, International Co-Lawyer Michael G. Karnavas notified the Trial Chamber that the Case Manager was in the holding cell with Mr. IENG Sary taking notes and that the Defence intended to file his daily observations of Mr. IENG Sary's condition.<sup>42</sup> Mr. Karnavas also pointed out that, although the ECCC doctor's 5 December 2012 medical report stated that Mr. IENG Sary would be more comfortable in the holding cell, comfort does not equate to ability to follow the proceedings.<sup>43</sup> Judge Cartwright informed the Defence that the Trial Chamber "in making any decision concerning Ieng Sary's ability to participate will take note primarily of medical information."<sup>44</sup> Mr. Karnavas clarified: "We're not making assessments as to our client's ability but merely observations as to what he is observing for whatever that may be worth to the Trial Chamber or to the physicians who are not in the room all the time but merely visit once or twice a day."<sup>45</sup> Senior Assistant Prosecutor Keith Raynor requested the Trial Chamber "to ensure that the medical report that comes to the Court each morning is sufficiently detailed in terms of information about the ability to follow the proceedings."<sup>46</sup> After the first morning break, National Co-Lawyer Ang Udom notified the Trial Chamber that Mr. IENG Sary had fallen asleep during the morning session.<sup>47</sup> The Judges deliberated and Judge Cartwright stated that the Trial Chamber:

reiterates that its starting point for any assessment of Ieng Sary's ability to participate in the Trial is the report supplied by the expert. It is interesting that you raise the topic of Ieng Sary being asleep this morning. There is a simple solution; your case manager could wake him up. It is not an indication of any mental health issue as the expert made very clear and Ieng Sary himself has never claimed any mental health inadequacies. Moreover falling asleep may simply indicate that Ieng Sary has no direct interest in the testimony of this civil party. The Trial Chamber is confident that the treating doctor will report to the Chamber

<sup>41</sup> Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 4 December 2012, 5 December 2012, E248/2.1.

<sup>42</sup> Transcript, 5 December 2012, E1/148.1, p. 2. See attached Annexes A-C, containing the three Observation Logs filed by the Defence.

<sup>43</sup> Transcript, 5 December 2012, E1/148.1, p. 2.

<sup>44</sup> *Id.*, p. 4.

<sup>45</sup> *Id.*, p. 5.

<sup>46</sup> *Id.*, p. 6.

<sup>47</sup> *Id.*, p. 36-37.

if he observes any unusual and extreme fatigue on Ieng Sary's behalf.<sup>48</sup>

19. On 6 December 2012, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.<sup>49</sup> The observations indicated that Dr. Lim Sivutha stated that he could not assess Mr. IENG Sary's mental ability to follow the proceedings since he is not a psychiatrist.<sup>50</sup> At the start of the trial proceedings, Mr. Ang Udom informed the Trial Chamber that Mr. IENG Sary had not slept well the night before and preferred to remain in the holding cell.<sup>51</sup> He additionally notified the Trial Chamber that the 6 December 2012 medical report did not indicate whether Mr. IENG Sary was able to participate in the proceedings.<sup>52</sup>

20. On 7 December 2012, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.<sup>53</sup> It indicated that Dr. Kim Samsan stated that he was not able to assess Mr. IENG Sary's ability to follow the proceedings.<sup>54</sup> On the same date, the Defence received an email from a Trial Chamber Legal Officer which stated, *inter alia*:

The Trial Chamber notes that, without prior authorization of the Chamber, the IENG Sary Defence has directed its case manager to audio-record the Accused and conversations with the Accused's treating physician (*see e.g.* E248.1) and to file logs of these observations. The Chamber orders the IENG Sary Defence to stop the audio-recording immediately. If the IENG Sary Defence wishes to resume audio recording of the Accused and/or his treating physician, the IENG Sary Defence shall seek leave pursuant to Internal Rule 92 specifying the reasons such practices are permissible under the ECCC legal framework.... Any further such observations of IENG Sary's condition, whether based on audio-recordings, video recordings, the observations of the IENG Sary Defence team, or otherwise, are prohibited until the permissibility of these practices is resolved by the Trial Chamber.<sup>55</sup>

<sup>48</sup> *Id.*, p. 37-38.

<sup>49</sup> Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 5 December 2012, 7 December 2012, E248.1.

<sup>50</sup> *Id.*, at 8:55a-9:10a.

<sup>51</sup> Transcript, 6 December 2012, E1/149.1, p. 3.

<sup>52</sup> *Id.*, p. 3-4.

<sup>53</sup> Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 6 December 2012, 7 December 2012, E248/1.1.

<sup>54</sup> *Id.*, at 10:36a-10:39a.

<sup>55</sup> Email from Trial Chamber Legal Officer, "Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility", 7 December 2012. This email was reproduced in a Trial Chamber memorandum. *See* Order for Submissions, 12 December 2012, E254.

21. On 8 December 2012, the Defence responded to the Trial Chamber Legal Officer's email, requesting an oral hearing on the issue and requesting the Trial Chamber to provide reasoning for its decision not to allow audio recording.<sup>56</sup>
22. On 11 December 2012, Judge Cartwright informed the Defence that its request for an oral hearing was denied.<sup>57</sup> Mr. Karnavas requested to continue audio taping Mr. IENG Sary while deliberations were made as to whether audio recording was permissible, explaining that the recordings would not be made public, could be provided to the Trial Chamber each day and could be deleted if necessary. He explained that if recordings were never made, there would be no record.<sup>58</sup> The Trial Chamber denied this request.<sup>59</sup>

#### IV. PRELIMINARY MATTERS

##### A. Admissibility of the Appeal

###### 1. The Appeal is admissible under Rule 104(4)(a)

23. Rule 104(4)(a) allows immediate appeals of "decisions which have the effect of terminating the proceedings." The Trial Chamber's decision that Mr. IENG Sary *must* attend proceedings from the holding cell and *may not* be present in the courtroom has the effect of terminating the proceedings for Mr. IENG Sary, because Mr. IENG Sary cannot follow the proceedings from the holding cell. The daily observation logs prepared by the Defence Case Manager for 4-6 December 2012 indicate that Mr. IENG Sary was often unable to participate in the proceedings, either because he was in pain, he could not view the monitor, he was fatigued or even fell asleep, or for other reasons.<sup>60</sup> Effectively, the proceedings are terminated for Mr. IENG Sary because to him they have become meaningless.

