

## **Trial Chamber Decides that Accused Ieng Sary Is Fit and May Be Ordered to Participate by Video-Link**

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Given the age and fragile health of the accused senior Khmer Rouge leaders currently on trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC), there have long been fears that they would not live to see judgment. One accused has already been found unfit and dismissed from the case.<sup>1</sup> Eighty-seven-year-old Ieng Sary has physical ailments, difficulty concentrating for long periods, and is unable to sit through a full day of trial. He regularly appears at the start of the day and then requests permission to participate from the holding cell during the mid-morning break, although proceedings generally last until at least 4 p.m. His medical problems have thus far resulted in a loss of 12 days of trial. On his recent return from a three-month hospitalization, the Trial Chamber found him fit and decided that, in order to mitigate the effects of his ongoing health issues, should he refuse to waive his right to be physically present, it may order him to participate by video-link from the holding cell.<sup>2</sup> Previous international courts have contemplated requiring accused to take part in proceedings by video-link; however, it appears that as of yet, no court has found it appropriate to do so.

In 2011, Ieng Sary’s defense counsel sought half-day trial sessions, arguing that Mr. Sary “has a right to be present and intends to exercise this right, yet his age and ill-health prevent him from sitting in the courtroom for an extended period of time.”<sup>3</sup> Nevertheless, the team did not contest a geriatric expert’s finding that Mr. Sary’s health problems did not affect his fitness to attend trial.<sup>4</sup> Shortly thereafter, the ECCC judges amended the Court’s Internal Rules to explicitly provide for audio-visual participation without an accused’s consent “where [his] absence reaches a level that causes substantial delay and, where the interests of justice so require[.]”<sup>5</sup>

Thus far, the Trial Chamber has suspended proceedings when Ieng Sary has been too ill to participate, except during a recent three-month hospitalization, during which time he waived his right to be present for specific witnesses not anticipated to testify about his conduct or crimes attributed to him.<sup>6</sup> Now that Mr. Sary has returned to the ECCC detention center, the Defense says he is not fit to follow proceedings but will maintain his waivers for non-critical witnesses in the hopes that his health will improve. However, the Defense states, should the Trial Chamber rule, as it has now done, that he is fit for trial, it will advise Mr. Sary to withdraw his waivers and seek his immediate severance from the proceedings.<sup>7</sup>

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<sup>1</sup> See Expert Commentary on Legal Filings: Decision to Release Accused Ieng Thirith from Detention (Sept. 17, 2012) at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>2</sup> Decision on Accused Ieng Sary’s Fitness to Stand Trial (Nov. 26, 2012) [hereinafter Fitness Decision].

<sup>3</sup> Ieng Sary’s Motion to Conduct the Trial Through Half-Day Sessions (Jan. 19, 2011) [hereinafter Ieng Sary 2011 Motion].

<sup>4</sup> Fitness Decision, ¶ 5.

<sup>5</sup> Internal Rules, r. 81(5).

<sup>6</sup> See, e.g., Accused Ieng Sary’s Limited Waiver of Rights to Be Present During Court Proceedings (Sept. 18, 2012).

<sup>7</sup> Transcript of Trial Proceedings—Case 002, ¶¶ 17-19, 45 (Nov. 12, 2012).

The ECCC, like all internationalized courts, guarantees the right of an accused to “be tried in his or her presence.”<sup>8</sup> To facilitate the elderly accused’s participation, the ECCC has set up a special room where they may watch the trial and instruct their counsel through a two-way audio-video link.<sup>9</sup> The Ieng Sary defense has argued that “video-link technology must not be equated with physical presence at trial.”<sup>10</sup> In support, it cited jurisprudence from the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR), which confirmed that “accused’s right to be tried in his or her presence implies a right to be physically present at trial” and found that neither its rules nor those of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court, nor the Special Court for Sierra Leone equate physical presence with participation by video-link.<sup>11</sup>

