

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/SC**Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 5 January 2012**CLASSIFICATION****Classification of the document
suggested by the filing party:** PUBLIC**Classification by OCIJ
or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**IENG SARY'S 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**

Filed by:**Distribution to:****The Co-Lawyers:**ANG Udom
Michael G. KARNAVAS**The Supreme Court Chamber Judges:**Judge KONG Srim
Judge SOM Sereyvuth
Judge MONG Monichariya
Judge YA Narin
Judge MOTOO Noguchi
Judge Agnieszka KLONOWIECKA-MILART
Judge Chandra Nihal JAYASINGHE
Reserve Judge SIN Rith
Reserve Judge Florence MUMBA**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 104(1), 104(4)(d), 105(2), and 21 of the ECCC Internal Rules (“Rules”), hereby appeals 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 (“Impugned Decision”).¹ This Appeal is made necessary due to errors on questions of law invalidating the decision, an error of fact that has occasioned a miscarriage of justice, and a discernible error in the exercise of the Trial Chamber’s discretion which has resulted in prejudice to Mr. IENG Sary. The Impugned Decision constitutes an interference with the administration of justice, violating: **a.** Mr. IENG Sary’s right to waive his presence during trial; and **b.** Mr. IENG Sary’s constitutionally protected right to participate in the proceedings and assist in his own defence. The Defence incorporates by reference all factual and legal arguments the Defence raised before the Trial Chamber relevant to this appeal.²

I. GROUNDS OF APPEAL

- A. At the ECCC, as under international law, Mr. IENG Sary’s right to participate in the proceedings and assist in his own defence is unqualified and guaranteed by the Constitution and the ECCC’s legal framework. For health reasons, Mr. IENG Sary cannot always participate or assist in his own defence while seated in the courtroom. Did the Trial Chamber err in compelling Mr. IENG Sary to remain in the courtroom rather than allowing him to participate and assist in his defence from a specially equipped holding cell?*
- B. The Rules and international procedural rules, jurisprudence and practice permit Mr. IENG Sary to waive his presence during trial when he is represented by counsel. Through his co-lawyers, Mr. IENG Sary waived his right to be present in the courtroom and requested, due to health reasons, to participate in the proceedings from a holding cell using monitoring equipment. Did the Trial Chamber err in rejecting Mr. IENG Sary’s waiver and compelling him to remain in the courtroom?*

¹ Transcript, 21 November 2011, E1/13.1 (“21 November Transcript”), p. 36; Transcript, 22 November 2011, E1/14.1 (“22 November Transcript”), p. 8.

² 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 (“Observations”). *See also* Initial Hearing Transcript, 27 June 2011, E1/14.1, p. 65-67, 69-70; 22 November Transcript, p. 1-3.

- C. The Constitution and the ECCC's legal framework together prohibit punishment being levied on Mr. IENG Sary that is not prescribed by law. The Trial Chamber compelled Mr. IENG Sary to remain in the courtroom while in severe physical pain having disregarded his waiver of his right to be present. Did the Trial Chamber err by punishing Mr. IENG Sary in a manner not prescribed by law?*
- D. The Constitution and the ECCC's legal framework together prohibit coercive measures being levied on Mr. IENG Sary that are not strictly limited to the needs of the proceedings or fully respectful of his human dignity. The Trial Chamber compelled Mr. IENG Sary to remain in the courtroom while in severe physical pain having disregarded his waiver of his right to be present. Did the Trial Chamber err by subjecting Mr. IENG Sary to coercive measures that are not strictly limited to the needs of the proceedings or fully respectful of his human dignity?*
- E. The Trial Chamber abuses its discretion by giving weight to extraneous or irrelevant considerations in rendering a decision, and failing to give weight or sufficient weight to relevant considerations. The Trial Chamber compelled Mr. IENG Sary to remain in the courtroom while in severe physical pain so that the public and other Parties could see that he was hearing the charges against him. Did the Trial Chamber abuse its discretion by favoring the desires of the public and other Parties over Mr. IENG Sary's medical condition and fundamental fair trial rights?*

II. SUMMARY OF ARGUMENTS

1. By compelling Mr. IENG Sary to remain in the courtroom, the Trial Chamber violated Mr. IENG Sary's constitutionally protected and unqualified right to participate effectively in the proceedings against him and his right to waive his presence at trial. The Impugned Decision constitutes an abuse of discretion and an interference with the administration of justice.
2. Mr. IENG Sary has a constitutionally protected and unqualified right to participate in the proceedings against him and to assist in his own defence. This right is guaranteed in the ECCC legal framework and by the International Covenant on Civil and Political Rights ("ICCPR"). Due to his medical conditions, compelling Mr. IENG Sary's physical

presence in the courtroom prohibited him from being mentally present and able to participate and assist in his defence.

3. In accordance with the Rules and international procedure, practice and jurisprudence, Mr. IENG Sary has the right to waive his presence in the courtroom if he does so voluntarily, knowingly and unequivocally and is represented by counsel. Mr. IENG Sary waived his presence in the courtroom and requested to participate in the proceedings from a holding cell, while represented in the courtroom by counsel. By refusing to recognize his waiver and compelling him to remain in the courtroom, the Trial Chamber violated Mr. IENG Sary's right to participate and assist in his defence and his right to waive his presence.
4. In rendering the Impugned Decision, the Trial Chamber compelled Mr. IENG Sary to remain in the courtroom while in severe physical pain, having disregarded his waiver of his right to be present. The Trial Chamber erred by punishing Mr. IENG Sary and subjecting him to coercive measures that are neither prescribed by law, strictly limited to the needs of the proceedings, nor fully respectful of his human dignity.
5. In rendering the Impugned Decision, the Trial Chamber gave excessive consideration to the desires and expectations of the public and other Parties, while paying insufficient regard to Mr. IENG Sary's medical conditions and, more importantly, his constitutionally guaranteed and unqualified fundamental fair trial rights, including his right to be treated with human dignity. The Trial Chamber abused its discretion by compelling Mr. IENG Sary to be present in the courtroom, even though his physical pain prevented him from being mentally present. Mr. IENG Sary's remote participation from one of the holding cells was a reasonable alternative to compelling him to be physically present in the courtroom. This discernible error in the exercise of the Trial Chamber's discretion resulted in prejudice to Mr. IENG Sary.

III. PRELIMINARY MATTERS

A. Admissibility of the Appeal

6. The Grounds of Appeal concern the Trial Chamber's knowing and willful interference with the administration of justice resulting from an abridgement of Mr. IENG Sary's constitutionally guaranteed and unqualified fundamental fair trial rights to participate in the proceedings against him and assist in his defence. The Trial Chamber erred in law and in fact and abused its discretion in refusing Mr. IENG Sary's request to participate in

the proceedings from a holding cell and compelling him to remain in the courtroom. These errors concern the Trial Chamber's disregard of Mr. IENG Sary's fundamental fair trial rights to participate and assist in his defence and his right to waive his presence in the courtroom. The errors impact the conduct of the proceedings, knowingly and willfully depriving Mr. IENG Sary of his constitutionally protected fundamental fair trial rights; they are incurable unless resolved on an interlocutory basis. The Grounds of Appeal are admissible pursuant to Rule 104(1), 104(4)(d) and 105(2).³

7. The Impugned Decision violates Mr. IENG Sary's right to participate effectively in the proceedings against him and assist in his own defence. By paying insufficient regard to Mr. IENG Sary's medical conditions⁴ and compelling him to be present physically in the courtroom because it was "opening statements against the accused" and to "illustrate to the parties and the public that [Mr. IENG Sary] indeed hear[s] the charges" against him,⁵ the Trial Chamber prevented Mr. IENG Sary from being mentally present and thus fully participating in the proceedings, as he is entitled to under the Constitution. The Impugned Decision contains errors of law that invalidate it⁶ and errors of fact which have caused a miscarriage of justice;⁷ thus, it is subject to immediate appeal pursuant to Rule 104(1). By valuing the desires of the public and other Parties over the fundamental right of Mr. IENG Sary to participate and assist in his own defence, the Trial Chamber committed "discernible error[s]" in exercising its discretion, prejudicing Mr. IENG Sary. The Impugned Decision is subject to immediate appeal pursuant to Rule 104(1) as an abuse of discretion, resulting in prejudice to Mr. IENG Sary.
8. The Impugned Decision is subject to immediate appeal because the Trial Chamber's violation of Mr. IENG Sary's fundamental fair trial rights constitutes an interference with

³ Rule 105(2) requires that a party filing an immediate appeal of a Trial Chamber decision shall: **a.** specify an alleged error of law and demonstrate how it invalidates the decision; **b.** specify a discernible error in the exercise of the Trial Chamber's discretion which results in prejudice to the appellant; or **c.** specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice.

⁴ See Report Prepared in Response to the Trial Chamber's Order Assigning Expert – E62/3, 13 June 2011, E62/3/5 (Confidential Document) ("Campbell Report"); 21 November Transcript, p. 36; 22 November Transcript, p. 1-3.