###### 2. The Appeal is admissible under Rule 104(4)(b)

<sup>56</sup> Email from Defence to Trial Chamber Legal Officer, "Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility", 8 December 2012.

<sup>57</sup> Draft Transcript, 11 December 2012, p. 2.

<sup>58</sup> *Id.*, p. 3-4.

<sup>59</sup> *Id.*, p. 5.

<sup>60</sup> See IENG Sary's Request for Reconsideration of the Trial Chamber's Decision Finding Him Fit to Stand Trial and Rejecting His Request for the Appointment of an Additional Expert to Assist in Determining Fitness, 7 December 2012, E238/11; Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 4 December 2012, 5 December 2012, E248/2.1; Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 5 December 2012, 7 December 2012, E248.1; Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 6 December 2012, 7 December 2012, E248/1.1. The Trial Chamber recently ordered the Defence to stop filing these logs. See Order for Submissions, 12 December 2012, E254.

24. Rule 104(4)(b) allows immediate appeals of “decisions on detention and bail under Rule 82.” The decision that Mr. IENG Sary must remain in the holding cell is a decision on detention. It unnecessarily restricts Mr. IENG Sary’s choice whether to participate in his trial from the courtroom or the holding cell, due to the fact that he is detained. The decision that Mr. IENG Sary may not be videotaped in his holding cell is a decision on detention because it forms part of the modalities of Mr. IENG Sary’s detention.<sup>61</sup> Were Mr. IENG Sary not in detention, the Defence would be free to video record him in order to make a record for appeal. The Pre-Trial Chamber, in considering an appeal of the OCIJ’s denial of a Defence request to video record meetings with Mr. IENG Sary, has previously held that “[a]ny aspect of the modalities of pre-trial detention ... shall be under the effective control of the competent ECCC judicial authorities and strictly limited to the needs of the proceedings.”<sup>62</sup> In accordance with Rule 21(2), the same holds true at the trial stage.<sup>63</sup> The Pre-Trial Chamber admitted an appeal against a decision by the OCIJ prohibiting the Defence from recording meetings with Mr. IENG Sary under Rule 74(3)(f) (the rule for pre-trial appeals), as an appeal “relating to provisional detention.” The present Appeal should be similarly admitted under Rule 104(4)(b).

### 3. The Appeal is admissible under Rule 104(4)(d)

25. Rule 104(4)(d) allows immediate appeals of “decisions on interference with the administration of justice under Rule 35(6).” The Supreme Court Chamber has held that “neither an error of fact or law nor an abuse of discretion on the part of the Trial Chamber can, *by itself*, constitute a knowing and willful interference with the administration of justice within the meaning of Rule 35.”<sup>64</sup> The Trial Chamber has not merely erred or abused its discretion. Through a series of interrelated decisions (including the Impugned Decision), the Trial Chamber has knowingly, willfully and continuously interfered with the administration of justice by violating Mr. IENG Sary’s fundamental fair trial rights to be physically present at his own trial and to prepare his defence through making a record.

<sup>61</sup> See Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 11.

<sup>62</sup> *Id.*

<sup>63</sup> Rule 21(2) states: that “[a]ny coercive measures to which [an Accused] may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. *Such measures shall be strictly limited to the needs of the proceedings...*” (emphasis added).

<sup>64</sup> Decision on IENG Sary’s Appeal Against Trial Chamber’s Order Requiring his Presence in Court, 13 January 2012, E130/4/3, p. 1 (emphasis added).

*First*, the Trial Chamber decided that Mr. IENG Sary was fit to stand trial, without fully hearing from the Defence on the matter. Moreover, the Trial Chamber based its decision on the opinion of one doctor who did not have the expertise to make such an assessment and whose medical opinion starkly differed from that of Mr. IENG Sary's board of treating doctors.<sup>65</sup>

*Second*, the Trial Chamber ordered Mr. IENG Sary to attend trial from his holding cell and denied his right to be physically present in the courtroom.

*Third*, the Trial Chamber forbade the videotaping of Mr. IENG Sary in his holding cell by the Audio-Visual Unit or his Defence team.

*Finally*, the Trial Chamber prohibited the Defence from audiotaping Mr. IENG Sary in the holding cell and filing its own observations of Mr. IENG Sary's condition.<sup>66</sup>

This is a classic case of willful blindness. The Trial Chamber has attempted in *every* way possible to shield itself from *any* information that would transparently and objectively dispel the myth that Mr. IENG Sary is actually able at all times to fully and meaningfully – as opposed to sporadically or diminishingly – participate in the trial proceedings.

#### **4. A broad interpretation of Rule 104(4) is required by Rule 21 and is in the interest of justice**

26. A broad interpretation of admissibility under Rule 104(4) is required to protect Mr. IENG Sary's fundamental fair trial rights to be tried in his presence and to prepare a defence through making a record, which, axiomatically, includes preserving errors of law, fact or abuse of discretion for interlocutory or post-trial appellate review. Recently the OCP has similarly argued against a strict interpretation of Rule 104(4), explaining that "a reasonable reading of Rule 104 must allow for an effective right to appellate review."<sup>67</sup>

<sup>65</sup> See IENG Sary's Request for Reconsideration of the Trial Chamber's Decision Finding Him Fit to Stand Trial and Rejecting His Request for the Appointment of an Additional Expert to Assist in Determining Fitness, 7 December 2012, E238/11.

<sup>66</sup> Email from Trial Chamber Legal Officer, "Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility", 7 December 2012.

<sup>67</sup> See Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, E163/5/1/1, para. 14.