Nevertheless, these courts have determined that the right to presence is not absolute, and may be either waived or forfeited where there are “substantial trial disruptions.”<sup>12</sup> Limitations on the right to presence must be evaluated in light of “the proportionality principle, pursuant to which 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.”<sup>13</sup>

The ECCC Co-Prosecutors have argued that, unlike the ICTY and ICTR, the ECCC is a civil law court, which allows trials *in absentia*. They note that, at the civil law-based Special Tribunal for Lebanon, “presence” is not defined exclusively as “physical presence” but also includes “legal presence.” Moreover, they emphasize that even at the ICTY and ICTR, trial may continue in the absence of an accused who causes persistent trial disruptions, even if such disruptions are not intentional, as long as the restrictions imposed are “a proportional response.”<sup>14</sup>

In determining that Ieng Sary is fit for trial, the ECCC Trial Chamber rejected the Defense request to have additional experts examine his fitness, and noted that his attendance in the holding cell, where he can lie down, would alleviate most of his physical challenges to participation. It also rejected the defense team’s request that he “be filmed in the holding cell or be present in the courtroom, where the court and public can observe his participation” and evaluate whether or not it is meaningful. Instead, the Trial Chamber ruled that it may order Mr. Sary to participate from the holding cell “in the interest of justice ... where no medical basis exists to justify the Accused’s absence from proceedings, but where the Accused’s presence in the courtroom would be contrary to his medical interests and/or to the expeditious conduct of

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<sup>8</sup> ECCC Internal Rules, r. 81(1). Although the Special Tribunal for Lebanon (STL) also upholds the right to presence, it uniquely makes provision for *in absentia* proceedings in specific circumstances. *See* Statute of the Special Tribunal for Lebanon, arts. 16(4)(d), 22.

<sup>9</sup> ECCC, Behind the Scenes: Holding Cells, <http://www.eccc.gov.kh/en/articles/behind-scenes-holding-cells>.

<sup>10</sup> Ieng Sary 2011 Motion, ¶ 13.

<sup>11</sup> *Zigiranyirazo v. Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, ¶¶ 11-14 (Appeals Chamber, Oct. 30, 2006) [hereinafter *Zigiranyirazo Decision*].

<sup>12</sup> *Id.* ¶ 14.

<sup>13</sup> *See, e.g., id.*; *S. Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 17 (Appeals Chamber, Nov. 1, 2004) (discussing limitations on the right to self-representation).

<sup>14</sup> Co-Prosecutors’ Observations on Ieng Sary’s Motion to Conduct the Trial Through Half-Day Sessions, ¶¶ 8-11 (Feb. 1, 2011).

trial.” It also found that video-recording was not “necessary to ensure that the Accused is appropriately monitored.”<sup>15</sup>

In the *Stanisic & Simatovic* case, the ICTY Appeals Chamber faced a similar defense challenge and considered if the Trial Chamber “abused its discretion in ordering the establishment of a video-conference link to allow the Accused to participate in the proceedings from [the detention unit] on days that he is too unwell to attend court.” It found that although the Trial Chamber had appropriately balanced the accused’s right to be present with both his and his co-accused’s right to an expeditious trial, it had failed “to give sufficient weight” to the right to presence and had overlooked other potential options, including “allowing the case to remain in the pre-trial phase for three to six months.” Moreover, it ruled that the Trial Chamber had erred by “fail[ing] to consider whether, given his physical and mental state, [the accused] would nevertheless be able to effectively participate in his trial via the video-conference link.”<sup>16</sup>

Should Ieng Sary withdraw his waivers and the Chamber order him to participate from the holding cell, the Defense is likely to argue that, as only 12 days of trial have been lost due to Mr. Sary’s health concerns, there has been no “substantial disruption” of proceedings, and its response is both disproportionate and inadequately considers whether or not his remote participation is effective, setting the stage for a prolonged fight over a second accused’s fitness for trial.

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<sup>15</sup> Fitness Decision, ¶¶ 17, 21, 29-34.

<sup>16</sup> Prosecutor v. Stanisic & Simatovic, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, ¶¶ 11, 18-20 (Appeals Chamber, May 16, 2008).