

**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:** 5 February 2013**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:** សម្ងាត់/Confidential**Classification Status:****Review of Interim Classification:** សាធារណៈ/Public**Records Officer Name:****Signature:**


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**IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S 16 JANUARY 2013  
DECISION TO DENY HIS REQUEST TO BE AUDIO AND/OR VIDEO RECORDED  
IN THE HOLDING CELL**

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Filed by:Distribution to:

**The Co-Lawyers:**  
ANG Udom  
Michael G. KARNAVAS

**The Supreme Court Chamber Judges:**  
Judge KONG Srim  
Judge SOM Sereyvuth  
Judge Agnieszka KLONOWIECKA-MILART  
Judge MONG Monichariya  
Judge Chandra Nihal JAYASINGHE  
Judge YA Narin  
Judge Florence Ndepele Mwachande MUMBA

**Co-Prosecutors:**  
CHEA Leang  
Andrew CAYLEY

**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 16 January 2013 Decision on the IENG Sary Defence Request to Audio and/or Video Record IENG Sary in the Holding Cell (“Impugned Decision”).<sup>1</sup> This Appeal is made necessary for two reasons: **1.** the Impugned Decision addresses submissions by the Defence on the right to video and/or audio record Mr. IENG Sary in the holding cell;<sup>2</sup> and **2.** the Impugned Decision provides legal reasoning for the Trial Chamber’s 4 December 2012 oral decision that the Defence could not video record Mr. IENG Sary in the holding cell, which the Defence has already appealed (“Pending Appeal”).<sup>3</sup> Upon consultation with the Supreme Court Chamber Legal Officer/Greffier, the Defence was instructed to file a separate Appeal, rather than supplement the Pending Appeal.<sup>4</sup> The Defence submits one overarching ground of appeal, which supplements the third ground of appeal raised in the Pending Appeal.<sup>5</sup> The Trial Chamber erred in law and in fact and abused its discretion by prohibiting the Defence from video and/or audio recording Mr. IENG Sary in the holding cell, thereby preventing a contemporaneous record of the impact of Mr. IENG Sary’s physical condition upon his ability to meaningfully participate in the proceedings and assist in his own defence and his fitness to stand trial. This Appeal tracks the order of the reasoning in the Impugned Decision. To avoid repetition, the Defence incorporates by reference all relevant facts

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<sup>1</sup> Decision on the IENG Sary Defence Request to Audio and/or Video Record IENG Sary in the Holding Cell, 16 January 2013, E254/3.

<sup>2</sup> On 7 December 2012, the Trial Chamber ordered the Defence to stop audio recording Mr. IENG Sary in the holding cell and to provide submissions on the right to video and/or audio record him. *See* 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 subsequently reproduced in a Trial Chamber Memorandum. *See* Order for Submissions, 12 December 2012, E254.

<sup>3</sup> 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, 18 December 2012, E238/9/1/1. The OCP filed a Response to the Pending Appeal (E238/9/1/2), to which the Defence filed a Reply (E238/9/1/3).

<sup>4</sup> Given the nature of the Pending Appeal, the Defence sought clarification from the Supreme Court Chamber Greffiers as to how best to proceed with regard to the Impugned Decision. *See* Letter from IENG Sary Defence to Supreme Court Chamber Greffier titled “Request for clarification concerning the Trial Chamber’s Decision on the IENG Sary Defence to Audio and/or Video Record IENG Sary in the Holding Cell (E254/3),” 23 January 2013. The Supreme Court Chamber Legal Officer/Greffier indicated that the most appropriate course of action would be to file a new appeal, avoiding repetition by referring to arguments in the Pending Appeal where necessary, rather than filing a supplement to the Pending Appeal. Email from Supreme Court Chamber Greffier to IENG Sary Defence titled “Re: Letter from Ieng Sary Defence requesting clarification”, 23 January 2013.

<sup>5</sup> *See* Pending Appeal, paras. 56-63.

and arguments from its Pending Appeal as reflected herein. The Impugned Decision is immediately appealable pursuant to Rules 104(4)(b) and 104(4)(d).

## I. QUESTION PRESENTED

A. *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 is making a record upon which the Trial Chamber and Supreme Court Chamber may make a decision and so that the Defence preserves errors for appeal. Did the Trial Chamber err in law and in fact and abuse its discretion by prohibiting the Defence from video and/or audio recording Mr. IENG Sary in the holding cell, thereby preventing a contemporaneous record of the impact of Mr. IENG Sary's physical condition upon his ability to meaningfully participate in the proceedings and assist in his own defence and his fitness to stand trial?*

## II. SUMMARY OF ARGUMENTS

1. Mr. IENG Sary has the fundamental right to prepare a defence, which includes the right to make a record from which to 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 exercise all of his fair trial rights. The Trial Chamber has erred in law and in fact and abused its discretion by prohibiting the Defence from video and/or audio recording Mr. IENG Sary in the holding cell. The Impugned Decision prevents the making of a contemporaneous record of Mr. IENG Sary's physical condition and how, or to what extent, it impacts his fitness to stand trial: his ability to meaningfully participate in the proceedings and assist in his own defence. As a consequence, the Impugned Decision prevents the Defence from preserving errors for appellate review. The Defence submits that the Trial Chamber, in erring and abusing its discretion, has:

- a. Erred in finding that the Defence's conduct regarding audio recording verged on misconduct pursuant to Rule 38;
- b. Erred in finding that the Defence was, in substance, seeking to gather its own evidence as to Mr. IENG Sary's fitness, i.e., conducting its own investigation;

- c. Erred in law in finding that the Pre-Trial Chamber's decision on recording does not suggest that the right to record Mr. IENG Sary follows from the right to an adequate record;
- d. Erred in fact and abused its discretion in finding that Mr. IENG Sary is not denied an adequate record of his fitness;
- e. Abused its discretion in finding that recording may jeopardize Mr. IENG Sary's rights to privacy and dignity;
- f. Erred in law in finding that recordings cannot be characterized as exculpatory evidence;
- g. Erred in fact and abused its discretion in finding that video and/or audio recording is unnecessary and irrelevant to the experts' medical assessment of Mr. IENG Sary's fitness to stand trial; and
- h. Abused its discretion in finding that video and/or audio recording Mr. IENG Sary is not the least intrusive means of creating a record.

The Supreme Court Chamber should grant this Appeal and annul the Impugned Decision. The Supreme Court Chamber should also order the Trial Chamber to either: **a.** permit the Audio Visual Unit to broadcast Mr. IENG Sary on the courtroom monitor; or **b.** allow the Defence to video and/or audio record Mr. IENG Sary in the holding cell. Finally, the Supreme Court Chamber should order the Trial Chamber to accept the filing of the video and/or audio recordings so they can be placed on the Case File, thus preserving an objective record and any errors for appellate review.

### III. BACKGROUND

2. On 4 December 2012, after ordering that Mr. IENG Sary participate in the proceedings from the holding cell rather than in the courtroom, the Trial Chamber denied the Defence's request that Mr. IENG Sary be video recorded while in the holding cell. The Defence appealed this decision.<sup>6</sup> The Defence began audio recording conversations between Mr. IENG Sary, the Defence and his treating doctors, in an effort to ascertain the treating doctors' actual

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<sup>6</sup> See Pending Appeal.

assessments of Mr. IENG Sary's physical and mental ability to follow and participate in the proceedings. The Trial Chamber subsequently also prohibited this form of recording until it had ruled on the permissibility of these practices.<sup>7</sup> As the Trial Chamber requested, the Defence made submissions on its right to video and/or audio record Mr. IENG Sary.<sup>8</sup> The Impugned Decision rejects those submissions, in the process also providing reasons for the Trial Chamber's prohibition on 4 December 2012 of any video recording of Mr. IENG Sary in the holding cell. To provide a full appreciation of the events upon which this Appeal is based, the Defence incorporates by reference the facts set out in paragraphs 5-22 of the Pending Appeal, and further supplements those facts as follows.

3. On 12 December 2012, the Defence filed a request supplementing its oral requests for the Trial Chamber to order experts to make daily medical examinations to assess Mr. IENG Sary's capacity to assist in his own defence. The Defence argued that the daily medical reports submitted by the treating doctors did not provide the detailed information necessary for the Trial Chamber to properly assess Mr. IENG Sary's capacity to follow the proceedings throughout the day. Given the treating doctors' admitted inability to make such an assessment themselves, the Defence requested that the Trial Chamber appoint qualified doctors to examine Mr. IENG Sary each day and provide their assessments as to, *inter alia*:
  - a. The extent of Mr. IENG Sary's ability to concentrate when he is feeling fatigued or dizzy or when he is in pain;
  - b. Whether Mr. IENG Sary is able to recall witness testimony when he is feeling fatigued or dizzy or when he is in pain; and
  - c. Whether Mr. IENG Sary is fully able to follow the proceedings when he is feeling fatigued or dizzy or when he is in pain.<sup>9</sup>

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<sup>7</sup> See *id.*, para. 20.