27. If the Appeal is not admitted at this stage, Mr. IENG Sary will have no remedy for the violation of his rights. The only remedy in the future would be to afford Mr. IENG Sary a new trial. Due to his age, ill health and the length of such a trial, a retrial is not possible.
28. Even if Mr. IENG Sary waited until judgement to appeal this violation of his rights, Mr. IENG Sary will have no record upon which to base his appeal. The Trial Chamber, through calculated and concerted effort, has blocked every avenue available to the Defence to enable it to act with due diligence and make a record.
29. The Trial Chamber has placed the Defence in a preposterously indefensible position:
- The Trial Chamber has forbidden Mr. IENG Sary's presence in the courtroom, where his capacity to follow the proceedings could be assessed, and has prevented a contemporaneous record from being made in the holding cell.
  - The Trial Chamber stated that it would "rely on the treating doctor to alert it to any substantial change in IENG Sary's physical condition."<sup>68</sup>
  - The ECCC doctors *only* monitor Mr. IENG Sary's physical condition and have stated that they are not competent to determine whether an Accused is capable of following the proceedings.<sup>69</sup>

Conveniently, the Trial Chamber will *never* be in a position to learn whether Mr. IENG Sary is able to follow the proceedings each day unless he suffers a substantial decline in his physical health, such as a stroke. The Trial Chamber is deliberately posturing itself to affect *its* desired outcome: securing plausible deniability of Mr. IENG Sary's daily ability to follow the proceedings. Through the illogical conditions set by the Trial Chamber, the Trial Chamber shields itself from being informed; yet, unless informed, it will not act. This scenario is commonly referred to as a "Catch-22" situation: "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule."<sup>70</sup> The Trial Chamber is brazenly engaged in willful blindness through subterfuge. Interlocutory appeal would provide for immediate scrutiny of this practice.

<sup>68</sup> Transcript, 4 December 2012, p. 19.

<sup>69</sup> See Defence Team's Observations of Mr. IENG Sary, 5 December 2012, entry at 8:55a-9:10a, E248.1; Defence Team's Observations of Mr. IENG Sary, 6 December 2012, entry at 10:36a-10:39a, E248/1.1.

<sup>70</sup> See MERRIAM-WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/catch%2022>. The logical dilemma known as "a Catch-22" was coined by author Joseph Heller in his book of the same title.

30. Rule 21(1) requires the Supreme Court Chamber to interpret the ECCC's applicable law and Rules so as to always safeguard Mr. IENG Sary's interests.<sup>71</sup> The Supreme Court Chamber has recognized this, holding that Rule 21 "is to be read to mean that the interpretation of the Internal Rules must not lead to [the] infringement of any interests of the Accused that emanate from fundamental rights guaranteed under statutes and applicable international legal instruments, such as ... the right to a defence."<sup>72</sup> The Pre-Trial Chamber has similarly recognized that Rule 21 requires a broad interpretation of the right to appeal: "[c]onsidering the fair trial rights of the Appellant ... the Pre-Trial Chamber finds that Rule 21 *requires* it to interpret the Internal Rules in such a way that the Appeal is also admissible on the basis of Rule 21."<sup>73</sup> Strictly limiting interlocutory appeals "is inconsistent with the jurisprudence of the ECCC, the practice of all international criminal tribunals, the needs of a fair and expeditious trial and the rights of the accused."<sup>74</sup> Indeed, Mr. IENG Sary's fundamental fair trial rights to be present in court and to prepare a defence through making a record are exactly the sorts of issues that would be open to interlocutory appeal at the international criminal tribunals.<sup>75</sup>

31. To interpret Rule 104(4) narrowly and find the appeal inadmissible would infringe Mr. IENG Sary's fundamental fair trial rights guaranteed by the Cambodian Constitution,<sup>76</sup>

<sup>71</sup> Rule 21(1) provides: "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement."

<sup>72</sup> Decision on Immediate Appeals by NUON Chea and IENG Thirith on Urgent Applications for Immediate Release, 3 June 2011, E50/2/1/4, para. 39.

<sup>73</sup> Decision on IENG Sary's Appeal against the Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 18 (emphasis added).

<sup>74</sup> Decision on IENG Sary's Appeal Against Trial Chamber's Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe, 20 March 2012, E51/15/1/2.1, para. 1. This opinion was recently cited approvingly by the OCP. See Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, E163/5/1/1, n. 28.

<sup>75</sup> See, e.g., *Prosecutor v. Stanišić & Simatović*, IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 ("*Stanišić* Appeals Chamber Decision"); *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007.

<sup>76</sup> Article 38 of the Cambodian Constitution provides that "[e]very citizen shall enjoy the right to defense through judicial recourse." 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." The right to prepare a defence is a human right recognized by Article 14(3)(b) of the International Covenant on Civil and Political Rights ("ICCPR"). The right to be present at trial is a human right recognized by Article 11 of the Universal Declaration of Human Rights ("UDHR") and Article 14(3)(d) of the ICCPR, to which Cambodia is a party.

the Agreement,<sup>77</sup> the Establishment Law<sup>78</sup> and applicable international legal instruments.<sup>79</sup> If there is any doubt as to this Appeal's admissibility under Rule 104(4), the interpretation which safeguards Mr. IENG Sary's interests must prevail.<sup>80</sup> Save for an interlocutory appeal, Mr. IENG Sary has no other avenue to rectify the Trial Chamber's violation of his ongoing rights to be tried in his presence and prepare a defence by making a complete record, which allows the Defence to preserve errors for appeal.

### **B. Request for a public, oral hearing**

32. This Appeal addresses a violation of Mr. IENG Sary's fundamental fair trial rights. This violation must be addressed in an open and transparent manner. Rule 109(1) indicates that appeal hearings should generally be conducted in public.<sup>81</sup> Issues of such importance *must* be transparently debated to ensure benefit to the public at large, especially when these issues are likely to impact the legitimacy and credibility of the ECCC. None of the issues raised are confidential.<sup>82</sup>

## **V. LAW AND ARGUMENT**

### **A. The Trial Chamber erred in law by interpreting Rule 81(5) in such a way as to compel Mr. IENG Sary to follow the proceedings from the holding cell rather than being physically present in the courtroom**

#### **1. Mr. IENG Sary has a right to be physically present in the courtroom**

33. Mr. IENG Sary has the fundamental right to be physically present at trial. This right is guaranteed to him by the Cambodian Constitution,<sup>83</sup> the Agreement,<sup>84</sup> the Establishment

<sup>77</sup> Agreement, Art. 13(1).

