

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S MOTION TO CONDUCT THE TRIAL THROUGH HALF-DAY SESSIONS

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves the Trial Chamber to conduct half-day trial sessions during the trial in Case 002. This motion is necessary because Mr. IENG Sary has a right to be present at trial and intends to exercise this right, yet his age and ill-health prevent him from sitting in the courtroom for an extended period of time. Mr. IENG Sary does not choose to make use of video-link technology in lieu of his physical presence at trial. The Defence requests that this matter be addressed at the trial management meeting which will be held in March or April 2011.¹

I. APPLICABLE LAW

1. Article 38 of the Cambodian Constitution states, “Every citizen shall enjoy the right to defense through judicial recourse.”
2. Article 31 of the Cambodia 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.”
3. Article 35 new (b) and (d) of the Establishment Law state:

The accused shall be presumed innocent as long as the court has not given its definitive judgment. In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. ... b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing; ... d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it...²

4. Rule 81(5) states:

If, due to health reasons or other serious concerns, the Accused cannot be present before the Chamber, it may, with the consent of the Accused, continue the proceedings in his or her absence. In such cases, the Accused may be defended during the proceedings by his or her lawyer. Where the Accused refuses to choose a lawyer, the Chamber shall order that the accused be represented by a lawyer and request the Defence Support Section to assign him or her a lawyer, from the lists mentioned at Rule 11. The Accused may also request to follow the proceedings by appropriate audiovisual means. If questioning of the Accused is necessary, the Chamber may order that the Accused be questioned from his or her current place of abode, if necessary, by appropriate audiovisual means. The

¹ Email from Susan Lamb, Senior Judicial Coordinator, to the IENG Sary Defence team Re: Communication to the parties on behalf of the Trial Chamber - Ieng Sary Defence team, 14 January 2011.

² Emphasis added.



Chamber shall set the date for the questioning, which shall be heard by the Chamber in the presence of the Co-Prosecutors, the Greffier, and the lawyer of the Accused, unless the Accused has expressly waived his or her right to a lawyer. The interview shall be placed on the record of the proceedings.³

5. Article 14(3)(b) and (d) of the International Covenant on Civil and Political Rights (“ICCPR”) states: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ... (d) To be tried in his presence...”

II. ARGUMENT

6. Mr. IENG Sary has the right to be present at trial, which is guaranteed to him by the Cambodian Constitution,⁴ the Establishment Law,⁵ the Rules,⁶ and the ICCPR.⁷ Mr. IENG Sary intends to exercise this right. Mr. IENG Sary’s age and medical problems prevent him from sitting in the courtroom for any extended period of time. The Defence therefore proposes that the Trial Chamber conduct the trial through half-day sessions, with at least one break of 15 minutes midway through the session.
7. Mr. IENG Sary has problems with his back which make sitting for an extended period of time extremely painful. He has urological issues which require him to make frequent trips to the toilet. He also has trouble maintaining his energy and concentrating for extended periods of time.⁸ These issues require that the trial sessions be shortened in order to accommodate Mr. IENG Sary’s fundamental right to be present at trial.

³ Emphasis added.

⁴ Article 31 of the Cambodia 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 be present at trial is a human right recognized by Article 14(3)(d) of the ICCPR, to which Cambodia is a party.

⁵ Establishment Law, Art. 35 new (d).

⁶ Rule 81(5).

⁷ ICCPR, Art. 14(3)(d).

⁸ The Defence team has been unable to meet with Mr. IENG Sary for more than approximately an hour at a time, and not more than two hours a day, because he has difficulty sitting for longer and finds the intense concentration required to be quite draining and is unable to meaningfully assist the Defence team when meetings extend for any lengthier period of time. He usually makes at least two trips to the toilet during each one hour meeting. *See also Case of IENG Sary*, 002/19-09-2007-ECCC, Letter from IENG Sary Defence to Co-Investigating Judges, Re: Request to Hold Interview with Mr. IENG Sary on 25 August 2008 in his Cell at the Detention Facility, 22 August 2008, A212/1, ERN: 00219033-00219035; *Case of IENG Sary*, 002/19-09-2007-ECCC, Letter from the Co-Investigating Judges to IENG Sary Defence, Re: Changing of Place of IENG Sary Interview Rule 63(8), 22 August 2008, A212/2, ERN: 00218954.



8. It is well established that the enjoyment of an Accused's procedural rights presupposes an adequate level of mental and physical capacity.⁹ The ICTY has held that the right to be present "appears to be to ensure the presence of an accused person who is capable of assisting the Tribunal by the presentation of his or her defence."¹⁰ "The use of counsel requires ... that the accused has the capacity to be able to instruct counsel sufficiently...."¹¹ Lack of capacity to instruct counsel can render an accused unfit to stand trial.¹² To participate effectively in the criminal proceedings against him, Mr. IENG Sary must be able to hear and follow the proceedings and be able to assist his counsel.¹³ If Mr. IENG Sary's mental capacity diminishes throughout the day due to the strain of attending a full day trial, this could prevent him from effectively communicating with counsel, in violation of his fundamental fair trial rights.
9. The Defence recognizes that conducting the trial through half-day sessions will take longer than sitting in trial full time. The Defence also recognizes that all the Accused have the right to be tried within a reasonable time.¹⁴ Half-day trial sessions will not cause unreasonable delay. At the ICTY, which has held many trials of comparable length and complexity to Case 002, half-day trial sessions are common. Even if half-day sessions could be considered to affect the rights of the other Accused to trial within a reasonable time, any competing interests must be considered bearing in mind the proportionality principle. Pursuant to this principle, "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."¹⁵ In any event, the other Accused may also benefit from half-day sessions, due to their respective health issues. Forcing Mr. IENG Sary or the other Accused to attend full-day sessions when they do not feel well enough to do so will likely only cause further delays in the future.