⁵ 21 November Transcript, p. 36. See also 22 November Transcript, p. 8. This phase of the trial was not the first occasion on which Mr. IENG Sary heard the charges against him. He was informed of the charges against him prior to the commencement of trial in several public hearings and through the issuance of the Closing Order. See Written Record of Adversarial Hearing, 14 November 2007, C19, p. 2; Written Record of Interview of Charged Person, 16 December 2007, D282, p. 3-5; Closing Order, 15 September 2010, D427; Initial Hearing, 27 June 2011, E1/4.1, p. 1.

⁶ Rule 104(1)(a).

⁷ Rule 104(1)(b).

the administration of justice.⁸ Contrary to the Pre-Trial Chamber's interpretation,⁹ there is nothing in the Establishment Law, Agreement or the Rules preventing the application of Rule 35 against the Trial Chamber itself.¹⁰ Immunity provided for under the Establishment Law and Agreement¹¹ does not operate to bar the admissibility of this Appeal as: **a.** the relief sought does not request *sanctions* as a remedy but merely the *reversal* of judicial error; and **b.** the Pre-Trial Chamber itself has proceeded against international personnel pursuant to Rule 35, notwithstanding the immunity from legal process granted to international personnel pursuant to Article 42 new(2)(a) of the Establishment Law and Article 20(2)(a) of the Agreement.¹²

9. A judge can trespass on an Accused's constitutional rights without necessarily being corrupt or ill-willed, i.e. tainted by bias or the appearance of bias. It would simply be wrong to find that jurisdiction considering behavior of judges in their own cases is limited to Rule 34 applications for disqualification.¹³ This distinction must be made otherwise legitimate challenges to judicial abuse at the interlocutory stage may be summarily dismissed unless *prima facie* evidence of explicit acts of judicial corruption or bias exists, such as encountering a judge – *in flagrante delicto* – taking a bribe.
10. The Pre-Trial Chamber's interpretation of Rule 35 – were it to be accepted – gives Trial Chamber judges *carte blanche* to act improperly by effectively limiting, stringently, the parties' rights of interlocutory appeal. Rule 35 cannot be so construed. Rule 21 requires all Rules to be interpreted in such a way so as to safeguard the interests of Mr. IENG

⁸ Rule 104(4)(d).

⁹ See Decision on IENG Sary's Rule 35 Application for Judge Marcel Lemonde's Disqualification, Case 002/07-12-2009-ECCC/PTC(06), 5, 29 March 2010 ("*Lemonde* Decision"), paras. 11, 14: "There is no prescribed jurisdiction for any of the Chambers of the ECCC to deal with any disciplinary matters in respect of any of the judges of the ECCC. ... As the Application seeks the disqualification of Judge Lemonde as a sanction pursuant to Internal Rule 35 based on behavior of the judge in his cases qualified by the Co-Lawyers as amounting to the interference of justice it is therefore not admissible."

¹⁰ Considered in light of Rule 21, Rule 35 must be distinguished from Rule 77 of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")'s Rules of Procedure and Evidence. Whereas ICTY Rule 77 relates to the International Tribunal's "inherent power" to "hold in contempt" those who knowingly and willfully interfere with the administration of justice, a plain and ordinary reading of the ECCC's Rule 35 shows that proceedings pursuant to the latter rule are not limited to those suspected of contempt, as Rule 35 is silent on this topic. Any inherent power of the ECCC to find a person liable for contempt is separate and distinguishable from the Chambers' power to find a person liable for knowing and willful interference with the administration of justice pursuant to Rule 35.

¹¹ Establishment Law, Arts. 41, 42 new; Agreement, Arts. 19 and 20.

¹² See Case File 002/14-12-2009-ECCC/PTC(08).

¹³ I.e. if and when judges have a personal or financial interest or an association which objectively might affect their or her impartiality, or give rise to the appearance of bias. Cf. *Lemonde* Decision, para. 11.

Sary, and to ensure legal certainty and transparency – in light of the inherent specificity of the ECCC – required by Rule 21.¹⁴

11. The Pre-Trial Chamber has held that Rule 21 “requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person’s right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded in this particular instance.”¹⁵ The Supreme Court Chamber should affirm a broad interpretation of the right to an immediate appeal. This is particularly relevant in this instance where the Trial Chamber is failing to safeguard Mr. IENG Sary’s fundamental fair trial rights: **a.** to participate and assist in his defence, **b.** to waive his presence in the courtroom, **c.** to be punished only according to law, and **d.** not to be made subject to coercive measures that are not strictly limited to the needs of the proceedings and that do not fully respect his human dignity.
12. Rule 35 applies to “any person” who knowingly and willfully interferes with the administration of justice. Rule 35(1) provides a non-exhaustive list of activities which may constitute interference with the administration of justice.¹⁶ The Co-Investigating Judges have explained that when exercising their Rule 35 discretion to impose sanctions for an interference with the administration of justice, “an obligation and corresponding violation should be identified.”¹⁷ The Trial Chamber has an obligation to all Accused to ensure that its judicial proceedings function in accordance with international standards of justice, fairness and due process of law,¹⁸ and to ensure that trials are conducted with full

¹⁴ Rule 21(1) states in pertinent part: “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.”

¹⁵ Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Decision Refusing to Accept the Filing of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 13.

¹⁶ Rule 35(1) states in pertinent part: “The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice, *including* any person who...” (emphasis added). At the ICTY, Rule 77(A) of the Rules of Procedure and Evidence also provides a non-exhaustive list of activities which may constitute an interference with the administration of justice. “The list of acts contained in Rule 77(A) (i)-(v) of the Rules is not exhaustive, merely representing examples of acts interfering with the Tribunal’s administration of justice.” *Prosecutor v. Milošević*, IT-02-54-Misc.5 & IT-02-54-Misc.6, Decision on the Initiation of Contempt Investigations, 18 July 2011, para. 11, *citing In the Case Against Florence Hartman*, IT-02-54-R77.5, Judgement on the Allegations of Contempt, 14 September 2009, para. 19; *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para. 39.

¹⁷ Order on the Request by the IENG Sary Defence Team for Sanctions against the Co-Prosecutors, 26 November 2009, D97/9/7, para. 8.

¹⁸ Agreement, Art. 12(2).

respect for the rights of the Accused.¹⁹ This obligation is breached when the Trial Chamber knowingly and willfully interferes with “matters closely related to the functioning of the judicial proceedings before the Tribunal.”²⁰

13. By rejecting Mr. IENG Sary’s waiver of his right to be present and by compelling him to remain in the courtroom when he could have participated in the proceedings from a holding cell, the Trial Chamber knowingly and willfully violated its obligation to protect Mr. IENG Sary’s constitutionally protected rights to participate and assist in his defence and his right to waive his presence in the courtroom. The Trial Chamber punished Mr. IENG Sary as if he were serving a sentence. By forcing Mr. IENG Sary to remain in court while enduring severe pain and suffering, the Trial Chamber effectively imposed an unlawful sentence, thereby violating the *nulla poena sine lege* principle expressly enshrined in Article 38 of the Constitution and Article 15(1) of the ICCPR. The Impugned Decision also violates Rule 21(2), which prohibits coercive measures which are not strictly limited to the needs of the proceedings and which do not fully respect human dignity.
14. The Trial Chamber, through the Impugned Decision, knowingly and willfully interfered with Mr. IENG Sary’s constitutionally protected fair trial rights. Without the Supreme Court Chamber’s interlocutory intervention, the Trial Chamber is likely to continue interfering capriciously with Mr. IENG Sary’s fundamental fair trial rights relevant to the appeal throughout the trial proceedings in Case 002. To ensure no further violations of Mr. IENG Sary’s fundamental fair trial rights, the Supreme Court Chamber should assume jurisdiction over this Appeal, and the Impugned Decision must be considered as a knowing and willful interference with the administration of justice. Consequently, this Appeal is admissible as an immediate appeal under Rule 104(4)(d).

B. Request for a Public, Oral Hearing

15. The Defence requests a public, oral hearing to address the issues raised in this Appeal. Rule 109(1) indicates that appeal hearings should generally be conducted in public.²¹ This Appeal concerns the administration of justice. The issues raised are not confidential.

¹⁹ Establishment Law, Art. 33 new. *See also* Rule 21.

²⁰ *Prosecutor v. Milošević*, IT-02-54-Misc.5 & IT-02-54-Misc.6, Decision on the Initiation of Contempt Investigations, 18 July 2011, para. 11.

IV. BACKGROUND

16. On 5 April 2011, at an *in camera* trial management meeting, Presiding Judge Nil Nonn stated that following amendments to Rule 81(5) at the February 2011 plenary session, any of the Accused may, at any time, choose to participate in the trial proceedings via video-link rather than appearing in person. Presiding Judge Nil Nonn added that the Trial Chamber may further order that the accused participate by video-link where this is required in the interests of justice.²²
17. On the morning of 27 June 2011, at the Initial Hearing, Mr. NUON Chea requested: “to leave the Courtroom and I will ... return if Your Honours will consider my request to be put for discussion before the general public in the open Court.”²³ Presiding Judge Nil Nonn accepted the request and Mr. NUON Chea was returned to the detention facility.²⁴ Presiding Judge Nil Nonn stated: “The Chamber advises the parties that the Courtroom holding cells, which contain a video link and direct phone line between each cell and the Court, are fully operational. Any of the accused may, at any time during this hearing, choose to participate in these proceedings via video link rather than appearing in person.”²⁵
18. On the same morning, the national Co-Lawyer for Ms. IENG Thirith, Mr. Phat Pouy Seang, requested: “Due to the health of my client, I’d like to seek leave so that she can return to the detention centre. She will remain so until the conclusion of the Initial Hearing due to her poor health.”²⁶ Presiding Judge Nil Nonn accepted the request and Ms. IENG Thirith was returned to the detention facility.²⁷ In allowing Ms. IENG Thirith to return to the detention facility, Presiding Judge Nil Nonn recognized “the rights of the accused to participate or not in this hearing.”²⁸ He also ordered the audio-visual

²¹ Rule 109(1) states: “Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only.”