<sup>78</sup> Establishment Law, Art. 35 new (b), (d).

<sup>79</sup> ICCPR, Art. 14(3)(b) and (d); UDHR, Art.11(1).

<sup>80</sup> This is required by Rule 21 and would also be in accordance with the principle of *in dubio pro reo*, a fundamental principle of criminal law that is recognized by Article 38 of the Cambodian Constitution. At issue in this Appeal are Mr. IENG Sary's fundamental fair trial rights to be present in court and to prepare a defence. An interpretation of Rule 104(4) that results in the inadmissibility of such issues would constitute a "collision of norms": on the one hand, a strict interpretation of Rule 104(4) (which would disable Mr. IENG Sary's fundamental fair trial rights) and, on the other hand, the Supreme Court Chamber's obligation to ensure that Mr. IENG Sary's rights to be present in court and to prepare a defence are not infringed. *See* Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, paras. 30-32.

<sup>81</sup> Rule 109(1) states: "Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only."

<sup>82</sup> IENG Sary's Consent to Public Discussion of his Health, 8 November 2012, E1/142.2.

<sup>83</sup> Cambodian Constitution, Art. 31.

<sup>84</sup> Article 13(1) of the Agreement states: "The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."

Law,<sup>85</sup> the Rules<sup>86</sup> and the ICCPR.<sup>87</sup> This right is not lessened because he is elderly and in poor health. The right to equal treatment before the law is enshrined in the Cambodian Constitution,<sup>88</sup> a number of international<sup>89</sup> and regional instruments,<sup>90</sup> and in the Constitutions of many States.<sup>91</sup> The Human Rights Committee, a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia),<sup>92</sup> has stated that the fair trial requirements enshrined in Article 14 of the ICCPR “are not respected where ... the accused is denied the opportunity to *personally attend* the proceedings, or where he is unable to properly instruct his legal representative.”<sup>93</sup>

34. Mr. IENG Sary’s presence in the holding cell does not equate to physical presence at trial. At the ICTY and ICTR, which have similar statutory / human rights guarantees of the right to be present at trial, the right to be present has been interpreted as the right to *physical* presence at trial.

35. At the ICTY, the *Stanišić & Simatović* Appeals Chamber emphasized that “the right to be present is a fundamental right” and “derogation is not appropriate when reasonable alternatives exist.”<sup>94</sup> At the ICTR, the *Zigiranyirazo v. Prosecutor* Appeals Chamber considered whether the Trial Chamber’s taking of witness testimony in The Netherlands

<sup>85</sup> Establishment Law, Art. 35 new (d).

<sup>86</sup> Rule 81(1).

<sup>87</sup> ICCPR, Art. 14(3)(d).

<sup>88</sup> Article 31 of the Cambodian Constitution provides that “[e]very Khmer citizen shall be equal before the law....”

<sup>89</sup> Article 7 of the UDHR provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Article 14(1) of the ICCPR provides that “[a]ll persons shall be equal before the courts and tribunals.” Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

<sup>90</sup> See Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Convention on Human Rights, Art. 24.

<sup>91</sup> See, e.g., United States Constitution, 14<sup>th</sup> amendment; French Constitution, adopted 1958, Art. 1; Declaration of Human and Civic Rights of 26 August 1789, Art. 6; Constitution of the Federal Republic of Austria, Art. 7; New Zealand Bill of Rights Act of 1990, Part 2, para. 27; Constitution of the Republic of Poland, 2 April 1997, Art. 32; Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 12; First Draft Constitution of the Republic of Zambia, 30 April 2012, Art. 45.

<sup>92</sup> See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, website, available at <http://www2.ohchr.org/english/bodies/hrc/>. Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992. See United Nations Treaty Collection, website, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#3](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#3).

<sup>93</sup> Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 289/1988: Panama, 8 April 1992, CCPR/C/44/289/1988 (Jurisprudence), para. 6.6 (emphasis added).

<sup>94</sup> *Stanišić* Appeals Chamber Decision, para. 19.

while the Accused Zigiranyirazo was video-linked from Arusha violated his right to be present at trial.<sup>95</sup> Noting that “*the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial,*”<sup>96</sup> the Appeals Chamber held that “participation via video-link is not considered presence.”<sup>97</sup>

**2. Rule 81(5) only allows the right to be physically present to be restricted in limited circumstances, which have not been met**

36. Rule 81(5) recognizes an Accused’s fundamental right to be physically present at the proceedings, and, in keeping with the principle of proportionality,<sup>98</sup> strictly limits the situations in which this right may be restricted. Rule 81(5) provides that the Trial Chamber may only order participation via video-link in limited and specific circumstances. Rule 81(5) states in pertinent part:

[w]here, due to health reasons or other serious concerns, the Accused *cannot attend in person* before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused’s absence with his or her consent or, *where the Accused’s absence reaches a level that causes substantial delay and, where the interests of justice so require*, order that the Accused’s participation before the Chamber shall be by appropriate audio-visual means.<sup>99</sup>

Rule 81(5) thus has three requirements that must be met before participation via audiovisual means may be ordered for a person physically and mentally fit to participate:

**a.** the Accused *cannot* attend in person; **b.** there must be a substantial delay; *and* **c.** ordering audiovisual participation must be in the interests of justice.

<sup>95</sup> Zigiranyirazo argued that this procedure violated his right to be present at trial, which can only be satisfied by actual physical attendance. *Zigiranyirazo v. Prosecutor*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 2. He explained that “inherent difficulties in following the evidence and visually interacting with the Judges” made it impossible for him to exercise fully his right to be physically present. *Id.*, para. 16. Zigiranyirazo noted that the use of a video-link meant that neither he nor his lead counsel, who also remained in Arusha, could observe or hear the judges or the witness unless the camera was pointed on them. As a result, the videolink “denied them normal visual interaction with the proceedings.” *Id.* The Appeals Chamber found in favor of Zigiranyirazo, after it determined, *inter alia*, that none of the Rules of Procedure for the ICTR, ICTY, International Criminal Court or Special Court for Sierra Leone equate physical presence with participation via video-link. *Id.*, para. 12.