<sup>8</sup> See *infra*, para. 5.

<sup>9</sup> IENG Sary's Supplemental Request For a Qualified Expert to Make Daily Medical Examinations Related to Mr. IENG Sary's Capacity to Assist in his Own Defence Or, In the Alternative, Request For the Trial Chamber to Order the ECCC Doctors to Make Specific Observations Relevant to Mr. IENG Sary's Capacity to Assist in His Own Defence, 12 December 2012, E255, paras. 4, 6.

Until a decision on the Supplemental Request was made, or in the alternative, the Defence, requested, at a minimum, that the Trial Chamber order the treating doctors to include in their reports information such as:

- a. Whether Mr. IENG Sary is awake when the doctor enters his holding cell and whether (and for how long) he takes naps during the day;
- b. How often Mr. IENG Sary gets dizzy and for how long each dizzy spell lasts;
- c. How long Mr. IENG Sary can lie still without needing to shift positions because of discomfort;
- d. How often Mr. IENG Sary was in a position to view the monitor each day; and
- e. Whether Mr. IENG Sary can tell them what has been happening in court that day or the prior day.<sup>10</sup>

The Defence submitted that such information would assist the Trial Chamber in determining whether Mr. IENG Sary is fully able to follow the proceedings by “provid[ing] the information necessary to demonstrate Mr. IENG Sary’s ability to concentrate and recall what he has heard when he is fatigued, dizzy or in pain.”<sup>11</sup>

4. On 14 December 2012, the OCP responded to the Defence’s Supplemental Request. The OCP argued that, given the recent finding on Mr. IENG Sary’s fitness, the purpose of the daily medical reports should be to monitor his health and indicate any “significant changes which may affect his *capacity* to participate in his defence (not his participation on an hourly basis, as the Defence has claimed).”<sup>12</sup> According to the OCP, the treating doctors’ daily medical reports on Mr. IENG Sary’s medical condition “should include sufficient information to enable the Trial Chamber to monitor his overall condition and identify any

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<sup>10</sup> *Id.*, para. 7.

<sup>11</sup> *Id.*

<sup>12</sup> Co-Prosecutors’ Response to “IENG Sary’s Supplemental Request For a Qualified Expert to Make Daily Medical Examinations Related to Mr. IENG Sary’s Capacity to Assist in his Own Defence Or, In the Alternative, Request For the Trial Chamber to Order the ECCC Doctors to Make Specific Observations Relevant to Mr. IENG Sary’s Capacity to Assist in His Own Defence”, 14 December 2012, E255/1, para. 5 (emphasis in original).

issues that may require a response from the Court.”<sup>13</sup> The OCP submitted that the Trial Chamber may wish to require the daily reports to include:

- a. A summary of Ieng Sary’s overall physical and mental condition on the day;
  - b. Observations as to whether Ieng Sary is generally able to follow the proceedings (understand what is being said, and by whom) when he is awake;
  - c. Observations as to whether Ieng Sary is able to communicate with those around him (express his requests, and understand the responses of those he is communicating with); and
  - d. A recommendation whether Ieng Sary would be accommodated better in the holding cell or in the courtroom, in light of Ieng Sary’s health needs and comfort.<sup>14</sup>
5. On 14 December 2012, pursuant to the Trial Chamber’s order of 7 December 2012,<sup>15</sup> the Defence filed submissions on its right to record Mr. IENG Sary and requested permission to do so.<sup>16</sup> The Defence argued:
- a. The right to record Mr. IENG Sary was part of his fundamental right to prepare a defence, which had been recognized by the Pre-Trial Chamber as implicitly authorized by the International Covenant on Civil and Political Rights (“ICCPR”) and the ECCC’s legal framework;<sup>17</sup>
  - b. Mr. IENG Sary’s Co-Lawyers are obligated to act with due diligence and to protect Mr. IENG Sary’s legal interests by making a record of their arguments and the Defence’s observations as to Mr. IENG Sary’s health and fitness;<sup>18</sup> and
  - c. The Trial Chamber’s refusal to allow the Defence to record Mr. IENG Sary was a coercive and disproportionate measure that violated Rule 21(2).<sup>19</sup>
6. On 18 December 2012, the Trial Chamber issued a memorandum to the treating doctors ordering:

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<sup>13</sup> *Id.*, para. 12.

<sup>14</sup> *Id.*

<sup>15</sup> *See* Pending Appeal, para. 20.

<sup>16</sup> IENG Sary’s Submissions on the Law Permitting Him to be Audio and/or Video Recorded in the Holding Cell, 14 December 2012, E254/1.

<sup>17</sup> *Id.*, paras. 7-16.

<sup>18</sup> *Id.*, paras. 17-19.

<sup>19</sup> *Id.*, paras. 20-23.



- a. Mr. IENG Sary's treating doctors to report daily and directly to the Trial Chamber before it convenes each morning and if necessary during the course of the day.
- b. The reports should include reference only to significant changes in Mr. IENG Sary's health status that deviate from the expert's conclusions in his report.
- c. In addition, if the treating doctor has any observations on the facilities in the holding cell that might enhance Mr. IENG Sary's physical ability to participate, then these observations should also be included in the report.<sup>20</sup>

The Trial Chamber issued these directions "to formulate physical measures which might be needed to ensure IENG Sary's effective participation in the proceedings."<sup>21</sup>

7. On 19 December 2012, the Trial Chamber issued a decision, *inter alia*, on the Defence's Supplemental Request<sup>22</sup> regarding Mr. IENG Sary's daily medical examinations. The Trial Chamber rejected the Defence's requests that the Trial Chamber appoint qualified doctors to examine and assess Mr. IENG Sary each day or, in the alternative, order the treating doctors to include more detailed information in their reports. The Trial Chamber held that the Supplemental Request was a *de facto* request for reconsideration of its decision that further assessment of Mr. IENG Sary's fitness to stand trial is unwarranted and that the Supplemental Request failed to present any new circumstances. The Trial Chamber noted that it had re-appointed Professor Campbell and Drs. Seena Fazel and Lina Huot to re-assess Mr. IENG Sary's health, treatment and care in March 2013.<sup>23</sup> The Trial Chamber further noted that it had directed the treating doctors to "report daily on certain aspects of the Accused's health status it deems appropriate."<sup>24</sup> The Trial Chamber denied any additional relief requested by the Defence.<sup>25</sup>

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<sup>20</sup> Trial Chamber Memorandum to Treating Doctors, 18 December 2012, E238/12.

<sup>21</sup> *Id.*

<sup>22</sup> *See supra*, para. 3.

<sup>23</sup> Decision on IENG Sary's Request for Reconsideration of the Trial Chamber Decision on the Accused's Fitness to Stand Trial and Supplemental Request, 19 December 2012, E238/11/1, para. 9.

<sup>24</sup> *Id.*, para. 10.

<sup>25</sup> *Id.*

8. On 20 December 2012, the Defence filed a request that the Trial Chamber modify its memorandum to Mr. IENG Sary's treating doctors. The Defence again requested that qualified medical experts be appointed who are capable of assessing Mr. IENG Sary's ability to fully follow the proceedings when he is fatigued or dizzy or in pain. In the alternative, the Defence requested that the treating doctors be ordered to include specific information in their reports related to his ability to fully follow the proceedings.<sup>26</sup>
9. On 3 January 2013, the Defence appealed the Trial Chamber's decision that Mr. IENG Sary is fit to stand trial and rejecting the Defence's request to appoint an additional medical expert. The Defence argued that the Trial Chamber erred in fact, erroneously considering Mr. IENG Sary's mental and physical health in isolation; assuming that because Mr. IENG Sary has no significant cognitive impairment, he is fit to stand trial. The Defence argued that the Trial Chamber did not have sufficient evidence before it to make a determination that Mr. IENG Sary is fit to stand trial. The Defence further argued that the Trial Chamber erred in fact and abused its discretion in finding that no additional expertise was required.<sup>27</sup>
10. On 10 January 2013, the Trial Chamber issued a memorandum. Relying on its recent memorandum to the treating doctors and its re-appointment of medical experts to assess Mr. IENG Sary in March 2013,<sup>28</sup> the Trial Chamber denied the Defence's Request that the Trial Chamber modify its orders to the treating doctors regarding their reports.<sup>29</sup>
11. On 16 January 2013, the Trial Chamber issued the Impugned Decision denying the Defence's request to audio and/or video record Mr. IENG Sary in his holding cell.<sup>30</sup> The Trial Chamber held:
  - a. the conduct of the Defence in audio recording Mr. IENG Sary verged on misconduct pursuant to Rule 38;<sup>31</sup>

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<sup>26</sup> IENG Sary's Request for Modification of the Trial Chamber's Memorandum to His Treating Doctor at the ECCC Detention Facility, 20 December 2012, E238/12/1.