²² Trial Management Meeting Transcript (Confidential), 5 April 2011, E1/2.1 (“TMM Transcript”), p. 21-22. *See also id.*, p. 27-42.

²³ Initial Hearing Transcript, 27 June 2011, E1/4.1, p. 17-18.

²⁴ *Id.*, p. 18.

²⁵ *Id.*, p. 33-34.

²⁶ *Id.*, p. 38.

²⁷ *Id.*, p. 39.

²⁸ *Id.*

communication equipment to be linked to the hearing, so that Ms. IENG Thirith could follow the proceedings from the detention facility.²⁹

19. In the afternoon of 27 June 2011, Presiding Judge Nil Nonn stated that “[b]efore we proceed this afternoon session, the Chamber would like to notify the accused and their counsels that according to the Internal Rule 81(3), (4) and (5), the accused’s presence is required during the trial proceedings.”³⁰ Further, “each and every day of the court proceedings, the accused person shall be present before the Chamber preliminarily before presenting the reasons that lead to the request for withdrawal from the courtroom.”³¹ Presiding Judge Nil Nonn also stated that “[t]he AV equipments have been installed so that the accused can also observe the proceeding through remote participation.”³²

20. Following Presiding Judge Nil Nonn’s statement, Mr. Sa Sovan, then national Co-Lawyer for Mr. KHIEU Samphan, stated:

[D]uring this time of the hearing my client has been rather tired and fatigued. And he would like to ask for the Chamber’s permission to allow him to go to the holding cell downstairs, and that he will be coming back to the courtroom tomorrow. He says it would be okay now for I will be representing him in this courtroom, and that the court proceedings today are dedicated to other defence counsel rather than to him in particular, so he would like to reserve his energy for tomorrow’s session instead.³³

21. Presiding Judge Nil Nonn responded to the request:

The Chambers has noted the request ... and of course noted the reasoning behind this request. The Chamber notes also the situation or the health condition of the accused, Mr. Khieu Samphan does not appear to be deteriorating or severe, that’s why the Chamber finds that he shall remain seated in this courtroom.³⁴

22. International Co-Lawyer for Mr. IENG Sary, Michael G. Karnavas, submitted:

First and foremost, Mr. President, with the deepest respect, I believe that when an accused believes that he is not able to be in court, and is willing to waive his rights to be present, that those wishes have to be granted by the Trial Chamber.

...

We respectfully request that some further consideration be given to this matter, because these individuals are old. They may look fine by appearances, but our client in particular has problems sitting for long periods of time. He also needs to use the restroom virtually every half hour. It is painful for him to be here, he

²⁹ *Id.*

³⁰ *Id.*, p. 62.

³¹ *Id.*, p. 63.

³² *Id.*

³³ *Id.*, p. 64.

³⁴ *Id.*

cannot concentrate, he cannot really assist in his own defence. However, the Trial Chamber has adopted a procedure, which I believe is on the cutting edge of the law, which is to have holding cells nearby where the clients can participate and can assist their clients.

...

Forcing an accused to be present, when they cannot or do not wish to be here, is not a solution. As I've indicated, if an accused wishes not to attend, for whatever the reason may be, that is a personal decision being made by the accused, and no rights are being taken away from him by the Trial Chamber. Conversely, forcing an accused to be in Court when they're physically, or even mentally, not willing, capable or willing to be here, I respectfully submit, borderlines on a violation of an accused's fair trial rights and their human rights.

...

The alternative is to allow the parties to brief the issue... But I do believe that if a client does not want to be in Court, he cannot be forced to be in Court. And if he's unable to be in Court, he should not be forced to be in Court. And I do believe, my personal opinion, and I can do more research on it, but I believe that forcing an accused to be in Court, when the accused is waiving his or her presence, recognising the Court, or even not recognising the Court, once they waive their presence, it is a voluntary waiver, their rights are not being violated, but I think it is a violation of human rights to force an accused to be in Court when he or she is clearly unable to be here.³⁵

23. International Co-Prosecutor Andrew Cayley submitted that "there is a basic fundamental requirement that an accused attend trial."³⁶ Further, "in terms of an accused actually not being present in the courtroom during the proceedings, if the Court were to grant that application, it needs to be very clear why the individual is not attending."³⁷
24. Judge Lavergne clarified that "[i]n the event that the accused refuses to appear, in such a scenario he can waive his right to be here and allow his counsel to make representations, but to make a deliberate choice to not appear."³⁸ Further, "the Chamber wishes to know at the beginning of each hearing day ... if each accused person intends to appear before the Chamber or not," pursuant to Rule 81(4).³⁹ Judge Lavergne continued that the Trial Chamber must know the health or other serious reasons why an Accused may not be able to physically appear and may wish to participate remotely, pursuant to Rule 81(5).⁴⁰

³⁵ *Id.*, p. 65-67, 69-70.

³⁶ *Id.*, p. 71.

³⁷ *Id.*, p. 72.

³⁸ *Id.*, p. 75. Judge Lavergne clarified that he was referring to Rule 81(4) in his discussion of the Accused's right to waive his appearance. *See id.*, p. 76.

³⁹ *Id.*, p. 75.

⁴⁰ *Id.*

25. International Lead Civil Party Co-Lawyer Elisabeth Simonneau-Fort submitted “to the extent that it is possible, and to the extent that all of the rights are respected, this is a matter of respect for victims and civil parties.... And if possible, they would like to see the accused present during these proceedings.”⁴¹
26. Following this discussion and in response to a request by Mr. IENG Sary to leave the courtroom, Presiding Judge Nil Nonn found that “the accused person has reason for us to believe that his health condition is warranted for permission to remain seated at the holding cell and that he observes the proceeding through remote participation with AV equipment installed in the cell.”⁴² Presiding Judge Nil Nonn further stated: “The Chamber would like to reiterate that all accused persons shall be brought to the courtroom early in the morning of every session, and the Chamber will look into the request on a daily basis, on a case-by-case situation; for example, if such a request is made concerning the presence of the accused in the courtroom and whether the Chamber would grant permission or not.”⁴³
27. On 28 June 2011, Mr. NUON Chea requested to return to the detention facility because the proceedings did not concern him.⁴⁴ Presiding Judge Nil Nonn granted his request, noting that “this is the right of the accused... He can now remove himself and return to the detention facility.”⁴⁵ Subsequently, Ms. IENG Thirith’s national Co-Lawyer sought leave for her “to go back to the detention facility because she is not now well.”⁴⁶ Presiding Judge Nil Nonn granted this request “[b]ecause [it] is well-reasoned” and also permitted Mr. IENG Sary to return to the detention facility “because they have the problem of the accused, and [because] the accused Ieng Sary has been sitting in this courtroom for quite a long time.”⁴⁷
28. On 11 October 2011, the Defence filed the Observations. The Observations were filed to clarify that at the international level an Accused has the right to waive his right to be present at trial if he does so in a voluntary, knowing and unequivocal manner and he is

⁴¹ *Id.*, p. 78.

⁴² *Id.*, p. 78-79.

⁴³ *Id.*, p. 79.

⁴⁴ Initial Hearing Transcript, 28 June 2011, E1/5.1, p. 1-2.

⁴⁵ *Id.*, p. 2.

⁴⁶ *Id.*, p. 83.

⁴⁷ *Id.*, p. 84.

represented by counsel. The Observations were offered in the interests of justice to assist the Trial Chamber.

29. On 20 October 2011, the Co-Prosecutors responded to the Observations, asserting that:

[P]hysical presence of the Accused during trial proceedings is an obligation under Cambodian law which is consistent with international standards, subject only to specific exceptions. Accordingly, Ieng Sary has a legal obligation to attend the trial proceedings in person. The ... Chamber may, in its discretion, order Ieng Sary to be physically present during the proceedings, but that the use of public force to compel his presence in a situation of continuing refusal to attend may disproportionately limit his right to dignity. The ... Chamber may exercise its discretion to accept a written waiver by the Accused of his right to be physically present during the trial proceedings, but should do so:

- (a) having first weighed the obligation to be present in person and the other legal interests involved to determine if a waiver is indeed in the interests of justice;
- (b) only if the Accused puts on the written record complete and adequate reasons justifying his absence from the trial proceedings for each day of the proceedings, which may include his refusal to participate; and
- (c) subject to a personal warning to the Accused that the Chamber expects him to participate in the proceedings and that his absence from the trial will not later be grounds for an appeal.⁴⁸

30. On 20 October 2011, during Ms. IENG Thirith's fitness to stand hearing, Presiding Judge Nil Nonn stated:

For the benefit of the parties and the public, the Chamber clarifies that all Accused, including IENG Sary, are routinely summoned and brought to court before the beginning of each hearing. Once before the Chamber, the Accused IENG Sary is entitled to waive his right to be present at his trial and he cannot be compelled to remain in court.⁴⁹

31. On 28 October 2011, the Trial Chamber issued a memorandum to all parties in Case 002 confirming Presiding Judge Nil Nonn's comments of 20 October 2011 and further stating:

The Chamber will ... summon all Accused to appear before the Chamber prior to each day's hearing in Case 002.