<sup>96</sup> *Id.*, para. 11 (emphasis added).

<sup>97</sup> *Id.*, para. 12. The Appeals Chamber did note that this right is not absolute, a point not contested by the parties in that case. *Id.*, para. 15.

<sup>98</sup> *Id.*, para. 14. In accordance with the principle of proportionality, “any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.” See *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, para. 17; *Stanišić* Appeals Chamber Decision, para. 16.

<sup>99</sup> Emphasis added.

**a. Mr. IENG Sary *can* be physically present in the courtroom**

37. The Trial Chamber erred in law by making no finding as to whether Mr. IENG Sary *could* attend court in person. Rule 81(5) requires the Trial Chamber to first consider whether Mr. IENG Sary *could* attend court in person. It is only when an Accused *cannot* attend court in person due to health reasons or other serious concerns that it is necessary to consider substantial delay or the interests of justice. Mr. IENG Sary *can* attend the proceedings in person; it is a matter of bringing him upstairs into the courtroom. This is in stark contrast to *Zigiranyirazo*, which involved transporting the Accused from Tanzania to The Netherlands.

**b. There was no substantial delay**

38. The Trial Chamber erred in law by misstating the second prong of Rule 81(5). The Trial Chamber simply concluded (speculated) that “the difficulties in allowing -- in providing that Ieng Sary come to the courtroom *would* reach a level that *might cause* substantial delay to the trial and for that reason it has decided to direct Ieng Sary to participate from the holding cells.”<sup>100</sup>

39. Rule 81(5) requires that “the Accused’s absence *reaches* a level *that causes* substantial delay.”<sup>101</sup> In other words, there must be an absence from court that has already caused substantial delay. This erroneous formulation of Rule 81(5) led to the improper restriction of Mr. IENG Sary’s right to be present at trial, even though his presence at trial has not caused a substantial delay. The Trial Chamber erred by failing to make *any* finding that there had been a substantial delay due to Mr. IENG Sary’s ill health that warranted an order that he participate from the holding cell.

40. The Trial Chamber erred in law when it failed to make a finding as to whether Mr. IENG Sary could be present in the courtroom. The Trial Chamber further erred in law when it misstated Rule 81(5) to envision participation from the holding cell when an Accused’s absence *might cause* substantial delay. These errors violate Mr. IENG Sary’s right to be physically present during his trial.

**c. The Trial Chamber should not have considered the interests of justice**

<sup>100</sup> Transcript, 4 December 2012, E1/147.1, p. 18.

<sup>101</sup> Emphasis added.

41. The criteria of Rule 81(5) are conjunctive, not disjunctive. If the first two criteria are not satisfied, the Trial Chamber cannot consider the third criterion, whether it would be in the interests of justice for an Accused to participate from the holding cell. Here, the Trial Chamber made no finding as to whether Mr. IENG Sary could be present in the courtroom. The Trial Chamber further did not find that a substantial delay in the proceedings had actually occurred. The Trial Chamber erred by considering the interests of justice when the first two criteria of Rule 81(5) had not been met, and by subsequently denying Mr. IENG Sary's request to be physically present in the courtroom and, instead, ordering him to the holding cell.

**B. The Trial Chamber erred in fact and abused its discretion by applying Rule 81(5) so as to compel Mr. IENG Sary to follow the proceedings from the holding cell rather than being physically present in the courtroom**

42. The Impugned Decision itself did not state that the Trial Chamber ordered Mr. IENG Sary to participate from the holding cell in the interests of justice. However, in its written decision issued just prior to the Impugned Decision, the Trial Chamber found that ordering Mr. IENG Sary to participate from his holding cell would be in the interests of justice,<sup>102</sup> which it found to be: **1.** Mr. IENG Sary's medical interests and / or **2.** the expeditious conduct of trial.<sup>103</sup>

**1. Mr. IENG Sary's medical interests do not require him to remain in the holding cell**

43. Mr. IENG Sary's medical interests are a legitimate concern of the Trial Chamber if they impact upon his fitness to stand trial. It is not, however, a legitimate concern of the Trial Chamber whether bringing Mr. IENG Sary into the courtroom might simply cause him discomfort. The Trial Chamber showed little concern when it required Mr. IENG Sary to sit in a chair in the courtroom on certain occasions (for example, during the OCP's opening statement, which, as is well known, is not evidence and has no evidentiary value), even after he had expressed extreme discomfort and had requested to return to his holding cell.<sup>104</sup> Suffice it to say, the Trial Chamber's concern for Mr. IENG Sary's "comfort" should not override his expressed intentions and wishes to directly follow the proceedings in the courtroom, as opposed to from the holding cell.

<sup>102</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 37.

<sup>103</sup> *Id.*

<sup>104</sup> See, e.g., Transcript, 21 November 2011, E1/13.1, p. 36-37; Transcript, 22 November 2011, E1/14.1.