<sup>27</sup> IENG Sary's Appeal Against the Trial Chamber's Decision That He is Fit to Stand Trial and Its Refusal to Appoint an Additional Expert to Assess Fitness, 3 January 2013, E238/9/2/1.

<sup>28</sup> Trial Chamber Memorandum titled "IENG Sary's Request for Modification of the Trial Chamber's Memorandum to His Treating Doctor at the ECCC Detention Facility (E238/12/1)", 10 January 2013, E238/12/1/1.

<sup>29</sup> *See supra*, para. 8.

<sup>30</sup> *See supra*, para. 5.

- b. the Defence's request to audio and/or video record Mr. IENG Sary was in substance a request to gather its own evidence as to his fitness to stand trial;<sup>32</sup>
- c. it does not follow from the right to have an adequate record that the Defence may record Mr. IENG Sary in his holding cell;<sup>33</sup>
- d. the Defence has an adequate record of Mr. IENG Sary's fitness and Mr. IENG Sary's treating doctors may bring any significant concerns to the Trial Chamber's attention when necessary;<sup>34</sup>
- e. audio and/or video recording Mr. IENG Sary may jeopardize his rights to privacy and dignity;<sup>35</sup>
- f. the right to record Mr. IENG Sary is not part of a right to exculpatory evidence;<sup>36</sup>
- g. audio and/or video recording Mr. IENG Sary is not necessary or relevant to the expert medical assessment of Mr. IENG Sary's fitness to stand trial;<sup>37</sup> and
- h. audio and/or video recording Mr. IENG Sary is not the least intrusive means of creating a record.<sup>38</sup>

#### IV. PRELIMINARY MATTERS

##### A. Admissibility of the Appeal

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

12. The Defence incorporates by reference paragraph 24 of the Pending Appeal and paragraph 6 of Mr. IENG Sary's Reply to the Co-Prosecutors' Response to the Pending Appeal,<sup>39</sup> and further supplements as follows.

13. Rule 104(4)(b) allows immediate appeals of "decisions on detention and bail under Rule 82." The decision that Mr. IENG Sary may not be audio or video recorded in his holding cell is a

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<sup>31</sup> Impugned Decision, para. 11.

<sup>32</sup> *Id.*, para. 12.

<sup>33</sup> *Id.*, para. 13.

<sup>34</sup> *Id.*, para. 14.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, para. 15.

<sup>37</sup> *Id.*, para. 16.

<sup>38</sup> *Id.*

<sup>39</sup> IENG Sary's Reply to the Co-Prosecutors' Response to his 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, 9 January 2013, E238/9/1/3.

decision on detention because the decision forms part of the modalities of Mr. IENG Sary's detention.<sup>40</sup>

14. The Pre-Trial Chamber, in considering an appeal of the Office of the Co-Investigating Judges' ("OCIJ") denial of a Defence request to video record meetings with Mr. IENG Sary, found: "the question of whether an item or device can be brought in and out of the Detention Facility by members of a defence team and used during their meetings with their client in pre-trial detention, forms part of the modalities of [Mr. IENG Sary's] detention."<sup>41</sup>
15. The Pre-Trial Chamber issued its decision pursuant to Rule 74(3)(f), which concerns pre-trial proceedings and states in relevant part: "The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges: ... f) relating to provisional detention or bail[.]" Rule 104(4)(d) provides: "The following decisions of the Trial Chamber are subject to immediate appeal: ... b) decisions on detention and bail under Rule 82[.]" Rule 82 concerns provisional detention and bail during trial proceedings.
16. In accordance with Rule 21(2), the principles that apply at the pre-trial stage hold true at the trial stage.<sup>42</sup> Mr. IENG Sary has the right to a fair and expeditious process at both the pre-trial and trial stages.<sup>43</sup> Moreover, the admission of this Appeal would not impact Mr. IENG Sary's Co-Accuseds' right to fair and expeditious proceedings. Admissibility under Rule 74(3)(f) should not be interpreted as being broader than under Rule 104(4)(d). As the Trial

<sup>40</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>41</sup> *Id.*

<sup>42</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>43</sup> Agreement, Art. 12(2): "The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the [ICCPR], to which Cambodia is a party; Rule 21(1): "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..." See also ICCPR, Art. 9(3): "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release"; Art. 14(3): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay[.]"

Chamber's decision prohibiting the Defence from video and/or audio recording Mr. IENG Sary is a decision on detention, the present Appeal should be admitted under Rule 104(4)(b).

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

17. The Defence incorporates by reference paragraph 25 of the Pending Appeal and paragraphs 7-9 of Mr. IENG Sary's Reply to the Co-Prosecutors' Response to the Pending Appeal, and further supplements as follows.
18. Rule 104(4)(d) allows immediate appeals of "decisions on interference with the administration of justice under Rule 35(6)." Although the underlying request to video and/or audio record Mr. IENG Sary while he is in the holding cell was not made pursuant to Rule 35, there was no violation of Mr. IENG Sary's rights (and, thus, no interference with the administration of justice) until the request was denied. It would be illogical to limit appeals under Rule 104(4)(d) to only decisions made pursuant to Rule 35 requests where, as in the present case, the decision *itself* (in combination with prior related decisions) interferes with the administration of justice. Such an interpretation of Rule 104(4)(d) would prevent parties from having any recourse if the Trial Chamber itself interferes with the administration of justice. The Trial Chamber cannot reasonably investigate itself pursuant to Rule 35; the Supreme Court Chamber must investigate an interference with the administration of justice perpetrated by the Trial Chamber.<sup>44</sup>
19. The Trial Chamber has not merely erred or abused its discretion.<sup>45</sup> 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 right to prepare his defence through making a record.

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<sup>44</sup> The Pre-Trial Chamber has recognized, in a strictly confidential decision, that it would be improper for an organ of the Court to investigate allegations that it interfered with the administration of justice as there may be a conflict of interest or a reasonable perception of bias in such cases. The Pre-Trial Chamber noted that Rule 35(2) does not refer to a specific Chamber, but simply states that "Chambers" may deal with interferences with the administration of justice. See Case 002/14-12-2009-ECCC/PTC (08), document number 3.

<sup>45</sup> See Decision on IENG Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court, 13 January 2012, E130/4/3, p. 1: "[N]either an error of fact or law or an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and wilful interference with the administration of justice within the meaning of Rule 35."

*First*, 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,<sup>46</sup> where his medical condition could be observed and monitored by the Trial Chamber Judges and his Defence team.

*Second*, the Trial Chamber prohibited the video recording of Mr. IENG Sary in his holding cell by the Audio-Visual Unit or his Defence team,<sup>47</sup> thereby preventing a contemporaneous video record being made of Mr. IENG Sary while he is in the holding cell.

*Third*, the Trial Chamber prohibited the Defence from audio recording Mr. IENG Sary in the holding cell and filing its own observations of Mr. IENG Sary's condition,<sup>48</sup> thereby preventing a contemporaneous audio record being made of Mr. IENG Sary while he is in the holding cell.

*Finally*, the Trial Chamber issued a written decision prohibiting the Defence from video or audio recording Mr. IENG Sary in the holding cell and affirming its previous order prohibiting the Defence from filing recordings or observations of Mr. IENG Sary in the holding cell,<sup>49</sup> thereby preventing *any* contemporaneous record being made of Mr. IENG Sary while he is in the holding cell.

20. The Trial Chamber is blocking the Defence's efforts to ensure that there is a record of Mr. IENG Sary's health *at all times* during the trial proceedings, not just during the brief periods of time when he is visited by a treating doctor. The Defence has repeatedly made reasoned submissions to the Trial Chamber as to why a contemporaneous and objective record of Mr. IENG Sary's condition is necessary.<sup>50</sup> Yet, the Trial Chamber continues to act with *willful*

<sup>46</sup> Transcript, 4 December 2012, E1/147.1, p. 17-19.

<sup>47</sup> *Id.*, p. 17-19, 27-28.

<sup>48</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; Order for Submissions, 12 December 2012, E254.

<sup>49</sup> Impugned Decision, p. 8.