Where an Accused opts to waive his right to be present, he or she may be returned to the holding cells where access to video facilities facilitates communication with the Defence team and participation in the proceedings. On all such occasions, the

⁴⁸ Co-Prosecutors' Response to IENG Sary's Observations on whether the Trial Chamber may Compel an Accused to be Present in Court, 20 October 2011, E130/2, para. 2.

⁴⁹ Transcript, 20 October 2011, E1/12.1, p. 136-37.

Defence team shall immediately provide the Chamber with a signed, unequivocal waiver of this right to be present in the courtroom during that day's proceedings.

The attendance of the accused in court may however be ordered where necessary for the Chamber to discharge its duty to safeguard the rights of the accused, or where presence is indispensable for the effective conduct of proceedings.⁵⁰

32. On 21 November 2011, during opening statements, the national Co-Lawyer for Mr. IENG Sary, Mr. Ang Udom, requested: "as my client Mr. Ieng Sary has his back problem and he cannot sit in the courtroom, I would like to request to have him monitor the proceedings in the room downstairs. That is for also for this afternoon session. Thank you."⁵¹

Presiding Judge Nil Nonn responded:

The Chamber is of the view that the brief opening statement against the accused -- and also to balance the right of the accused -- the presence is accused is important. In order to illustrate to the parties and the public that the accused indeed hear the charges against them, the Chamber therefore rejects the remote participation by the accused.⁵²

33. On 22 November 2011, Mr. Karnavas submitted:

Mr. President, Your Honours, I have an application to make, we attempted to make it yesterday, I will make it again -- I will try to make it today. *It concerns my clients and it concerns you, Mr. President, violating his 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 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.

Mr. Ieng Sary wishes to participate but he cannot do so if he cannot listen to the proceedings here in Court, he wishes to participate downstairs. He's willing to do that. *But to force him to be here where he has to take off the headsets effectively turns this trial into a sham trial -- a show trial and nothing more. His presence here becomes a mockery, he cannot participate and he cannot advise his lawyers.*

Therefore, I would urge you, Mr. President, along with your colleagues, to deliberate on this issue and come to a resolution because this is going to be a continuing problem. If you wish for the world to see that this is a model Tribunal

⁵⁰ Memorandum from the President of the Trial Chamber, Judge Nil Nonn, to all parties in Case 002, re: "Trial Chamber Response to IENG Sary's 'Observations' of 14 October 2011 (E130), 28 October 2011, E130/3 ("Trial Chamber Memorandum").

⁵¹ Transcript of Opening Statements, 21 November 2011, E1/13.1, p. 36.

⁵² *Id.*

and that this is a court that is going to dispense justice as the Prosecution yesterday suggested, invoking Justice Jackson's words, then I suggest that we do everything that we can to ensure that the proceedings go as smoothly as possible and that the Accused can participate in their defence. In none -- in none of the International Tribunals or Internationalized Tribunals are accused forced to be in Court, none. The International Criminal Court for the former Yugoslavia or for Rwanda or Sierra Leone or Lebanon or the ICC, we brief the issue, we filed observations because we were concerned that some members of the Bench were not fully aware of or appreciated the fair trial rights of the Accused, one of which is to waive his presence, that's why we did so.

So we urge you, Mr. President, with the deepest respect, to please consider or reconsider your decision, allow Mr. Ieng Sary to go downstairs and watch the proceedings so later on he can advise his clients and give instructions to his clients. He is not withdrawing from this proceeding, he is participating, he wishes to participate. Please allow him to participate by ensuring that his fair trial rights are respected throughout the proceedings.⁵³

34. Presiding Judge Nil Nonn stated:

The Trial Chamber is of the opinion that, at this stage, 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. For the above reasons, the Trial Chamber rejects the request made by the Accused. The Accused is therefore required to be in this courtroom to follow the proceeding.⁵⁴

V. ARGUMENT AND LAW

35. The Constitution, the Establishment Law and the Agreement require that ECCC proceedings be conducted in accordance with international standards of justice, fairness, and due process of law.⁵⁵ The Trial Chamber *must* ensure a fair trial and *must* protect Mr. IENG Sary's fundamental fair trial rights.⁵⁶ As demonstrated *infra*, these rights include Mr. IENG Sary's right to participate in the proceedings and assist in his defence, and his right to waive his presence in the courtroom. The Constitution, the Establishment Law and the Agreement also incorporate the *nulla poena sine lege* principle.⁵⁷ This principle requires that Mr. IENG Sary shall only be subjected to legal

⁵³ 22 November Transcript, p. 1-3 (emphasis added).

⁵⁴ *Id.*, p. 8.

⁵⁵ Constitution, Art. 31; Establishment Law, Art. 33 new; Agreement, Art. 13(1).

⁵⁶ Establishment Law, Art. 33 new; Agreement, Art. 13; Rule 21.

⁵⁷ Constitution, Art. 31; Establishment Law, Art. 33 new; Agreement, Art. 13(1), incorporating ICCPR Art. 15(1): "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. *Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby*" (emphasis added).

sanction that is prescribed by law.⁵⁸ Rule 21(2) also requires that any “coercive measures to which [Mr. IENG Sary] may be subjected shall ... be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.” The Trial Chamber breached these obligations and violated Mr. IENG Sary’s fundamental fair trial rights by gratuitously inflicting physical pain on him, i.e., punishing him by disregarding his waiver of his right to be present and compelling him to remain in the courtroom when in severe pain and discomfort – rather than allowing him to participate in the proceedings from a specially equipped holding cell.

A. The Trial Chamber erred in law by violating Mr. IENG Sary’s unqualified right to participate and assist in his defence

36. Citing no legal authority, the Trial Chamber ordered Mr. IENG Sary to remain in the courtroom to hear the opening statements and so that the public and the Parties could observe that he was hearing the charges against him.⁵⁹ This order is without merit. As guaranteed by the Establishment Law, the Agreement, and the ICCPR, Mr. IENG Sary has the fundamental right to participate effectively in any and all criminal proceedings against him. By being forced to remain in the courtroom when his physical pain and discomfort impacted his mental awareness, Mr. IENG Sary was prevented from participating effectively in the proceedings. The Trial Chamber violated Mr. IENG Sary’s right to participate and assist in his own defence, a right expressly guaranteed by the Constitution and the ECCC legal framework.

37. Mr. IENG Sary’s right to participate in the proceedings includes certain minimum guarantees: **a.** to have adequate time and facilities for the preparation of his defence;⁶⁰ **b.** to communicate with counsel of his choosing;⁶¹ and **c.** to be tried in his presence and defend himself in person.⁶² For Mr. IENG Sary to effectively exercise his right to participate, he must be “capable, from a physical and mental point of view, of taking part

⁵⁸ See *Baskaya & Okçuoğlu v. Turkey*, Eur. Ct. H. R. App. Nos. 23536/94 & 24408/94, 8 July 1999, para. 36. See also Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle Of Legality in International Criminal Law Sentencing*, 99(4) J. CRIM. L. & CRIMINOLOGY, 857, 868 (2009): “Article 7 [of the ECHR] embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law.”

⁵⁹ 21 November Transcript, p. 36; 22 November Transcript, p. 8.

⁶⁰ Establishment Law, Art. 35 new (b); Agreement, Art. 13(1); ICCPR, Art. 14(3)(b).

⁶¹ Establishment Law, Art. 35 new (b); ICCPR, Art. 14(3)(b).

⁶² Establishment Law, Art. 35 new (d); ICCPR, Art. 14(3)(d).

in the criminal proceedings against him.”⁶³ In *Stanford v. United Kingdom*, a case involving an Accused’s inability to hear the testimony of a victim, the European Court of Human Rights⁶⁴ held that the right of an Accused to participate effectively in the proceedings includes the right “to be present, [and] to hear and follow the proceedings.”⁶⁵ The Supreme Court Chamber should be guided by this jurisprudence when deliberating on this Appeal.

38. To participate in the proceedings, Mr. IENG Sary must be *mentally present*. “Presence” does not simply mean Mr. IENG Sary’s “mere physical presence” before the Trial Chamber.⁶⁶ In *Strugar*, the ICTY Trial Chamber held the requirement of presence in proceedings “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*.”⁶⁷ Logically, to assist in the presentation of his defence, Mr. IENG Sary *must* be able to follow the proceedings and communicate with his co-lawyers. To communicate with his co-lawyers, Mr. IENG Sary *must* have “the capacity to be able to instruct counsel sufficiently....”⁶⁸ According to the Human Rights Committee, fair trial rights “are not respected where ... the accused is ... unable to properly instruct his legal representative.”⁶⁹
39. Though physically present, when compelled to remain in court, Mr. IENG Sary’s medical conditions prevent him from being mentally present at all times during the proceedings. When compelled to remain in court, Mr. IENG Sary cannot participate effectively in the proceedings or assist in his own defence. Worse still, by compelling him to remain in

⁶³ *Mielke v. Germany*, Eur. Comm. H.R. 30047/96, 25 November 1996, p. 27-28. See also Decision on IENG Thirith’s Fitness to Stand Trial, 17 November 2011, E138, para. 27; *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004 (“*Strugar* Decision”), para. 30.