44. In its written decision, the Trial Chamber relied on Professor Campbell's opinion that Mr. IENG Sary "is best able to concentrate when lying down and that in view of his increased frailty, the Accused's medical needs are most appropriately provided for in the holding cell."<sup>105</sup> The fact that Professor Campbell did not include in his list of recommendations the installation of a hospital bed in the courtroom does not mean, and should not be interpreted to mean (as the Trial Chamber has done), that such a measure would be any less comfortable or appropriate for Mr. IENG Sary.<sup>106</sup>
45. Although slight delays may occur by bringing Mr. IENG Sary into the courtroom, no further prejudice would result. Mr. IENG Sary's presence in the courtroom would provide the Trial Chamber, the parties and the public a full, fair and complete opportunity to actually observe Mr. IENG Sary's condition. The Defence submits that Mr. IENG Sary's *actual* state of being may be essential for the Trial Chamber to determine Mr. IENG Sary's *actual* ability to participate in his defence, as envisioned by the Cambodian Constitution and all other legal instruments to which the ECCC must adhere.
46. In his report Professor Campbell observed that making use of the holding cell would be "easier for" Mr. IENG Sary;<sup>107</sup> he did not state that it would not be in Mr. IENG Sary's best medical interests to come into the courtroom. When Professor Campbell was asked whether it would be more appropriate for Mr. IENG Sary to remain in the holding cell, Professor Campbell responded: "He is more uncomfortable sitting than he was, and when he's lying flat, he is comfortable. And the holding cell is well set up, and I feel it is most appropriate for him."<sup>108</sup> Professor Campbell was never asked to consider the possibility of bringing a hospital bed into the courtroom.
47. All of Mr. IENG Sary's medical needs that are provided for in the holding cell can be provided for in the courtroom. A hospital bed could effortlessly be provided in the courtroom. The doctors could be ordered to sit in the courtroom during the proceedings. Medical supplies such as oxygen could be made available in the courtroom.

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<sup>105</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 36.

<sup>106</sup> *Id.*

<sup>107</sup> Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, para. 21.

<sup>108</sup> Transcript, 8 November 2012, E1/142.1, p. 26.

48. There is no indication the Trial Chamber even considered whether accommodations could be made to allow Mr. IENG Sary to exercise his fundamental right to participate in the courtroom before it ordered him to participate via the holding cell. The courtroom is a *better* place than the holding cell for ensuring that Mr. IENG Sary's medical needs are accommodated. In the courtroom, the Trial Chamber, the Defence and the doctors could constantly monitor Mr. IENG Sary's condition.<sup>109</sup> In the courtroom, Mr. IENG Sary would still be able to view the proceedings even if he shifts position (once he overcomes his dizziness). In the courtroom, the Co-Lawyers could ensure that a contemporaneous record is being kept of Mr. IENG Sary's condition and, if necessary, could timely react.
49. The Trial Chamber erred in fact in finding that Mr. IENG Sary's medical condition requires him to participate from the holding cell. This error has occasioned a miscarriage of justice. The Trial Chamber abused its discretion by giving weight to extraneous or irrelevant considerations and by failing to give weight to relevant considerations, such as whether Mr. IENG Sary's medical needs could be met from the courtroom.<sup>110</sup>

**2. The expeditious conduct of trial does not require Mr. IENG Sary to remain in the holding cell**

50. The Trial Chamber failed to provide *any* rationale for its conclusion that it would be more expeditious to keep Mr. IENG Sary in the holding cell rather than allow him to be physically present in the courtroom. The Supreme Court Chamber has already held that adequate reasoning is required.<sup>111</sup>
51. Mr. IENG Sary requested to participate from the courtroom; there is no issue at this time of losing trial days. If the Trial Chamber considers that it would take longer each day to bring Mr. IENG Sary into the courtroom than into the holding cell, it could simply order

<sup>109</sup> In the holding cell, the doctors only check on Mr. IENG Sary briefly and infrequently. If Mr. IENG Sary wishes to communicate with counsel, he can do it in person if he is in the courtroom. Although there is a telephone in the holding cell, Mr. IENG Sary cannot use it because his arms are quite weak and his fingers and hands are numb. *See, e.g.*, Transcript, 8 November 2012, E1/142.1, p. 75: “[Professor Campbell:] As I indicate in my report, he complained of numbness from just above the wrist and the hands and in the lower part of the shins, down on the feet.”

<sup>110</sup> *See* Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 25, *quoting* *Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, explaining that giving weight to extraneous or irrelevant considerations or failing to give weight to relevant considerations is an abuse of discretion.

<sup>111</sup> Decision on NUON Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, paras. 24-30.

him to be brought into the courtroom earlier. More likely, though unstated, the Trial Chamber is concerned that there might be delays to the trial if Mr. IENG Sary must use the restroom during trial or might need to shift his position in bed, which would cause him to be dizzy and temporarily unable to follow the proceedings.<sup>112</sup> This is not a valid reason to order Mr. IENG Sary to remain in the holding cell.

52. In the Impugned Decision, the Trial Chamber did not find that Mr. IENG Sary's presence in the courtroom had caused substantial delay. The Trial Chamber did, in its prior written decision, "note" that Mr. IENG Sary's "ill-health has directly resulted in the partial or total adjournment of twelve scheduled trial days,"<sup>113</sup> but the Trial Chamber made no finding as to whether this amounted to a substantial delay. If the Trial Chamber considered that missing twelve days of trial amounted to a substantial delay, it erred in fact. Twelve days, out of the approximately 150 days of trial that have been held thus far over the course of more than one year, is an insignificant number. The Trial Chamber's recent decision to reduce the number of court days to three days per week on alternate weeks will cause much more time to be lost, though no justification was offered as to how this prolongation of the trial proceedings justifiably advances the interests of justice.<sup>114</sup>

53. At the ICTY, which deals with cases of similar length and complexity as Case 002/01, a delay of 3-6 months due to an Accused's illness did not amount to a substantial delay. In the *Stanišić & Simatović* case, the ICTY Appeals Chamber considered whether the Trial Chamber's order for the Accused Stanišić to participate in his trial via video-link violated the principle of proportionality. The Accused Stanišić's ill health had delayed the start of trial by 3-6 weeks and a doctor had recommended that proceedings be delayed an additional 3-6 months. The Appeals Chamber found that the Trial Chamber had not given sufficient weight to the Accused Stanišić's right to be present and had given undue weight to the objective of commencing the proceedings. The Appeals Chamber did "not find that the period of delay in the circumstances of this case had reached a level that was

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<sup>112</sup> See, e.g., Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4: "Ieng Sary has a feeling of giddiness on head and body movement, such as rolling over in bed, sitting and standing up. At times this gives him a sensation of rotating or movement and nausea and at other times a feeling of light headedness. He says it also makes him feel short of breath."

<sup>113</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 35.