<sup>50</sup> See Transcript, 4 December 2012, E1/147.1, p. 12-15; IENG Sary's Supplemental Request For a Qualified Expert to Make Daily Medical Examinations Related to Mr. IENG Sary's Capacity to Assist in his Own Defence Or, In the Alternative, Request For the Trial Chamber to Order the ECCC Doctors to Make Specific Observations Relevant to

*blindness*<sup>51</sup> concerning Mr. IENG Sary's actual ability to fully and meaningfully participate in the trial proceedings. A recent example illuminates this conduct. International Co-Lawyer Michael G. Karnavas reported to the Trial Chamber that Mr. IENG Sary's treating doctor informed the Defence's Case Manager that he could not determine whether Mr. IENG Sary can follow the proceedings when he is awake.<sup>52</sup> When the Case Manager asked the doctor to put this information in his medical report, the doctor indicated that he could not do so unless he was given permission by the board of doctors that supervises him.<sup>53</sup> As Mr. Karnavas stated to the Trial Chamber:

[E]xactly the same thing was told to us yesterday, yet in the afternoon, we had a report saying that our client can follow the proceedings from downstairs. If a doctor is not in a capacity to indicate whether our client is able to follow the proceedings, how can they then make a report saying that from down there they are following the proceedings? And why would a doctor who is on call to examine our client ... then need instructions from the board which is not located in this institution, on the premises, as to what he should put in the report? In other words, it would appear, Your Honours, that you are being misled when they say that he can – that Mr. Ieng Sary can follow the proceedings. Because if a doctor is not professionally trained then they cannot; and such observations are nothing other than pure mendacity.<sup>54</sup>

Rather than conducting further enquiry into the possibility that the treating doctors are putting statements in their daily reports that they are not qualified to make, the Trial Chamber stated that it is “unhelpful for medically unqualified staff or lawyers to press the treating doctor[,] because he is clear that his report must be direct to the Trial Chamber.”<sup>55</sup> The Trial Chamber's refusal to investigate inaccuracies in the daily medical reports ensures: **1.** that it will continue to rely on misleading information about Mr. IENG Sary's daily state of health,

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Mr. IENG Sary's Capacity to Assist in His Own Defence, 12 December 2012, E255; IENG Sary's Submissions on the Law Permitting Him to be Audio and/or Video Recorded in the Holding Cell, 14 December 2012, E254/1; IENG Sary's Request for Modification of the Trial Chamber's Memorandum to His Treating Doctor at the ECCC Detention Facility, 20 December 2012, E238/12/1.

<sup>51</sup> The use of the term “willful blindness” is not intended to insult the Trial Chamber. Rather, it is used as a legal concept as expressed in criminal law. *See* IENG Sary's Reply to the Co-Prosecutors' Response to His Appeal Against the Trial Chamber's Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 28 January 2013, E251/1/3, para. 9, regarding the well-established concept of “willful blindness” in criminal law.

<sup>52</sup> Transcript, 24 January 2013, E1/164.1, p. 59.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, p. 59-60.

<sup>55</sup> *Id.*, p. 76.

ability to participate in the proceedings and fitness to stand trial; and **2.** that the Defence will not have a complete and accurate record of Mr. IENG Sary's condition from which to appeal to the Supreme Court Chamber.

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

21. The Defence incorporates by reference paragraphs 26-31 of the Pending Appeal.

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

22. The Defence incorporates by reference paragraph 32 of the Pending Appeal.

**V. LAW AND ARGUMENT**

*The Trial Chamber erred in law and in fact and abused its discretion by prohibiting the Defence from video and/or audio recording Mr. IENG Sary in the holding cell, thereby preventing a contemporaneous record of the impact of Mr. IENG Sary's physical condition on his ability to meaningfully participate in the proceedings and assist in his own defence and his fitness to stand trial*

23. The Trial Chamber's efforts in suppressing any attempts by the Defence to memorialize a visible and verifiable record of Mr. IENG Sary's actual state of health, and its impact on his ability to follow and meaningfully participate in the proceedings, are errors that directly affect Mr. IENG Sary's fundamental fair trial right to prepare a defence.<sup>56</sup> This right is guaranteed to him by the Cambodian Constitution,<sup>57</sup> ECCC law<sup>58</sup> and international law<sup>59</sup> and is expressly afforded to him at all stages of the proceedings.<sup>60</sup> A necessary and integral part

<sup>56</sup> The Defence incorporates by reference paragraph 56 of the Pending Appeal, regarding the right to prepare a defence, and supplements herein.

<sup>57</sup> Cambodian Constitution, Art. 38.

<sup>58</sup> Agreement, Art. 13(1); Establishment Law, Art. 35 new.

<sup>59</sup> ICCPR, Art. 14(3)(b); Universal Declaration of Human Rights ("UDHR"), Art. 11(1). The right to prepare a defence is also explicitly incorporated in the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). Article 6(3)(b) of the ECHR 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..."

<sup>60</sup> See Agreement, Art. 13(1): "The rights of the accused enshrined in Articles 14 and 15 of the [ICCPR] shall be respected throughout the trial process"; Rule 21(1).



of the right to prepare a defence is making a timely record to preserve errors for appeal.<sup>61</sup> Making a record is as vital to the Co-Lawyers' obligations to Mr. IENG Sary as appearing in court to robustly defend him, whether through examining witnesses or making evidentiary objections or oral submissions.<sup>62</sup> If the Defence does not make a record of the Trial Chamber's errors regarding Mr. IENG Sary's health and fitness, then these errors may be deemed to have been waived by the Defence upon appeal.<sup>63</sup> This would amount to ineffective assistance of counsel.<sup>64</sup>

24. The Defence seeks to make video and/or audio recordings of Mr. IENG Sary in the holding cell (or, at a minimum, have its Case Manager's daily written observations placed on the Case File) so that there is a contemporaneous and objective record of the impact of Mr. IENG Sary's physical condition upon his ability to follow and meaningfully participate in the proceedings. Such a record is particularly important where, as here, the Trial Chamber's

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<sup>61</sup> Illustrating the purpose of making a record to preserve errors for review on appeal, Judge Wiseman of the 5<sup>th</sup> Appellate District of the Court of Appeal of California observed: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." *Protect Our Water et al. v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003). See also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights: "Although ... 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>62</sup> See IENG Sary's Reply to the Co-Prosecutors' Response to His Appeal Against the Trial Chamber's Decision on Fitness to Stand Trial, 28 January 2013 ("Reply to OCP Response to Appeal Against Fitness Decision"), E238/9/2/4, para. 8, regarding the Defence's obligation to act with due diligence in representing Mr. IENG Sary.

<sup>63</sup> Errors by judges at the trial level generally cannot be appealed unless the errors are raised and preserved as part of the judicial record. See, e.g., *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/SC, Appeal Judgement, 3 February 2012 ("*Duch* Appeal Judgement"), para. 20, which implicitly requires that errors be preserved in the judicial record.

<sup>64</sup> The International Criminal Tribunal for the former Yugoslavia defines ineffective assistance of counsel as occurring when there is "gross" or "manifest" incompetence by a lawyer. *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Judgement, 17 March 2009, para. 42. See also *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeals Judgement, 28 November 2007, para. 131. The United States Supreme Court defines "ineffective assistance of counsel" as occurring when: **1.** the lawyer's "performance was deficient[, which] requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment [to the U.S. Constitution]"; **and 2.** "the deficient performance prejudiced the defense[, which] requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

errors affect Mr. IENG Sary's substantial rights, resulting in manifest injustice.<sup>65</sup> Put differently, these errors are not harmless.<sup>66</sup> Here, the Trial Chamber has violated Mr. IENG Sary's fundamental fair trial right to prepare a defence by preventing a complete, contemporaneous record from being made of Mr. IENG Sary's fitness to stand trial, i.e., his ability to follow and participate in the proceedings. The Trial Chamber refused to allow Mr. IENG Sary to appear in court as he requested, refused to allow him to be broadcast on the courtroom monitor while in the holding cell and refused to allow the Defence to video record him in the holding cell. The Trial Chamber then refused to allow the Defence to place on the Case File its written observations of Mr. IENG Sary and audio recordings of its conversations with his treating doctors regarding his ability to follow the proceedings. In doing so, the Trial Chamber has successfully prevented *any* contemporaneous and verifiable record being made as to whether Mr. IENG Sary is actually able to follow and participate in the proceedings. The Trial Chamber's errors of law and fact and abuse of discretion invalidate the Impugned Decision, have caused a miscarriage of justice and are leading to an unreasonable outcome in this case. Hence, the need for immediate relief in this matter.