⁶⁴ The jurisprudence of the European Court of Human Rights is a source of authority that has been recognized and applied at the ECCC. See, e.g., Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of IENG Sary and KHIEU Samphan, 5 November 2009, 4; Order on Translation Rights and Obligations of the Parties, 19 June 2008, A190, n. 5, 7, 13.

⁶⁵ *Stanford v. United Kingdom*, Eur. Ct. H.R. 16757/90, 23 February 1994, para. 26. See also *Colozza v. Italy*, Eur. Ct. H.R. 9024/80, 12 February 1985, para. 27: “Although this is not expressly mentioned in [Article 6(1) of the ECHR], the object and purpose of the Article taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing”; *Mbenge v. Zaire*, U.N. Human Rights Committee, Communication No. 16/1977, 25 March 1983 (“*Mbenge* Communication”), para. 14.1: “According to Article 14(3) of the [ICCPR], everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance.”

⁶⁶ *Strugar* Decision, para. 32.

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.*, para. 22; *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.

⁶⁹ *Wolf v. Panama*, Communication No. 289/1988, Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, 8 April 1992, CCPR/C/44/D/289/1988, para. 6.6.

court, the Trial Chamber risks exacerbating Mr. IENG Sary's well-documented health problems, jeopardizing his overall physical well-being and even his life expectancy.⁷⁰

40. Mr. IENG Sary's co-lawyers had informed the Trial Chamber (though it would already have known), that Mr. IENG Sary has a back problem preventing him from sitting in the courtroom at all times,⁷¹ and as such, he "was unable to listen, he was in pain, he ... wishes to participate but he cannot do so if he cannot listen to the proceedings here in Court. He wishes to participate downstairs."⁷² These statements mirror the findings of Professor John Campbell, a geriatric expert appointed by the Trial Chamber who has diagnosed Mr. IENG Sary with several medical conditions.⁷³ Professor Campbell recommended controlling Mr. IENG Sary's pain and discomfort by permitting him to use a holding cell with special equipment and furniture, as this would enable him to participate fully in the proceedings.⁷⁴ The ECCC (with the financial assistance of international donors) equipped the holding cells to enable the Accused to participate remotely in the proceedings, specifically in order to implement Professor Campbell's recommendations and accommodate each of the Accused's advanced ages and health conditions. The ECCC has installed a reclining chair⁷⁵ and audio-visual equipment and a direct phone link in the holding cell to allow for two-way communication between Mr. IENG Sary and the courtroom.⁷⁶ These facilities were installed after carefully considering the rights and needs of the Accused in Case 002.

41. The Trial Chamber obdurately refused to abide by the findings and recommendations of its very own expert: Mr. IENG Sary should be permitted to participate in the proceedings from a specially equipped holding cell. By compelling Mr. IENG Sary's physical presence in the courtroom, the Trial Chamber knowingly and willfully ensured his mental absence, preventing him from exercising his fundamental right to participate and assist in his own defence and violating the Constitution, the Establishment Law, the Agreement,

⁷⁰ The Defence encourages the Supreme Court to engage experts in reviewing Mr. IENG Sary's medical history.

⁷¹ 21 November Transcript, p. 36.

⁷² 22 November Transcript, p. 1-3.

⁷³ Campbell Report, paras. 12, 17, 22.

⁷⁴ *Id.*, para. 30.

⁷⁵ Email from Matteo Crippa, Trial Chamber Legal Consultant, to Tanya Pettay, IENG Sary Defence Legal Consultant, Re: Fw: Implementation of Expert Medical Report/Re "Reclining Chair" for IENG Sary, 6 December 2011.

⁷⁶ Initial Hearing Transcript, 27 June 2011, E1/4.1, p. 63; Interoffice Memorandum from John Downard, AV Supervisor, CMS to Rupert Abbott, Acting Head of DSS, Re: Update on Videoconferencing Equipment, 7 January 2011; Behind the scenes: the holding cells, available at <http://www.eccc.gov.kh/en/articles/behind-scenes-holding-cells>.

and the Rules.⁷⁷ By knowingly and willfully obstructing Mr. IENG Sary's exercise of his fundamental fair trial rights, the Trial Chamber interfered with the administration of justice.

B. The Trial Chamber erred in law and in fact, abused its discretion and interfered with the administration of justice by disregarding Mr. IENG Sary's right to waive his presence at trial

1. The Trial Chamber erred in law by disregarding Mr. IENG Sary's right to waive his presence in the courtroom

42. The Trial Chamber declined to accept Mr. IENG Sary's waiver of his right to be present in the courtroom, despite the fact that he was represented by counsel.⁷⁸ Mr. IENG Sary did not seek to waive his right to participate in the trial itself (though the Defence submits that an Accused has the right to waive his presence if he is represented by counsel);⁷⁹ he simply wished to participate in the proceedings from a specially equipped holding cell.
43. The Establishment Law and the ICCPR (incorporated into the Constitution) recognize Mr. IENG Sary's right to be tried in his presence.⁸⁰ Rule 81 and international procedural rules, jurisprudence and practice establish that Mr. IENG Sary has the right to waive his presence in the courtroom voluntarily if he is represented by counsel. The Trial Chamber recognized (before its *volte face*) that Mr. IENG Sary "is entitled to waive his right to be present at his trial and ... cannot be compelled to remain in court."⁸¹ The Trial Chamber has also stated: "[w]here an Accused opts to waive his right to be present, he or she may be returned to the holding cells where access to video facilities facilitates communication with the Defence team and participation in the proceedings."⁸² Mr. IENG Sary did just that: he exercised his right to waive his presence in the courtroom, obviating the need to compel his presence in the courtroom. The Trial Chamber's error of law violated Mr. IENG Sary's procedural right to waive his presence in the courtroom, and in so doing, violated his constitutionally protected and unqualified right to participate in the proceedings and assist in his defence. By knowingly and willfully obstructing Mr. IENG

⁷⁷ Constitution, Art. 31; Establishment Law, Art. 33 new; Agreement, Art. 13(1).

⁷⁸ 21 November Transcript, p. 36; 22 November Transcript, p. 8.

⁷⁹ See Observations, para. 15.

⁸⁰ Constitution, Art. 31; Establishment Law, Art. 35 new (d); ICCPR, Art. 14(3)(d).

⁸¹ Transcript, 20 October 2011, E1/12.1, p. 136-37.

⁸² Trial Chamber Memorandum, p. 2. See also TMM Transcript, p. 21-22.

Sary's exercise of his fundamental fair trial rights, the Trial Chamber interfered with the administration of justice.

a. Pursuant to international practice, the right to be present at trial is Mr. IENG Sary's right to waive

44. International procedural rules, jurisprudence and practice establish that Mr. IENG Sary is not required to appear in court if he has voluntarily, knowingly and unequivocally waived his right to be present and he is represented by counsel. Although Article 300 of the Cambodian Code of Criminal Procedure states that an Accused "shall appear in person during the hearings at court," Article 333 states that the court may also proceed in an Accused's absence. While in certain national jurisdictions an Accused may be obliged to be present during trial,⁸³ this is not the case at the ECCC. If there is uncertainty regarding the interpretation or application of existing procedures, the Trial Chamber can seek guidance from procedural rules established at the international level.⁸⁴ If uncertainty still remains after the application of Civil Law rules of interpretation, then the interpretation most favorable to the Accused must be applied.⁸⁵

45. In *Delalić et al.*, the ICTY Trial Chamber recognized that the right to be present is the Accused's right: "therefore no part of the proceedings can be held in his absence, unless he waives his right and authorizes [legal counsel] to represent him."⁸⁶ Similarly, in

⁸³ See French Code of Criminal Procedure, Arts. 319-20; *Lala v. The Netherlands*, Eur.Ct.H.R. No. 14861/89, 22 September 1994, para. 14 (referencing the Dutch Code of Criminal Procedure, sect. 272); *R v. O'Boyle* (1991) Cr. App. R. 202, 208. *C.f.* U.S. Fed. R. Crim. P. 43, which permits a waiver of a defendant's right to appear when, after making an initial appearance, the defendant voluntarily absents himself after commencement of the trial.

⁸⁴ See Article 33 new of the Establishment Law. See also, *e.g.*, *Case of KAING Guek Eav alias Duch*, 001/18-07/2007/ECCC/TC, Judgement, 26 July 2010, E188, para. 35; Decision on NUON Chea's Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011, E116, para. 18; Decision on NUON Chea's Preliminary Objection Alleging the Unconstitutional Character of the Internal Rules, 8 August 2011, E51/4, paras. 6-7; Decision on IENG Sary's Motion to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, paras. 3, 6, 7.