<sup>114</sup> See Transcript, 23 October 2012, E1/137.1, p. 49-50; Trial Chamber memorandum "Judicial Recesses During 2013", 11 December 2012, E253.

so substantial as to warrant derogation from the fundamental right of the Accused to be present at trial.”<sup>115</sup>

54. If Mr. IENG Sary is unable to participate – whether in the courtroom *or* the holding cell – the proceedings must stop until he regains his ability to participate. To continue the proceedings while Mr. IENG Sary is unable to participate would violate his fair trial rights. To pretend that he is following the proceedings while he is out of sight and no record is being made to the contrary is subterfuge.
55. The Trial Chamber erred in fact when it implicitly found that it would be more expeditious for Mr. IENG Sary to participate in trial from the holding cell rather than the courtroom. This error has occasioned an ongoing and continuous miscarriage of justice. The Trial Chamber additionally abused its discretion by giving weight to extraneous or irrelevant considerations and by failing to give weight to relevant considerations, such as whether Mr. IENG Sary’s presence in court would actually affect the expeditious conduct of the proceedings.

**C. The Trial Chamber erred by abusing its discretion in prohibiting the Defence from making a record of Mr. IENG Sary’s condition by videotaping him while he is in the holding cell**

56. Mr. IENG Sary has the fundamental right to prepare a defence. This right is guaranteed to him by the Cambodian Constitution,<sup>116</sup> the Agreement,<sup>117</sup> the Establishment Law,<sup>118</sup> the ICCPR<sup>119</sup> and the UDHR.<sup>120</sup> It is also explicitly incorporated in the European Convention on Human Rights and Fundamental Freedoms.<sup>121</sup> A necessary and integral

<sup>115</sup> *Stanišić* Appeals Chamber Decision, para. 18. See also *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 15, in which the ICTR Appeals Chamber found that the Trial Chamber had not properly applied the principle of proportionality and violated the Accused’s right to be present at trial by scheduling a witness to testify while the Accused was ill and could not attend court for three days.

<sup>116</sup> Cambodian Constitution, Art. 38.

<sup>117</sup> Agreement, Art. 13(1).

<sup>118</sup> Establishment Law, Art. 35 new (b).

<sup>119</sup> ICCPR, Art. 14(3)(b).

<sup>120</sup> UDHR, Art. 11(1).

<sup>121</sup> Article 6(3)(b) of the European Convention on Human Rights and Fundamental Freedoms provides: “Everyone charged with a criminal offence has the following minimum rights: ... (b) to have adequate time and facilities for the preparation of his defence...”

part of preparing a defence is making a record: without a record the Defence will have nothing on which to base any appeal.<sup>122</sup>

57. The Trial Chamber abused its discretion by directly violating Mr. IENG Sary's constitutional fair trial rights when it refused to allow Mr. IENG Sary to be video recorded during trial. The Trial Chamber's decision that Mr. IENG Sary cannot be video recorded – either by the Audio Visual Unit or the Defence – denies Mr. IENG Sary his right to make a record and thus to prepare a defence. Mr. IENG Sary must not be accorded fewer rights simply because he has been relegated to his holding cell.<sup>123</sup> As part of its continuing duty to defend Mr. IENG Sary,<sup>124</sup> the Defence has a due diligence

<sup>122</sup> In discussing general principles on the introduction and application of a public emergency and consequent derogation measures from the ICCPR, the Commission on Human Rights stated: "Although protections against arbitrary arrest and detention (article 9) and the right to a fair and public hearing in the determination of a criminal charge (article 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, *the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency, and respect for them is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation.* In particular: ... (h) *An adequate record of the proceedings shall be kept in all cases.*" Commission on Human Rights, *Note Verbale Dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva Addressed to the Secretary General*, 28 September 1984, U.N. Doc. E/CN.4/1985/4, para. 70 (emphasis added).

<sup>123</sup> If Mr. IENG Sary were in the courtroom, the Trial Chamber and the Defence could monitor his participation in the proceedings and could suspend the proceedings any time he is not able to participate. For example, if Mr. IENG Sary were observed to be sleeping in the courtroom, presumably the Trial Chamber would want to determine whether he is actually participating in the proceedings. If he is in the holding cell, such a determination is not possible. As a result, the Trial Chamber has adopted Professor Campbell's approach and decided that, if Mr. IENG Sary is asleep, it must be because he is bored or chooses to be asleep. As stated *supra*, Professor Campbell was of the opinion: "Now, I have dozed through a good few lectures, it doesn't mean I'm not capable of concentrating on them. ... [F]rom my examination of Ieng Sary, I have not found any evidence that he is not capable of concentrating. That doesn't mean [sic] that he may not doze off at times, as I've said, many of us do, if there's not much that's actually maintaining our interest at the time." Transcript, 8 November 2012, E1/142.1, p. 56. Judge Cartwright has demonstrated a similar lack of concern for Mr. IENG Sary's inability to stay awake or the cause of this condition, stating: "There is a simple solution; your case manager could wake him up. ... [F]alling asleep may simply indicate that Ieng Sary has no direct interest in the testimony of this civil party." Transcript, 5 December 2012, E1/148.1, p. 37-38.

<sup>124</sup> See United Nations Basic Principles on the Role of Lawyers, adopted by the 8<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August – 7 September 1990, Principle 13(a), stating that defence counsel has a duty to represent the Accused's legal interests by assisting him in "every appropriate way, and taking legal action to protect [his] interests." See also Rule 22(4), which states, in relevant part: "[Lawyers] have an obligation to promote justice and the fair and effective conduct of proceedings"; Cambodian Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia (2004), Art. 6: "In all circumstances, the lawyer must respect the obligations of his or her oath and the principles of conscience, humanity and tact." Newly admitted Cambodian lawyers must swear to "implement [their] profession with dignity, conscientiousness, honesty, humanity, and with an independent mind, and in observance of the Constitution and Laws of the Kingdom of Cambodia." See also Cambodian Law on the Statutes of the Bar (1995), Art. 34.

obligation to ensure that the trial proceedings do not continue while Mr. IENG Sary is unable to fully participate.<sup>125</sup>