25. Mr. IENG Sary's enjoyment of his fair trial rights presupposes an adequate level of mental and physical capacity.<sup>67</sup> Mr. IENG Sary has the fundamental right to be tried only when he is fit to stand trial, i.e., when he is physically and mentally present, able to communicate with counsel, and able to *meaningfully* participate and assist in his own defence.<sup>68</sup> This right is guaranteed to him by the Cambodian Constitution,<sup>69</sup> ECCC Law<sup>70</sup> and the ICCPR.<sup>71</sup> If Mr.

<sup>65</sup> Legal errors that invalidate a decision or factual errors that result in a miscarriage of justice are not harmless errors. *See Prosecutor v. Galić*, IT-98-29-A, Appeals Judgement, 30 November 2006, para. 6.

<sup>66</sup> *See Duch* Appeal Judgement, paras. 11, 13, 16-17.

<sup>67</sup> *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 21.

<sup>68</sup> *See* Decision on NUON Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 16: "The applicable standard in determining fitness to stand trial is that of '*meaningful participation* which allows the accused to exercise his fair trial rights to such a degree that he is *able to participate effectively* in his trial and has an understanding of the essentials of the proceedings.'" *See also* Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, E138, para. 27, *quoting Prosecutor v. Strugar*, IT-01-42-A, Appeals Judgement, 17 July 2008, para. 55.

<sup>69</sup> Cambodian Constitution, Art. 31.

<sup>70</sup> Agreement, Art. 13(1); Establishment Law, Art. 35 new; Rule 81(1).

<sup>71</sup> ICCPR, Art. 14(3)(d).

IENG Sary is in his holding cell and is asleep, dizzy, nauseous, coughing and/or in pain,<sup>72</sup> then – viewing his capacities “overall and in a reasonable and commonsense manner”<sup>73</sup> – he is unable to meaningfully participate in the proceedings or assist in his own defence. A contemporaneous record of Mr. IENG Sary’s condition is essential to the Trial Chamber’s determination of Mr. IENG Sary’s ability to participate in the proceedings and fitness to stand trial, particularly when it appears that Mr. IENG Sary is too physically and/or mentally exhausted to enjoy his other fair trial rights. Such a record would also ensure that the Supreme Court Chamber has all the evidence before it if called upon to review the Trial Chamber’s rulings for error.

**A. The Trial Chamber erred in finding that the Defence’s conduct regarding audio recording verged on misconduct under Rule 38**

26. The Trial Chamber’s finding that the Defence’s audio recording verged on misconduct under Rule 38 is spurious. The audio recordings do not constitute misconduct. At the time they were made, the Trial Chamber had only prohibited the Defence from video recording Mr. IENG Sary in the holding cell,<sup>74</sup> which the Defence proposed after the Trial Chamber refused to allow Mr. IENG Sary to: **a.** participate from the courtroom;<sup>75</sup> and **b.** be broadcast on video monitor by the Audio Visual Unit while in the holding cell.<sup>76</sup>
27. The reasons for seeking to video record Mr. IENG Sary in the holding cell are immensely different from the reasons for audio recording conversations with his treating doctors. Aside

<sup>72</sup> See Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012 (“Professor Campbell’s Report”), E238/4; Observation Log concerning Mr. Ieng Sary’s ability to follow the proceedings and participate in his Defence 4 December 2012, 5 December 2012 (“4 December 2012 Observation Log”), 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 (“5 December 2012 Observation Log”), 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 (“6 December 2012 Observation Log”), E248/1.1.

<sup>73</sup> Decision on NUON Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 16; Decision on IENG Thirith’s Fitness to Stand Trial, 17 November 2011, E138, para. 27, quoting *Prosecutor v. Strugar*, IT-01-42-A, Appeals Judgement, 17 July 2008, para. 55.

<sup>74</sup> Transcript, 4 December 2012, E1/147.1, p. 17-19, 27-28.

<sup>75</sup> *Id.*, p. 13-14. See *id.*, p. 17-19, denying the Defence’s request.

<sup>76</sup> *Id.*, p. 3, 14. See *id.*, p. 19, 27-28, denying the Defence’s request.

from the fact there is a vast difference between video and audio recording,<sup>77</sup> the Trial Chamber was fully apprised of the Defence's intentions regarding recording Mr. IENG Sary, as reflected in the record.<sup>78</sup>

28. The Defence sought to video record Mr. IENG Sary to make an objective record for the Trial Chamber – and, if necessary, the Supreme Court Chamber – that accurately presented Mr. IENG Sary's state of health and whether he is actually able to follow the trial proceedings from the holding cell (as Professor Campbell claimed he could do).<sup>79</sup> In contrast, the audio recordings were made to ensure a verifiable record of the treating doctors' assessments of Mr. IENG Sary's ability to follow the proceedings,<sup>80</sup> to be considered in conjunction with the Case Manager's written observations.

29. Given the prohibitions placed upon the Defence, the Defence imbedded its Case Manager to observe Mr. IENG Sary in the holding cell during the proceedings and to make written observation logs. These logs, in conjunction with any audio recordings generated through discussions with the treating doctors, would constitute as complete and contemporaneous a record as possible, however imperfect or subjectively perceived they may be. The purpose is self-evident: for the Trial Chamber – and, if necessary, the Supreme Court Chamber – to have all the evidence before it when determining Mr. IENG Sary's ability to follow and meaningfully participate in the proceedings, assist in his own defence, and stand trial.

30. Rule 38 authorizes Chambers to impose sanctions against or refuse audience to a lawyer, after issuing a warning, for offensive or abusive conduct, obstruction of the proceedings, abuse of process or conduct that is otherwise contrary to Article 21(3) of the Agreement.<sup>81</sup>

There has been no showing that the Defence engaged in offensive or abusive conduct toward

<sup>77</sup> The Merriam-Webster Dictionary defines an "audiotape" as "a tape recording of sound" and a "videotape" as, *inter alia*, "a recording of visual images and sound (as of a television production) made on magnetic tape." MERRIAM-WEBSTER DICTIONARY (2013), available at <http://www.merriam-webster.com/dictionary>.

<sup>78</sup> See Transcript, 4 December 2012, E1/147.1, p. 12-15; Transcript, 5 December 2012, E1/148.1, p. 5.

<sup>79</sup> See Professor Campbell's Report.

<sup>80</sup> See *infra*, paras. 40-41, regarding the inaccurate and misleading nature of the treating doctors' medical reports.

<sup>81</sup> Agreement, Art. 21(3): "Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession."

the treating doctors, any other members of the medical staff, the Trial Chamber or the other parties in attempting to make its record.<sup>82</sup> The audio recordings do not obstruct, inconvenience, or otherwise negatively impact the proceedings, nor do they bring the proceedings into disrepute or cause prejudice to anyone. The audio recordings were not made in defiance of any order from the Trial Chamber. Upon issuance of the Trial Chamber's order to cease audio recording and filing the written observation logs,<sup>83</sup> the Defence immediately complied. The audio recordings are not contrary to Article 21(3) of the Agreement. In zealously defending Mr. IENG Sary's right to prepare a defence and make a record, the Defence has simply been fulfilling its obligations to Mr. IENG Sary and its duty to protect his fundamental fair trial rights. The Defence has been neither frivolous nor contemptuous.

31. The Trial Chamber is quick to assert borderline contemptuous conduct by the Defence while it manifestly violates Mr. IENG Sary's fundamental fair trial right to make a record and preserve errors for appeal. The insinuation that the Defence is contemptuous amounts to a veiled coercive measure,<sup>84</sup> the consequence of which is chilling: restraining the Defence from zealously defending Mr. IENG Sary.<sup>85</sup>

**B. The Trial Chamber erred in finding that the Defence was, in substance, seeking to gather its own evidence as to Mr. IENG Sary's fitness to stand trial, i.e., conducting its own investigation**

32. The Trial Chamber's claim that the Defence was engaging in an investigation is incongruous. The Defence openly and unambiguously informed the Trial Chamber of its intent and

<sup>82</sup> Dr. LIM Sivutha consented to being audio recorded. *See* 5 December 2012 Observation Log, at 8:55 – 9:10a.

<sup>83</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; Order for Submissions, 12 December 2012, E254.

<sup>84</sup> *See* Rule 21(2).