⁸⁵ See Constitution, Art. 38: "Any case of doubt shall be resolved in favor of the accused;" Decision on Immediate Appeal by KHIEU Samphan on Application for Immediate Release, 6 June 2011, E50/3/1/4, para. 31: "In so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it is limited to doubts that remain after interpretation. Therefore, *in dubio pro reo* is primarily applied to doubts about the content of a legal norm that remain after the application of the civil law rules of interpretation, that is, upon taking into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective." See also ICC Statute, Art. 22: "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

⁸⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Transcript, 4 November 1997, p. 8973.

Nahimana the International Criminal Tribunal for Rwanda (“ICTR”) Appeals Chamber held: “however firmly the right of the accused to be tried in his presence may be established in international law, that [does] not ... preclude the beneficiary of such right from refusing to exercise it.”⁸⁷

46. At the ICTR and the Special Court for Sierra Leone, if an Accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in his absence provided that: **a.** the Accused has made his initial appearance; **b.** the Accused has been informed that he is required to be present for trial; and **c.** the Accused is represented by counsel.⁸⁸ The ICTR Appeals Chamber has held that a waiver of one’s right to be present can be made in a tacit or express manner but it “must be free and unequivocal.”⁸⁹ An Accused’s waiver must demonstrate that he is aware of: **a.** the place and date of the trial; **b.** the charges pending against him; **c.** his right to be present during the trial; **d.** his obligation to appear for trial; and **e.** the consequences of waiving his right to be present.⁹⁰ In this case, Mr. IENG Sary had been properly summoned to appear before the Trial Chamber for opening statements.⁹¹ Mr. IENG Sary had been informed at earlier public hearings of the charges against him⁹² and was aware of the consequences of waiving his right to be present in court. As was his right, Mr. IENG Sary validly waived his right to be present in the courtroom.
47. Even when Mr. IENG Sary waives his right to be present at his trial, his rights remain protected by the presence of his co-lawyers in the courtroom.⁹³ Mr. IENG Sary’s right to the assistance of counsel is a minimum guarantee of a fair trial.⁹⁴ Mr. IENG Sary’s co-lawyers have an obligation to act diligently and “mount an active defence in the best

⁸⁷ *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana* Appeals Judgement”), para. 107. *See also Mbenge* Communication, para. 14.1.

⁸⁸ ICTR Rules of Procedure and Evidence, Rule 82*bis*; Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 60. *See also* Special Tribunal for Lebanon Statute, Art. 22(1)(a).

⁸⁹ *Nahimana* Appeals Judgement, para. 109. *See also Id.*, n. 213, quoting *Battisti v. France*, Eur. Ct. H.R. 28769/05, 12 December 2006.

⁹⁰ *Nahimana* Appeals Judgement, para. 109. *See also Mbenge* Communication, para. 14.1.

⁹¹ Summons – Accused, 16 November 2011, E131/7.

⁹² Written Record of Adversarial Hearing, 14 November 2007, C19; Written Record of Interview of Charged Person, 16 December 2007, D282, p. 3-5; Initial Hearing, 27 June 2011, E1/4.1, p.1.

⁹³ Regarding the Co-Lawyers’ duty of due diligence, *see* Decision on IENG Sary’s Motion to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para. 2.

⁹⁴ ICCPR, Art. 14(3)(d). *See also Van Geyseghem v. Belgium*, Eur. Ct. H.R. No. 26103/95, 21 January 1999, para. 34.

interest of [their client].”⁹⁵ In all due modesty, it is beyond cavil that the Defence has offered Mr. IENG Sary a robust defence throughout the proceedings.⁹⁶ If Mr. IENG Sary is absent from the courtroom and participating in the proceedings from a holding cell, his co-lawyers *must* and *will* protect his fundamental fair trial rights.

b. Rule 81 recognizes Mr. IENG Sary’s right to waive his presence in the courtroom

48. Consistent with international procedural rules, jurisprudence and practice, Rule 81 expressly recognizes Mr. IENG Sary’s right to waive his presence in the courtroom. The relevant provisions of Rule 81 are contained within Rule 81(4) and Rule 81(5).⁹⁷ Rule 81(4) applies to an Accused who has been summoned to court following his initial appearance; it contemplates Mr. IENG Sary’s waiver of his right to appear if he “refuses or fails to attend the proceedings, or is expelled from them.”⁹⁸ Rule 81(5) permits Mr.

⁹⁵ See *Prosecutor v. Barayagwiza*, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 21. See also *Nahimana Appeals Judgement*, para. 109: “[W]here an accused ... decides voluntarily not to be present at trial, it is in the interests of justice to assign him or her Counsel in order, in particular, to guarantee the effective exercise of the other rights enshrined in Article 20 of the Statute [Rights of the Accused].” The ICTY *Tadić Appeals Chamber* has also stated that the purpose of according the accused certain rights under the ICTY Statute “was that the accused should exercise due diligence in utilizing them.” JUDGE RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* 306 (Transnational Publishers Inc., 2002), discussing *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998.

⁹⁶ Between 12 December 2007 to 26 December 2011, the Defence had filed a minimum of 355 submissions on behalf of Mr. IENG Sary. It has also launched a web site (<https://sites.google.com/site/iengsarydefence/>) to ensure maximum transparency. See also, e.g., Memorandum from Ms. Nisha Valabhji, Officer-in-Charge, Defence Support Section (“DSS”) to Mr. ANG Udom and Mr. Michael G. Karnavas, Co-Lawyers for IENG Sary, Subject: Trial Chamber referral of IENG Sary Requests (E53/2 & E65) and IENG Sary Motions (E70, E69, E71) to DSS for review pursuant to its power to refuse part payment for work claimed, 25 April 2011, in which DSS approved payment in full in relation to five filings referred to it by the Trial Chamber for review pursuant to DSS’s power to refuse part payment for work that is not “necessary and reasonable.” See also Andrew Cayley, *Ieng Sary Defence Team Need Not Apologise For Doing Its Job*, CAMBODIA DAILY, 12 July 2011, p. 34: “This court is uniquely placed and has linked it to some highly placed technical legal issues which must be addressed by the parties and then determined by the judges. Ang Udom and Michael Karnavas are simply doing their jobs – what is expected of them.”

⁹⁷ Rule 81(3) cannot be interpreted as requiring Mr. IENG Sary’s presence in the courtroom during trial. When viewed in the context of Rule 81 as a whole, Rule 81(3) applies to proceedings *prior to and during* the initial appearance. The sub-rules of Rule 81 follow a chronological sequence reflecting the different stages of proceedings before the Trial Chamber. Rule 81(1) states the general principle that Mr. IENG Sary shall be tried in his presence. Rule 81(2) contemplates proceedings *prior to* Mr. IENG Sary’s initial appearance, as indicated by the language the “Accused shall be brought to the ECCC detention facility until he or she is brought before the Chamber.” Rule 81(6) contemplates questioning of Mr. IENG Sary during the substantive proceedings *after* his initial appearance. Rule 81(7) contemplates the absence from the proceedings of an Accused’s lawyer. See Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, n. 267, citing Article 31 of the Vienna Convention on the Law of Treaties as indicative of the rules of statutory interpretation.

⁹⁸ Rule 81(4). See also Judge Lavergne’s statements at the Initial Hearing: “[i]n the event that the accused refuses to appear, in such a scenario he can waive his right to be here and allow his counsel to make representations, but to make a deliberate choice not to appear.” Initial Hearing Transcript, 27 June 2011, E1/4.1, p. 75. See also p. 76, where Judge Lavergne confirms that he is referring to Rule 81(4).

IENG Sary to waive his right to appear before the Trial Chamber where, due to health or other serious concerns, he cannot appear physically before the Chamber but is otherwise fit to participate in the proceedings. When Mr. IENG Sary is absent from the courtroom, Rules 81(4) and (5) ensure that he is defended during the proceedings by his lawyer.

49. Mr. IENG Sary waived his presence in the courtroom, requesting that he participate remotely as prescribed by Rule 81. To avoid substantial delay as a result of his medical conditions, Mr. IENG Sary requested to participate in the proceedings by audio-visual means.⁹⁹ This request was made notwithstanding the Defence's submission that Mr. IENG Sary cannot be *compelled* to participate even through audio-visual means.¹⁰⁰

2. The Trial Chamber erred in law and in fact and interfered with the administration of justice by contriving reasons to compel him to remain in the courtroom

50. While the Defence submits that Mr. IENG Sary has the right to absent himself from the proceedings while represented in the courtroom by counsel if he does so in a voluntary, knowing and unequivocal manner, in this instance, Mr. IENG Sary was merely seeking to absent himself from the courtroom because of his medical conditions, not from the entire proceedings. Mr. IENG Sary wished to participate in the proceedings from the holding cell, specifically designed and equipped to enable him to follow the proceedings while accommodating his medical conditions.

51. The Trial Chamber created artificial criteria – absent any legal authority – for compelling the presence of an Accused in the courtroom even when he has voluntarily, knowingly and unequivocally waived his right to be present in the courtroom for health reasons. The Trial Chamber reasoned that it may order an Accused to be present in court “where necessary for the Chamber to discharge its duty to safeguard the rights of the accused” or “where [an Accused's] presence is indispensable for the effective conduct of proceedings.”¹⁰¹ Admirable as it may sound, in this instance, the Trial Chamber ordered Mr. IENG Sary to be present in court to hear opening statements and to illustrate to the public and the Parties that he was hearing the charges against him.¹⁰² Neither of these

⁹⁹ See Rule 81(5).