58. If the Defence cannot record Mr. IENG Sary, it cannot properly and completely record what Mr. IENG Sary is reporting to his treating doctors and what his treating doctors are orally reporting to the Defence. The Co-Lawyers will have no way to contemporaneously monitor his condition or ensure that he is following the proceedings while they are in the courtroom. Since the ECCC doctor only sees Mr. IENG Sary briefly two or three times per day, there will be *no record* of whether Mr. IENG Sary is awake, asleep, feeling dizzy, or able to see the monitor or follow the proceedings. The Trial Chamber will be (as it desires to be) unaware of whether Mr. IENG Sary is able to follow the proceedings. The Supreme Court Chamber will have no record upon which to decide whether the Trial Chamber violated Mr. IENG Sary's fair trial rights.
59. The Trial Chamber did not rely on *any* legal authority for its decision to prohibit video recording. It gave no reasons for its decision, apart from stating: "the Trial Chamber will rely on the treating doctor to alert it to any substantial change in Ieng Sary's physical condition, and it needs to be emphasized that it is medical monitoring that is required, not monitoring by the judges or defence counsel personally or by the public. *For that reason*, the Court declines to rule that Ieng Sary be videotaped while he is in the holding cells."<sup>126</sup> The Defence agrees that Mr. IENG Sary requires medical monitoring, but this is not a reason to prohibit video recording.
60. Rule 21(2) requires that "[a]ny coercive measures to which [an Accused] may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. *Such measures shall be strictly limited to the needs of the proceedings...*"<sup>127</sup> The Human Rights Committee similarly has stated that "[I]awyers should be able to advise and represent the Accused in accordance with generally recognized professional ethics *without restrictions, influence, pressure or undue interference* from any

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<sup>125</sup> Defence counsel are required to act with due diligence to safeguard their clients' interests. The ICTY has stated that the purpose of according the accused certain rights under the ICTY Statute "was that the accused should exercise due diligence in utilizing them." JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 306 (Transnational Publishers Inc., 2002).

<sup>126</sup> Transcript, 4 December 2012, E1/147.1, p. 19 (emphasis added).

<sup>127</sup> Emphasis added.

quarter.”<sup>128</sup> Measures which restrict Mr. IENG Sary’s fundamental fair trial rights are coercive.<sup>129</sup>

61. Videotaping Mr. IENG Sary would be nonintrusive – it would not disrupt the proceedings or cause prejudice to any party. It would have absolutely no negative effect. It would simply allow a record to be made. The Trial Chamber has not identified a sufficiently important objective necessitating the impairment of Mr. IENG Sary’s right to prepare a defence.<sup>130</sup> Thus, the Trial Chamber’s decision violates the principle of proportionality.<sup>131</sup>
62. The Pre-Trial Chamber has addressed the issue of recording Mr. IENG Sary. The Defence sought to audio record its meetings with Mr. IENG Sary in the detention facility.<sup>132</sup> The OCIJ prohibited this practice, finding no legal basis for the right to audio record interviews.<sup>133</sup> The Defence appealed.<sup>134</sup> The Pre-Trial Chamber granted the appeal and found that the absence of explicit language or authority in the Agreement, Establishment Law or ICCPR granting the right to record did not mean that such a right falls outside the scope of actions that are implicitly authorized.<sup>135</sup> The Pre-Trial Chamber found that a narrow interpretation of Mr. IENG Sary’s rights is incompatible with the object and purpose of fair trial guarantees.<sup>136</sup> The Pre-Trial Chamber ordered the Detention Facility Chief to allow the Defence to record Mr. IENG Sary, because this would ensure that he had adequate facilities at his disposal to prepare his defence.<sup>137</sup> This

<sup>128</sup> Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, U.N. Doc. CCPR/C/GC/32, para. 34, discussing the right to communicate with counsel.

<sup>129</sup> See Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 37: “Any measure imposed as a restriction on the rights of a charged person found in Rule 21(1) must be ‘strictly limited to the needs of the proceedings.’” See also Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7, paras. 14-15.

<sup>130</sup> See *Stanišić* Appeals Chamber Decision, para. 18, setting out the principle of proportionality.

<sup>131</sup> See *supra* footnote 98.

<sup>132</sup> Request for an Order to the ECCC Detention Facility to Allow the Defence to Conduct Audio/Video Recordings of our Client at the Detention Facility, 18 March 2010, A371.

<sup>133</sup> Letter Re: Your Request to conduct Audio/Video Recordings of IENG Sary in the Detention Facility, 9 April 2010, A371/1.

<sup>134</sup> IENG Sary’s Appeal against the OCIJ’s Rejection of his Defence Team’s Request to Conduct Audio/Video Recordings of Meetings in the ECCC Detention Facility, 23 April 2010, A371/2/12.

<sup>135</sup> Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 31.

<sup>136</sup> *Id.*, para. 31.

<sup>137</sup> *Id.*, para. 35, p. 19.

decision is instructive since it deals with the same issue raised in this Appeal: Mr. IENG Sary's right to prepare a defence through being video recorded.

63. The Trial Chamber failed to abide by Rule 21(2)'s limitation on coercive measures. It also failed to give weight to Mr. IENG Sary's fundamental right to prepare a defence. The Trial Chamber thus abused its discretion by prohibiting the Defence from video recording Mr. IENG Sary. This abuse of discretion has resulted in prejudice to Mr. IENG Sary because it has violated his fundamental fair trial right to prepare a defence.

## VI. RELIEF REQUESTED

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to ANNUL the Impugned Decision and to ORDER the Trial Chamber to allow Mr. IENG Sary to be physically present in court. If the Supreme Court Chamber declines to permit Mr. IENG Sary to be present in the courtroom, it should either:

- A. ORDER the Trial Chamber to display Mr. IENG Sary on the courtroom monitor if he is relegated to the holding cell; OR
- B. ORDER the Trial Chamber to allow Mr. IENG Sary to be videotaped in the holding cell by the Defence if he is relegated to the holding cell, and further ORDER the Trial Chamber to accept the filing of these video tapes so they can be placed on the Case File, thus preserving an objective record and any errors for future appellate review.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 18<sup>th</sup> day of **December, 2012**