<sup>85</sup> Lord Henry Brougham eloquently described the defence lawyer's role as follows: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion." 2 *The Trial of Queen Caroline* 3 (1821), *quoted in* Tom Smith, *Zealous Advocates: The Historical Foundations of the Adversarial Criminal Defence Lawyer*, 1 *LAW, CRIME & HISTORY* 1, 9 (2012).

purpose in requesting to video record Mr. IENG Sary.<sup>86</sup> When the Trial Chamber denied this request, the Defence sought alternative means for making a record, i.e., by preparing observation logs and audio recording discussions with the treating doctors. The intent and purpose of these actions was transmitted to the Trial Chamber with unabashed transparency and clarity.<sup>87</sup> At no time did the Trial Chamber, upon learning of these efforts, order the Defence to cease making observation logs and/or audio recordings *because* they amounted to impermissible investigative actions. Were these actions as patently investigative as the Trial Chamber *now* suggests, then it logically follows that the Trial Chamber would have expressed the obvious when first informed by the Defence that it would notify the Trial Chamber of its Case Manager's observations. It was not until the third filing (placing on the record) of these observation logs that the Trial Chamber ordered the Defence to cease and desist.<sup>88</sup>

33. The Defence sought to make a record of Mr. IENG Sary's actual state of health and fitness in order to promote transparency and accountability by ensuring that: **1.** the Trial Chamber has all the relevant evidence to assess Mr. IENG Sary's fitness and actual ability to meaningfully participate in the proceedings; and **2.** the Trial Chamber's judicial actions are accurately recorded for scrutiny by the Supreme Court Chamber.<sup>89</sup>

34. The record that the Defence sought to make is not an "investigation" within the meaning of Rule 55 (which the Trial Chamber has previously cited as prohibiting the Defence from conducting an investigation).<sup>90</sup> Any suggestion to the contrary is fanciful. The Defence incorporates by reference paragraphs 57-58 of the Pending Appeal.

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<sup>86</sup> See Transcript, 4 December 2012, E1/147.1, p. 12-15; Pending Appeal, para. 16.

<sup>87</sup> See Transcript, 5 December 2012, E1/148.1, p. 5; Pending Appeal, para. 18.

<sup>88</sup> See Email from Trial Chamber Legal Officer, "Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility", 7 December 2012; Order for Submissions, 12 December 2012, E254. The Defence filed its 4 December 2012 Observation Log with the Trial Chamber Greffiers on 5 December 2012. The 6 December 2012 Observation Log and 7 December 2012 Observation Log were both filed with the Trial Chamber Greffiers on 7 December 2012.

<sup>89</sup> See Reply to OCP Response to Appeal Against Fitness Decision, para. 8, regarding the need for transparency and accountability in making a record of the Trial Chamber's action.

<sup>90</sup> See Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, E251, para. 37. The

**C. The Trial Chamber erred in law in finding that the Pre-Trial Chamber's decision on recording does not suggest that the right to record Mr. IENG Sary follows from the right to an adequate record**

35. The Trial Chamber is incorrect in finding that the Pre-Trial Chamber's decision on the right to record Mr. IENG Sary<sup>91</sup> does not apply to this case. The Pre-Trial Chamber's Decision was addressed to some extent in paragraph 62 of the Pending Appeal, which the Defence incorporates by reference and supplements herein. To fully address the Impugned Decision, some repetition of the submissions made in the Pending Appeal is warranted.
36. Although the Pre-Trial Chamber's decision was concerned with preparing a defence at the pre-trial stage, the Trial Chamber's interpretation of the decision is unreasonably narrow. The Pre-Trial Chamber found that the Defence had the right – in accordance with the Establishment Law and the Rules, which must be interpreted in accordance with the ICCPR<sup>92</sup> – to record its meetings with Mr. IENG Sary because this would enable him to adequately prepare his defence.<sup>93</sup> The Pre-Trial Chamber held that an interpretation of the ECCC legal framework and the ICCPR that “narrowly interpret[s] the rights of an accused is not compatible with the object and purpose of fair trial guarantees.”<sup>94</sup> This principle applies equally to the trial stage as it does to the pre-trial stage.
37. The Trial Chamber found that the following circumstances distinguish the present situation from the one before the Pre-Trial Chamber: **1.** the holding cell is directly below the courtroom; **2.** any member of the Defence team can be with Mr. IENG Sary at any time; and

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OCIJ has also previously held that Rule 55 prohibits the Defence from conducting investigations. *See* Letter from the OCIJ to the NUON Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/I, p. 2. The common sense interpretation of Rule 55 is that it concerns investigations of crimes within the ECCC's jurisdiction. Pursuant to Rule 55: “1. A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC. 2. The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.”

<sup>91</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 2012 (“Pre-Trial Chamber Decision on Recording”), A371/2/12.

<sup>92</sup> Agreement, Art. 12(1); Establishment Law, Art. 33 new. *See also* Pre-Trial Chamber Decision on Recording, paras. 27, 31.

<sup>93</sup> Pre-Trial Chamber Decision on Recording, para. 35. The Pre-Trial Chamber also found this to be part of Mr. IENG Sary's right to communicate with counsel. *Id.*

<sup>94</sup> *Id.*, para. 31.

3. there is a direct and confidential phone line from the holding cell to the courtroom.<sup>95</sup> These circumstances do not justify the denial of a contemporaneous and objective record of Mr. IENG Sary's physical condition.

38. The proximity of the holding cell to the courtroom is of no import to determining whether a contemporaneous record is being kept. Neither the Trial Chamber nor the Co-Lawyers can observe and monitor Mr. IENG Sary from the courtroom while he is in the holding cell. Even if a member of the Defence team is with Mr. IENG Sary during the trial proceedings (as the Case Manager currently is), if no recording is allowed (and if the Trial Chamber will not permit the Defence to place its daily observation logs on the Case File), then there is no contemporaneous record of Mr. IENG Sary's condition. Similarly, a direct and confidential telephone line from the holding cell to the courtroom does not assist the making of a contemporaneous record.<sup>96</sup> Regularly interrupting the proceedings, whether in person or by telephone, to provide updates on Mr. IENG Sary's condition would negatively impact the expeditiousness of the proceedings. The three circumstances advanced by the Trial Chamber – whether viewed individually or in combination – are as unpersuasive as its instruction to the Defence to “wake up” Mr. IENG Sary when he dozes off is unreasonable.<sup>97</sup>

39. None of the Trial Chamber's cited circumstances reconcile the fact that *no* complete and accurate record is being made as to Mr. IENG Sary's actual state, from which the Trial or Supreme Court Chamber can discern whether he is following and meaningfully participating in the proceedings. The Trial Chamber's preference for avoiding scrutiny through opacity

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<sup>95</sup> Impugned Decision, para. 13.

<sup>96</sup> It should be noted that a telephone line is of no use to Mr. IENG Sary if he is asleep or on oxygen, or his fingers are numb. *See* Pending Appeal, para. 48, n. 109.

<sup>97</sup> The Trial Chamber and Professor Campbell have claimed that, if Mr. IENG Sary falls asleep, it is because he is disinterested in the proceedings. As Judge Cartwright observed regarding Mr. IENG Sary's inability to stay awake: “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.” Transcript, 5 December 2012, E1/148.1, p. 37-38. Professor Campbell stated: “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 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.



cultivates and perpetuates the self-induced illusion:<sup>98</sup> *Mr. IENG Sary, although in the holding cell suffering from extreme fatigue, in a semi-conscious state, in pain and in need of oxygen, would be capable of following the proceedings, were he only interested in doing so.* A true and complete record of Mr. IENG Sary's condition, which is permitted under the ECCC's legal framework, would be illuminating.

**D. The Trial Chamber erred in fact and abused its discretion in finding that Mr. IENG Sary is not denied an adequate record of his fitness**

40. The Trial Chamber's reliance on incorrect and insufficient medical information to find that an adequate record exists of Mr. IENG Sary's health and fitness is misplaced.<sup>99</sup> As the Trial Chamber and the OCP have acknowledged, Mr. IENG Sary's condition fluctuates.<sup>100</sup> It is illogical to suggest that an expert assessment from almost three months ago<sup>101</sup> and an assessment scheduled to occur in March 2013 constitute an adequate record of Mr. IENG Sary's health and fitness. These considerations are irrelevant to a determination of Mr. IENG Sary's *current* (i.e., day-to-day and moment-to-moment) status. Moreover, the treating doctors' daily reports *cannot* and *do not* provide a complete picture of Mr. IENG Sary's actual ability to follow and participate in the proceedings throughout each trial day. These reports are typically provided only at the beginning of each trial session; they are based on

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<sup>98</sup> As the Defence has submitted to the Supreme Court Chamber, the Trial Chamber is acting with willful blindness regarding Mr. IENG Sary's health and fitness to stand trial. *See* IENG Sary's Reply to the Co-Prosecutors' Response to His Appeal Against the Trial Chamber's Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 28 January 2013, E251/1/3, para. 9.

<sup>99</sup> Impugned Decision, para. 14.