¹⁰⁰ See Observations, para. 15.

¹⁰¹ Trial Chamber Memorandum, p. 2.

¹⁰² 21 November Transcript, p. 36; 22 November Transcript, p. 8.

reasons is contemplated in the Rules, international procedural rules, jurisprudence or practice. The Trial Chamber erred in law and in fact by overriding Mr. IENG Sary's valid waiver of his right to be present in the courtroom for invalid and arbitrary reasons.

52. Ironically, rather than safeguarding Mr. IENG Sary's rights by compelling him to remain in the courtroom, the Trial Chamber disregarded Mr. IENG Sary's constitutional right to participate effectively in the proceedings and his right to waive his presence, and in so doing, interfered with the administration of justice. Mr. IENG Sary's presence in the courtroom was not indispensable to the effective conduct of the proceedings. The purpose of the proceedings was for the parties to give opening statements which, unquestionably, are neither evidence nor argument.¹⁰³ Opening statements by the parties – a procedure which is foreign to the French/Civil Law system but adopted at the ECCC by the judges in plenary¹⁰⁴ – merely preview the case and the evidence the parties expect to present and are often enveloped in hyperbole and theatrics.¹⁰⁵ It was unnecessary for Mr. IENG Sary to be present to hear statements that were not evidence. The Trial Chamber was on notice that Mr. IENG Sary was not going to be testifying during these proceedings;¹⁰⁶ therefore, he did not need to be in the courtroom. Mr. IENG Sary's presence in or absence from the courtroom would have had no impact on whether or how opening statements proceeded. The OCP, other Defence teams or co-Accused could present their opening statements or remarks regardless of Mr. IENG Sary's physical presence or absence.
53. Mr. IENG Sary was not required to be present in the courtroom to show the public and the Parties that he was hearing the charges against him. Mr. IENG Sary has been

¹⁰³ See Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011, E131, p. 3, where the Trial Chamber implicitly acknowledges that opening statements are not evidence by stating: "Following the conclusion of opening statements, the hearing of evidence in Case 002 will commence at 9 a.m. on Monday 28 November 2011." See also 22 November Transcript, p. 1, where Michael G. Karnavas, International Co-Lawyer for Mr. IENG Sary, stated: "Opening statements are not evidence... [They are] 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." The Trial Chamber did not refute this statement.

¹⁰⁴ Adopted by the plenary on 5 September 2008, Rule 89bis(2) states: "Before any Accused is called for questioning, the Co-Prosecutors may make a brief opening statement of the charges against the Accused. The Accused or his/her lawyers may respond briefly."

¹⁰⁵ See e.g. International Co-Prosecutor Andrew Cayley's opening remarks. 21 November Transcript, p.108-33; 22 November Transcript, p. 21-68. Aside from lacing his statement with incendiary remarks, a major portion of the International Co-Prosecutor's opening statement was argumentative, as if it were a summation of the evidence or closing argument.

¹⁰⁶ See IENG Sary's Notice to the Trial Chamber that he will not testify during trial, 24 October 2011, E101/4.

informed of the charges being brought against him in previous public hearings.¹⁰⁷ He also has had for many months access to the Closing Order. The opening statements were not the first opportunity for the public and the Parties to observe Mr. IENG Sary in court. The audio-visual equipment in the holding cells was designed to allow two-way communication between an Accused and the courtroom,¹⁰⁸ objections to which were never raised by the OCP or Civil Parties.¹⁰⁹

54. Through judicial fiat, the Trial Chamber manufactured arbitrary reasons to compel Mr. IENG Sary's presence in the courtroom. Neither international practice nor the Rules allow Mr. IENG Sary's right to waive his presence in the courtroom to be overridden by these arbitrary reasons. By knowingly and willfully refusing to recognize Mr. IENG Sary's valid waiver of his right to be present and compelling him to remain in the courtroom for reasons lacking legality, the Trial Chamber interfered with the administration of justice.

3. Should the Supreme Court Chamber find that Mr. IENG Sary's right to participate in and assist with his defence is qualified, the restrictions imposed by the Impugned Decision were disproportionate to the reasons for denying Mr. IENG Sary's waiver

55. Should the Supreme Court Chamber find that Mr. IENG Sary's right to participate in and assist with his defence are qualified rights, then given the alternative of permitting Mr. IENG Sary's participation from a holding cell, the restrictions imposed by the Impugned Decision were disproportionate to the justifications advanced for his requested waiver. Pursuant to the principle of proportionality, "any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective."¹¹⁰ None of the reasons given for the Impugned Decision constituted sufficiently important objectives proportionately justifying the Trial Chamber's derogation from Mr. IENG Sary's fundamental fair trial rights. Mr. IENG

¹⁰⁷ Written Record of Adversarial Hearing, 14 November 2007, C19, p. 2; Written Record of Interview of Charged Person, 16 December 2007, D282, p. 3-5; Initial Hearing, 27 June 2011, E1/4.1, p. 1.

¹⁰⁸ See TMM Transcript, p.21-22.

¹⁰⁹ *Id.*, p.27 (OCP), 40 (Civil Parties).

¹¹⁰ *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. 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.

Sary was unable to participate when he remained seated in the courtroom due to his medical conditions, particularly his severe back pain.¹¹¹ Mr. IENG Sary wished to continue participating in the proceedings and assisting in his defence. The holding cells were designed for this specific situation.¹¹² Given that the Trial Chamber has previously allowed Mr. IENG Sary, Ms. IENG Thirith and Mr. NUON Chea to return to a holding cell or the detention center for health and other reasons,¹¹³ and given the Trial Chamber's own previous rulings that an Accused may waive his right to be present and choose to participate from a holding cell,¹¹⁴ the Trial Chamber's refusal to allow Mr. IENG Sary to do the same during the opening statements was inconsistent, arbitrary, unjustifiable, and (if applicable) violated the principle of proportionality.

C. Through the Impugned Decision, the Trial Chamber erred in law by violating the *nulla poena sine lege* principle

56. The Trial Chamber erred in law by compelling Mr. IENG Sary to remain in court while in severe physical pain, in violation of the *nulla poena sine lege* principle. The *nulla poena sine lege* component of the principle of legality is expressly enshrined in Article 38 of the Constitution, which states that “[c]oercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited,”¹¹⁵ and Article 15(1) of the ICCPR. The *nulla poena sine lege* principle requires that any penal sanctions must be clearly defined in the law.¹¹⁶ Leading commentators consider the *nulla poena sine lege* provision of Article 15(1) of the ICCPR, and Article 7(1) of the European Convention on Human Rights as giving rise to the *lex scripta* (written law), *lex certa* (certain and predictable), and *lex stricta* (prohibition of analogy) attributes of *nulla poena sine lege*, in addition to explicitly incorporating *lex praevia* (prohibition of retroactivity).¹¹⁷ *Nulla poena sine lege* is a safeguard preventing

¹¹¹ 21 November Transcript, p. 36; 22 November Transcript, p. 1-3.

¹¹² Behind the scenes: the holding cells, *available at* <http://www.eccc.gov.kh/en/articles/behind-scenes-holding-cells>.

¹¹³ *See supra*, Background.

¹¹⁴ TMM Transcript, p. 21-22; Initial Hearing Transcript, 27 June 2011, E1/4.1, p. 75; Transcript, 20 October 2011, E1/12.1, p. 136-7; Trial Chamber Memorandum.

¹¹⁵ Constitution, Art. 38 states in pertinent part: “Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited. Persons who commit, participate or conspire in such acts shall be punished according to the law.”

¹¹⁶ *Baskaya & Okçuoğlu v. Turkey*, Eur. Ct. H. R. App. Nos. 23536/94 & 24408/94, 8 July 1999, para. 36.

¹¹⁷ *See* Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle Of Legality in International Criminal Law Sentencing*, 99(4) JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 857, 869, *citing* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 359-60 (2d ed. 2005) (1993).

factors such as popular prejudice, political pressure, or immediate public opinion from influencing sentencing, thereby protecting the integrity of the criminal justice process itself.¹¹⁸ A retributive punishment which forces an Accused to suffer a sentence prior to a lawful conviction would violate this principle.

57. To satisfy the public and the other Parties, the Trial Chamber improperly compelled Mr. IENG Sary – an ill, 86-year-old man who was in pain – to remain on display in the courtroom. Though Mr. IENG Sary has not been convicted of any crime, by requiring him to remain in the courtroom and endure physical pain and suffering rather than permitting him to participate in the proceedings from a holding cell, the Trial Chamber inflicted upon him what can only be characterized as cruel and unusual punishment. The Impugned Decision amounts to an anticipatory sentence; the application of raw power rather than law. The actions of the Trial Chamber cannot be reconciled with the presumption of innocence¹¹⁹ or the *nulla poena sine lege* principle. The Impugned Decision is antithetical to the notion of a fair trial itself, as guaranteed by the Constitution, the Establishment Law, the Agreement, the Rules, and the ICCPR.