⁹ See *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, ("Strugar Decision"), 26 May 2004, para. 21.

¹⁰ *Id.*, para. 32.

¹¹ *Prosecutor v. Kovačević*, IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006, para. 23.

¹² *Strugar* Decision, paras. 35-36.

¹³ See *Barbera, Messegue & Jabardo v. Spain*, ECHR, 6 December 1998, para. 70; *Makhfi v. France*, ECHR, 19 October 2004, para. 40; *Stanford v. United Kingdom*, RCHR, 23 February 1994, para. 26.

¹⁴ See, e.g., Establishment Law, Art. 35 new (c); Rule 21(4).

¹⁵ *Prosecutor v. Stanišić & Simatović*, IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings, 16 May 2008 ("Stanišić Decision on Interlocutory Appeal"). In *Stanišić*, the Appeals Chamber overturned a discretionary decision of the Trial Chamber, to which it was required to accord deference, and held that the Trial Chamber failed "to give sufficient weight to the right of the Accused to be present and accord[ed] undue weight to the objective of commencing the proceedings." *Id.*, para. 18.

10. The Defence has been informed that video conferencing equipment has been installed in the holding cells and may be installed in the Detention Unit, in case an Accused wishes to view the proceedings via video-link.¹⁶ Mr. IENG Sary does not choose to make use of this system in lieu of his right to be physically present at trial. He intends to actively assist in his own defence, and so must be able to communicate with his co-lawyers during the proceedings.
11. Mr. IENG Sary's right to communicate with his co-lawyers is guaranteed by the Cambodian Constitution¹⁷ and the Establishment Law.¹⁸ He must be present in the courtroom in order to communicate with his co-lawyers during trial. The Human Rights Committee 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."¹⁹ The fact that Mr. IENG Sary has co-lawyers who represent his interests at trial may not compensate for Mr. IENG Sary's absence from the courtroom, unless he waives his right to be present. Mr. IENG Sary is no mere observer to this trial. As former ICTY/ICTR Appeals Chamber Judge Schomburg has explained, "[t]he international community has come to accept that an accused must never become the mere object of criminal proceedings."²⁰
12. Even if Mr. IENG Sary were somehow able to communicate with his co-lawyers while watching the trial through video-link,²¹ this cannot be a substitute for his right to be present at trial if he does not wish to waive this right. At the ICTY and ICTR, which

¹⁶ Interoffice Memorandum from John Downard, AV Supervisor, CMS to Rupert Abbott, Acting Head of DSS, Re: Update on Videoconferencing Equipment, 7 January 2011.

¹⁷ Article 31 of the Cambodia 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 communicate with counsel is a right guaranteed by Article 14(3)(b) of the ICCPR, to which Cambodia is a party.

¹⁸ Article 35 new of the Establishment Law states, "In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the [ICCPR]. ... to communicate with counsel of their own choosing..." (emphasis added).

¹⁹ 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.

²⁰ See Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation, para. 3, in *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Momcilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, 11 May 2007 (emphasis added).

²¹ In *Stanišić*, the proposed video-link technology included a telephone line that allowed the Accused to communicate with counsel at all times. Nonetheless, the Appeals Chamber overturned the Trial Chamber's decision to employ video-link technology. *Stanišić* Decision on Interlocutory Appeal, paras. 13, 22.

have similar statutory 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.²²

13. In *Zigiranyirazo v. Prosecutor*, for example, the ICTR Trial Chamber allowed a witness to testify from The Netherlands for security reasons, while the defendant Zigiranyirazo was video-linked from Arusha. Zigiranyirazo argued that this procedure violated his right to be present at trial, which can only be satisfied by actual physical attendance.²³ 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.²⁴ 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.”²⁵ The Appeals Chamber found in favor of Zigiranyirazo and held 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.”²⁶ The Appeals Chamber held that “participation via video-link is not considered presence.”²⁷ Likewise, in the present case video-link technology must not be equated with physical presence at trial. The Trial Chamber must recognize and make reasonable provisions to respect Mr. IENG Sary’s fundamental right to be present at his own trial.

III. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to conduct the trial in Case 002 through half-day sessions with at least one fifteen-minute break per session.

Respectfully submitted,

²² See, e.g., *Stanišić* Decision on Interlocutory Appeal, para. 6; *Zigiranyirazo v. Prosecutor*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 (“*Zigiranyirazo* Decision on Interlocutory Appeal”), para. 13.

²³ *Zigiranyirazo* Decision on Interlocutory Appeal, para. 2.

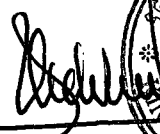
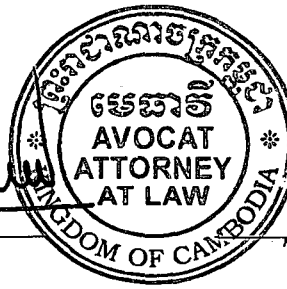
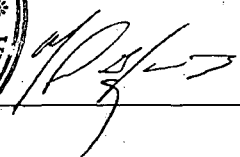
²⁴ *Id.*, para. 16.

²⁵ *Id.*

²⁶ *Id.*, para. 11.

²⁷ *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. Similarly, in *Stanišić*, the Appeals Chamber observed that the right of an Accused to be present at trial may be restricted “on the basis of substantial trial disruptions.” *Stanišić* Decision on Interlocutory Appeal, para. 6 (emphasis added). Restricting trial sessions to half-days due to inability to sit through lengthier proceedings cannot be considered a substantial trial disruption.



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Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 19th day of January, 2011