<sup>100</sup> Transcript, 4 December 2012, E1/147.1, p. 17-18: "[Judge Cartwright]: With that as its starting point, however, [Professor Campbell] 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"; *Id.*, p. 10: "[Senior Assistant Co-Prosecutor Smith]: You know, the Prosecution has always said that Mr. Ieng Sary's health is fragile and the doctors have said that, as well, but it must be looked at on a day-by-day basis." The Defence submits that his condition may change from hour to hour, or moment to moment. *Id.*, p. 12-13.

<sup>101</sup> The Trial Chamber found that Mr. IENG Sary was assessed by court-appointed experts to be fit to stand trial as recently as 26 November 2012. This is incorrect. Mr. IENG Sary was assessed by Professor Campbell on 5 and 6 November 2012. 26 November 2012 is the date upon which the Trial Chamber issued its decision finding Mr. IENG Sary fit to stand trial. This decision has been appealed. *See* Decision on Accused's Fitness to Stand Trial, 26 November 2012, E238/9; IENG Sary's Appeal Against the Trial Chamber's Decision That He is Fit to Stand Trial and Its Refusal to Appoint an Additional Expert to Assess Fitness, 3 January 2013, E238/9/2/1; Co-Prosecutors' Response to IENG Sary's Appeals Against the Trial Chamber's Decision on Fitness to Stand Trial, 18 January 2013, E238/9/2/2; Reply to OCP Response to Appeal Against Fitness Decision.

assessments done earlier that morning and are perfunctory in nature, amounting to no more than two to three lines.<sup>102</sup>

41. The treating doctors' reports contain inaccurate and misleading information. Although the treating doctors have indicated that they are not competent to determine whether Mr. IENG Sary can follow the proceedings,<sup>103</sup> they repeatedly state in their reports that he *can* follow the proceedings from the holding cell.<sup>104</sup> The treating doctors also fail to bring significant changes in Mr. IENG Sary's condition to the Trial Chamber's attention, despite being ordered to do so by the Trial Chamber.<sup>105</sup> As Mr. Karnavas informed the Trial Chamber, Mr. IENG Sary's treating doctor recently refused to report to the Trial Chamber that Mr. IENG Sary was being administered oxygen and could not follow the proceedings because of his extreme fatigue.<sup>106</sup> The treating doctor stated to Mr. Karnavas that he was only instructed to monitor Mr. IENG Sary's vital signs, which were normal.<sup>107</sup> As Mr. Karnavas informed the Trial Chamber, the treating doctor indicated that "if [Mr. IENG Sary's] vital signs are okay, then he can follow the proceedings."<sup>108</sup>

42. Despite being informed by the Defence of inaccuracies in the treating doctors' reports, the Trial Chamber continues to rely upon them. The Trial Chamber thus relies on outdated,

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<sup>102</sup> See, e.g., Medical report before hearing, 4 December 2012, E1/147.2, a report that is less than 1 page long and informs the Trial Chamber of the results of a check-up done at 8:00 am that morning; Medical check up for IENG Sary before the hearing on 14 January 2013, 14 January 2013, E1/160.2, a report that is less than 1 page long and informs the Trial Chamber of the results of a check-up done at 8:10 that morning. See also Weekly Medical Report by the ECCC Medical Unit, 3 January 2013 to 9 January 2013, E11/104, a report that is 1 page long although it purports to encompass 7 days of medical assessments. Please note that these reports are 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>103</sup> See *supra*, para. 20. See also 5 December 2012 Observation Log, at 8:55a-9:10a; 6 December 2012 Observation Log, at 10:36a-10:39a.

<sup>104</sup> See, e.g., Medical check up for IENG Sary before the hearing on 14 January 2013, 14 January 2013, E1/160.2.

<sup>105</sup> See Trial Chamber Memorandum titled "Memorandum to the Doctor Treating Ieng Sary at the Detention Centre," 18 December 2012, E238/12.

<sup>106</sup> See Transcript, 23 January 2013, E1/163.1, p. 33-34.

<sup>107</sup> *Id.*, p. 33. The treating doctor considered the fact that Mr. IENG Sary could not follow the proceedings to be "[Mr.] IENG Sary's problem."

<sup>108</sup> *Id.*

incomplete and inaccurate reports to justify preventing the Defence from making a record of Mr. IENG Sary's health and fitness and deliberately shielding itself from such a record.<sup>109</sup>

**E. The Trial Chamber abused its discretion in finding that recording may jeopardize Mr. IENG Sary's rights to privacy and dignity**

43. The Trial Chamber's claim that the Defence might jeopardize Mr. IENG Sary's rights to privacy and dignity by video or audio recording him is illogical.<sup>110</sup> The Trial Chamber maintains that it is dignified for Mr. IENG Sary to remain in a holding cell, on a bed, falling in and out of sleep due to extreme fatigue, being administered oxygen and suffering dizziness and pain,<sup>111</sup> while his trial moves forward. This claim is contrived.
44. The Defence has repeatedly acted to protect Mr. IENG Sary's fundamental rights to privacy and dignity, guaranteed to him by the Cambodian Constitution,<sup>112</sup> the Agreement,<sup>113</sup> the Establishment Law,<sup>114</sup> the ICCPR<sup>115</sup> and the Universal Declaration of Human Rights.<sup>116</sup> The Defence cautioned the Trial Chamber as early as 11 October 2011 that the guarantee of human dignity "belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human.... [This] human dignity cannot be replaced by anything else, and it is not relative to anyone's desires or opinions."<sup>117</sup> The Trial Chamber

<sup>109</sup> See also Reply to OCP Response to Appeal Against Fitness Decision, para. 9.

<sup>110</sup> Impugned Decision, paras. 14, 16.

<sup>111</sup> Professor Campbell's Report; 4 December 2012 Observation Log; 5 December 2012 Observation Log; 6 December 2012 Observation Log.

<sup>112</sup> Cambodian Constitution, Arts. 31, 38.

<sup>113</sup> Agreement, Art. 12.

<sup>114</sup> Establishment Law, Art. 33 new.

<sup>115</sup> ICCPR, Art. 10(1): "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"; Art. 17(1): "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

<sup>116</sup> UDHR, preamble: "Whereas recognition of the inherent dignity and of the equal and unalienable rights of all members of the human family is the foundation of freedom, justice and peace in this world"; Art. 1: "All human beings are born free and equal in dignity and rights"; Art. 12, in relevant part: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." The right to privacy is also explicitly incorporated in the ECHR, Art. 8(1): "Everyone has the right to respect for his private and family life, his home and his correspondence."

<sup>117</sup> IENG Sary's Observations on Whether the Trial Chamber May Compel An Accused to Be Present in Court When the Accused Has Voluntarily, Knowingly and Unequivocally Waived His Right to be Present and is Represented By Counsel, 11 October 2011, E130, para. 7, quoting Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 10, 12-13 (Cornell University Press, 1992).

nevertheless violated Mr. IENG Sary's dignity by displaying him to the public during the OCP's opening statement (which has no evidentiary value), even after he expressed extreme physical discomfort and requested to return to his holding cell.<sup>118</sup>

45. The Trial Chamber's invocation of privacy and "human dignity" as a justification for curtailing the Defence's efforts to make a full and transparent record is unsound. The importance of the proceedings in Case 002/01 and the rights and interests of the victims in seeing a resolution are beyond cavil. However, these considerations – which seem, at least in part, to be the motivating factors behind the Impugned Decision – *cannot* outweigh Mr. IENG Sary's fundamental fair trial rights.<sup>119</sup> The balance of justice should never be tilted in favor of resolving Case 002/01 by abridging any of the rights guaranteed to any of the Accused by the Cambodian Constitution and the ECCC.

**F. The Trial Chamber erred in law in finding that recordings cannot be characterized as exculpatory evidence**

46. The Trial Chamber's finding that recordings of Mr. IENG Sary cannot constitute exculpatory evidence is erroneous.<sup>120</sup> Exculpatory material includes "*not only* material establishing

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<sup>118</sup> Transcript, 22 November 2011, E1/14.1, p. 1-3, where Mr. Karnavas submitted: "concern[ing] you, Mr. President, violating [Mr. IENG Sary's] human rights by forcing him to be here yesterday when he was unable to participate. He had a headache all afternoon, he took off the headsets, he was unable to listen, he was in pain, he waived his presence, yet you forced him to be here claiming that this is an indispensable part of the proceedings. Opening statements are not evidence, never have been, never will be, however theatrical they – opening statements may be. So it is not an indispensable part of the proceedings. What is indispensable, I would say, are the rights of every accused as well as the rights of all other parties." See IENG Sary's Appeal Against the Trial Chamber's Decision Denying His Right to Waive His Presence in the Courtroom During Trial and Denying His Constitutional Right to Assist in His Own Defence, 5 January 2012, E130/4/1. See also Transcript, 21 November 2011, E1/13.1, p. 36-37, requiring Mr. IENG Sary's presence in court "to demonstrate to the parties and the public that the accused indeed hear the charges against them"; Transcript, 22 November 2011, E1/14.1, p. 8, again requiring Mr. IENG Sary's presence in court because "it is the opening statement presenting the charges against the Accused and also to show to the parties and the public and that the Accused shall hear all the charges against them."