D. Through the Impugned Decision, the Trial Chamber erred in law by imposing coercive measures that were not strictly limited to the needs of the proceedings and fully respectful of Mr. IENG Sary’s human dignity

58. By compelling Mr. IENG Sary to remain in court while in severe physical pain, the Trial Chamber erred in law by imposing coercive measures that were not strictly limited to the needs of the proceedings and fully respectful of Mr. IENG Sary’s human dignity. Article 38 of the Constitution requires that the “law shall protect the life, honor and dignity of the citizens.” The ECCC has expressly adopted the principle of respect for human dignity during its proceedings: Rule 21(2) restricts the use of “coercive measures” against an Accused to those that are strictly limited to the needs of the proceedings and fully respect human dignity. Rights protected by the ICCPR themselves “derive from the inherent

¹¹⁸ *Id.*, 864: “A modern approach to the principle of legality appreciates *nulla poena*’s utility for not only limiting judicial authority, but also safeguarding it by preventing factors such as popular prejudice, political pressure, or immediate public opinion from influencing the sentence. It partly restrains these potential threats to justice in sentencing as well as the appearance of such an influence. Thus, in addition to safeguarding the rights of a defendant, *nulla poena* also protects the integrity of the criminal justice process.”

¹¹⁹ See Constitution, Art. 38; Establishment Law, Art. 35 new; Agreement, Art. 13(1); Rule 21(1)(d); ICCPR, Art. 14(2).

dignity of the human person,”¹²⁰ as protection of human rights rests “directly on a moral foundation, the belief that every human being, simply by virtue of his or her existence, is entitled to certain very basic, and in some instances unqualified, rights and freedoms.”¹²¹ Human dignity is “a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human.... [This] inherent dignity cannot be replaced by anything else, and it is not relative to anyone’s desires or opinions.”¹²² The inviolability of human dignity was the foundation of the post-World War II Basic Law for the Federal Republic of Germany¹²³ and underpins the government’s obligations to its citizens, with scholars noting that its centrality arose from the horrors of Nazi Germany.¹²⁴ The protection of dignity reflected in Article 38 of the Constitution¹²⁵ may be viewed as arising similarly from Cambodia’s “grievous” decline and “suffering and destruction” during the “two decades” preceding the Constitution.¹²⁶

59. By compelling Mr. IENG Sary to remain in court while in severe pain and discomfort, the Trial Chamber stripped Mr. IENG Sary of the dignity due to him as a human being and guaranteed by the Constitution. The Impugned Decision reduces Mr. IENG Sary’s physical presence in the courtroom to a mere spectacle; a curiosity item for the consumption and delectation of the public gallery. The Impugned Decision tramples over the very notions of justice, fairness, and propriety that the ECCC was established to exemplify, and fails to respect Mr. IENG Sary’s human dignity which this institution is to safeguard.

¹²⁰ ICCPR, Preamble. Article 31 of the Constitution requires that Cambodian courts “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.” These covenants include the ICCPR, to which Cambodia is a party.

¹²¹ LORD BINGHAM OF CORNHILL, *THE RULE OF LAW* 116 (Penguin Books 2010). The fundamental importance of human dignity is also affirmed in the United Nations Charter, which states that a central goal of the United Nations is to “reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person....” Charter of the United Nations, 1 U.N.T.S. XVI, Preamble (signed on 26 June 1945).

¹²² 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).

¹²³ Article 1 of the Basic Law for the Federal Republic of Germany (adopted on 8 May 1949) states: “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” The Basic Law links human dignity to human rights and establishes that “inviolable and inalienable human rights” are the basis of every community, peace and justice in the world. *Id.*, Art. 1(2), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>. Human dignity constitutes “the highest legal value in Germany.” N. Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 *COL. J. EUR. L.* 201, 216 (2008), citing EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* 42 (Praeger 2002).

¹²⁴ N. Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 *COL. J. EUR. L.* 201, 207 (2008).

¹²⁵ Constitution, Art. 38.

¹²⁶ *Id.*, Preamble.

E. The Trial Chamber abused its discretion and caused prejudice to Mr. IENG Sary by violating his fundamental fair trial rights

60. Notwithstanding that Mr. IENG Sary was in such severe pain and discomfort that he was unable to participate mentally in the proceedings, the Trial Chamber compelled him to remain in the courtroom and on display so that the public and Parties could observe him hearing the charges against him.¹²⁷ In catering to the base expectations of the public in this way, in a manner seemingly designed to exact retribution prior to the imposition of any lawful sentence, the Trial Chamber subjected Mr. IENG Sary to coercive measures not strictly limited to the needs of the proceedings, failed to fully respect his human dignity, and violated the *nulla poena sine lege* principle. The desires and expectations of the public and the Parties are extraneous to Mr. IENG Sary's fundamental fair trial rights and to the Trial Chamber's obligation to ensure a fair trial; they cannot take precedence over Mr. IENG Sary's fundamental rights to participate in the proceedings and in his own defence, to have his human dignity fully respected, and to be free from coercive measures that are neither prescribed by law nor strictly limited to the needs of the proceedings. The Trial Chamber abused its discretion by considering irrelevant factors and ignoring relevant factors when rendering the Impugned Decision.

61. By keeping Mr. IENG Sary on public display rather than permitting him to follow and participate in the proceedings from a specially equipped holding cell, the Trial Chamber committed a discernible error in the exercise of its discretion that resulted in severe prejudice to Mr. IENG Sary.¹²⁸ The Defence invites the Supreme Court Chamber to be guided by ICTY jurisprudence on the standard for abuse of discretion. In *Prlić et al.*, the ICTY Appeals Chamber held that an abuse of discretion has occurred where the Impugned Decision is "so unfair or unreasonable ... [in that] the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations."¹²⁹

¹²⁷ 21 November Transcript, p. 36; 22 November Transcript, p. 8.

¹²⁸ See Rule 104(1).

¹²⁹ *Prosecutor v. Prlić et al.*, IT-04-74-AR65.24, Decision on Jadranko Prlić's Appeal Against the Trial Chamber Decision on his Motion for Provisional Release, 8 June 2011, para. 4, citing *Prosecutor v. Popović et al.*, IT-05-88-AR65.10, Decision on Radivoje Miletić's Appeal Against Decision on Miletić's Motion for Provisional Release, 19 November 2009, paras. 4-5; *Prosecutor v. Prlić et al.*, IT-04-74-AR65.14, Decision on Jadranko Prlić's Appeal Against the *Décision Relative à la demande de mise en liberté provisoire de l'accusé Prlić*, 9 April 2009, 5 June 2009, paras. 5-6; *Prosecutor v. Popović et al.*, IT-05-88-AR65.7, Decision on

62. The Trial Chamber indulged the wishes of the public and the Parties, while disregarding Mr. IENG Sary's well-documented medical conditions and their impact on his ability to exercise his fundamental right to participate in the proceedings against him when seated in the courtroom, as well as his right to be treated with dignity and the *nulla poena sine lege* principle. Considering the findings and recommendations of the Trial Chamber's own expert, Professor Campbell, and the fact that the holding cells have been specially equipped to accommodate the Accused's medical conditions, Mr. IENG Sary's medical condition was a highly relevant factor that the Trial Chamber should have taken into account. When the Trial Chamber compelled Mr. IENG Sary's physical presence in the courtroom, it knowingly and willfully prevented him from participating mentally and assisting in his defence, thereby causing him prejudice.

VI. CONCLUSION AND RELIEF REQUESTED

63. Through the Impugned Decision, the Trial Chamber deprived Mr. IENG Sary of his right to participate effectively in the proceedings and to assist in his defence. By compelling him to remain in the courtroom for the benefit of the public and the other Parties and disregarding his waiver of his right to be present, the Trial Chamber not only failed in its obligation to safeguard Mr. IENG Sary's right to a fair trial, but it subordinated his fair trial rights to the expectations of the public and Parties. Fittingly, former ICTY/ICTR Appeals Chamber Judge Schomburg has observed: "[t]he international community has come to accept that an accused *must never become the mere object of criminal proceedings.*"¹³⁰ In this instance, the Trial Chamber has treated Mr. IENG Sary not merely as an object, but as an object of curiosity, on show and on stage to satisfy the retributive desires of the gallery, seemingly regardless of the deleterious impact of this conduct on the fairness of the trial and the legitimacy of ECCC as a whole.

64. As the United States Supreme Court has eloquently noted, "dignity, order, and decorum" should be hallmarks of court proceedings.¹³¹ This observation applies equally to ECCC proceedings. Yet through the Impugned Decision, the Trial Chamber infringed both Mr.

Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008, para. 6.

¹³⁰ 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).


¹³¹ *Illinois v. Allen*, 397 U.S. 337, 343 (1970): "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmark of all court proceedings...."

IENG Sary's right to be treated with human dignity *and* his due process rights guaranteed by the Constitution, the Establishment Law, the Agreement, and the Rules. The Trial Chamber has knowingly and willfully interfered with the administration of justice. Because the Trial Chamber has erred in law and in fact and abused its discretion, the Supreme Court Chamber should, with all deliberate speed, rectify the injustice manifested by the Impugned Decision.


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


- A. FIND this Appeal admissible;
- B. GRANT an oral, public hearing on the issues raised in this Appeal;
- C. HOLD that the Trial Chamber erred in compelling Mr. IENG Sary to remain in the courtroom and refusing to permit him to participate in the proceedings from a specially equipped holding cell; and
- D. ANNUL the Impugned Decision.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 5th day of **January, 2012**