<sup>119</sup> See Establishment Law, Art. 33 new: "The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, *with full respect for the rights of the accused* and for the protection of victims and witnesses" (emphasis added).

<sup>120</sup> The Trial Chamber seems confused by the ICCPR's Human Rights Committee's use of the term "e.g." in its definition of exculpatory evidence, finding that, because the example given by the Human Rights Committee concerned indications that a confession was not voluntary, the commentary thus concerned rights different to those at issue here. Impugned Decision, para. 15. The very definition of "e.g." indicates that it is not an exhaustive list. "E.g." is an abbreviation of the Latin term "*exempli gratia*," which means "[f]or example; for instance." BLACK'S LAW DICTIONARY 593 (7<sup>th</sup> ed. 1999). The fact that the example provided by the Human Rights Committee related to

innocence but also *other evidence that could assist the defence* (e.g. indications that a confession was not voluntary).”<sup>121</sup> Evidence that demonstrates the impact of Mr. IENG Sary’s physical condition on his ability to participate in the proceedings is evidence that could assist the Defence in making a record of Mr. IENG Sary’s unfitness for trial and preserving the Trial Chamber’s errors for appeal.

47. The right to video and/or audio record Mr. IENG Sary is encompassed within the ICCPR as part of the right to adequate facilities to prepare a defence.<sup>122</sup> This issue was addressed to some extent in paragraph 60 of the Pending Appeal, which the Defence incorporates by reference and supplements herein. The Human Rights Committee<sup>123</sup> defines the right to “adequate facilities” as encompassing access to documents and other evidence, including all materials that are exculpatory.<sup>124</sup> The ICCPR implicitly envisages the right to make a record as part of the rights to adequate facilities to prepare a defence and to have access to exculpatory evidence.

**G. The Trial Chamber erred in fact and abused its discretion in finding that video and/or audio recording is unnecessary and irrelevant to the experts’ medical assessment of Mr. IENG Sary’s fitness to stand trial**

48. The Trial Chamber’s finding that video and/or audio recording is neither necessary nor relevant is misleading and misplaced.<sup>125</sup> While the Defence concedes that audio and/or video recording may not be strictly necessary for an expert medical assessment, it *is* necessary to have accurate and objective recordings so that Mr. IENG Sary’s condition and the treating

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involuntary confessions does not mean that evidence that could assist the Defence cannot also include evidence related to an Accused’s fitness to stand trial. Such an interpretation would be ludicrous.

<sup>121</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, para. 33 (emphasis added).

<sup>122</sup> ICCPR, Art. 14(3)(b).

<sup>123</sup> The Human Rights Committee is a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia). 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>124</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, para. 33.

<sup>125</sup> Impugned Decision, para. 16.

doctors' assessments are recorded. Such recordings are particularly necessary given the Trial Chamber's reliance on inaccurate reports from the treating doctors.<sup>126</sup> To the best of the Defence's knowledge, the Trial Chamber has not actually inquired of the medical experts whether daily video or audio recordings of Mr. IENG Sary would be useful. Recordings of Mr. IENG Sary may be of great use to experts, particularly since they do not observe Mr. IENG Sary every day or for a continuous period.

49. The Trial Chamber found that assessments by the Defence or others who have no medical training are of no relevance to the Trial Chamber.<sup>127</sup> The Defence does not seek to present the Trial Chamber with medical assessments. The Defence seeks to present its *observations* in an objective and verifiable recorded format.<sup>128</sup>
50. The Trial Chamber is obligated to *always* safeguard Mr. IENG Sary's interests and to ensure transparent proceedings.<sup>129</sup> As such, the Trial Chamber *should* desire access to *all* available and relevant information regarding his actual ability to meaningfully participate in the proceedings each trial day. Through the Impugned Decision, the Trial Chamber has demonstrated its singular lack of interest in any information other than the treating doctors' formulaic and inaccurate medical reports.

**H. The Trial Chamber abused its discretion in finding that video and/or audio recording Mr. IENG Sary is not the least intrusive means of creating a record**

51. The Trial Chamber's finding that "it is plainly not the case that a video and/or audio recording is the least intrusive means to create a record"<sup>130</sup> is specious. Such a recording of Mr. IENG Sary is not intrusive. The Defence proposed several conditions for implementation by the Trial Chamber: **a.** the Trial Chamber could destroy the recordings if it

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<sup>126</sup> *See supra*, para. 41.

<sup>127</sup> Impugned Decision, para. 16.

<sup>128</sup> The Trial Chamber has held that it may, in determining fitness to stand trial, rely on its own observations of the Accused during the proceedings. Decision on NUON Chea's Fitness to Stand Trial and Defence Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 18. As the Defence sees Mr. IENG Sary on a regular basis, the Trial Chamber should similarly rely on the Defence's observations of him.

<sup>129</sup> Rule 21(1).

<sup>130</sup> Impugned Decision, para. 16.

determined they were inadmissible; **b.** the recordings would not be made public; and **c.** the Defence would provide the recordings to the Trial Chamber at the end of each day.<sup>131</sup> These conditions would ensure no intrusion upon Mr. IENG Sary, the Trial Chamber or the proceedings. This issue was addressed to some extent in paragraph 61 of the Pending Appeal, which the Defence incorporates by reference and supplements herein.

52. Rather than accepting the Defence's proposed conditions or imposing alternatives, the Trial Chamber simply refused to allow any form of recording. The Trial Chamber has not identified a sufficiently important objective – such as a security concern or a risk to another person or to the proceedings – that necessitates impairing Mr. IENG Sary's fundamental right to prepare a defence.<sup>132</sup> Instead, the Trial Chamber cites the illusory intrusive nature of video and/or audio recording to justify consciously avoiding any positive knowledge of Mr. IENG Sary's actual ability to participate in his trial.

## VI. CONCLUSION AND RELIEF REQUESTED

53. The Trial Chamber is preventing the Defence from making a record of Mr. IENG Sary's health and ability to enjoy his fair trial rights by ostensibly adopting a strategy of consequentialism: completing the proceedings in Case 002/01 with Mr. IENG Sary as a sitting Accused, under any and all circumstances. While this may be understandable in light of the alleged crimes contained in the Closing Order, it is neither noble nor righteous to violate Mr. IENG Sary's fundamental fair trial rights. The virtues of the rule of law<sup>133</sup> are

<sup>131</sup> Transcript, 11 December 2012, E1/151.1, p. 3-4. *See also* Pending Appeal, para. 22.

<sup>132</sup> *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.

<sup>133</sup> Lord Bingham defines the "rule of law" as requiring "that all persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts." *THE RULE OF LAW* 8 (Penguin Books 2011). The virtues of the rule of law are thus equality before the law and predictability; virtues which will be lost if the court does not strictly apply legal rules. Citing Judge Gros's dissenting opinion in the International Court of Justice's judgement, *Tunisia-Libya Continental Shelf Case* (Reports 1982), p. 153, Professor Koskenniemi notes the risks at stake if abstract ideas, such as fairness, become determinative of decisions: decisions become a matter of "political compromise." The reason for legal rules in the first place is to avoid having judges engage in political decision making and balancing exercises. In taking a purposive approach, legal rules "have only instrumental value" and "lack independent normative force", with the content of the law becoming dependent on the purpose each individual judge is trying to achieve. The virtues of the rule of law are thus lost. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 51 (Cambridge University Press 2007).

most required when complying with it is least convenient. Abandoning the scrupulous adherence to and strict application of all fair trial rights guaranteed by the Cambodian Constitution and the ECCC by implementing *laws of necessity* may appease public or donor desires and expectations, but it also, assuredly, risks tainting the trial proceedings and sacrificing the end by de-legitimizing the judgement.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to:

A. ANNUL the Impugned Decision; and

B. ORDER the Trial Chamber to either permit the Audio Visual Unit to broadcast Mr. IENG Sary on the courtroom monitor or allow the Defence to video and/or audio record Mr. IENG Sary in the holding cell; and

C. ORDER the Trial Chamber to accept the filing of the video and/or audio recordings 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 5<sup>th</sup> day of February, 2013