

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 14 December 2012**CLASSIFICATION****Classification of the document
suggested by the filing party:** PUBLIC**Classification by OCIJ
or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**IENG SARY'S SUBMISSIONS ON THE LAW PERMITTING HIM TO BE AUDIO
AND / OR VIDEO RECORDED IN THE HOLDING CELL**

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Judge YOU Ottara
Judge YA Sokhan
Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge THOU Mony
Reserve Judge Claudia FENZ**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rule 92 of the ECCC Internal Rules (“Rules”) and the Trial Chamber’s directions,¹ hereby makes submissions on the law permitting him to be audio and / or video recorded in the holding cell. These submissions are made necessary by the Trial Chamber’s decision prohibiting the Defence from audio or video recording its observations of Mr. IENG Sary, including its conversations with his treating doctors, and ordering the Defence to make written submissions pursuant to Rule 92.² The Defence submits that the right to make audio and / or video recordings of Mr. IENG Sary is inherent in his fundamental right to prepare a defence, which includes the right to make a record. The Defence has a continuing obligation to protect Mr. IENG Sary’s legal interests. Given Mr. IENG Sary’s age and frailty, his health and fitness will continue to be an issue. It is crucial that the Defence be permitted to make a record by audio and / or video recording its observations of Mr. IENG Sary, including its conversations with his treating doctors, if they consent. Audio / video recording is the *best and least intrusive* means of making an *objective and verifiable record* and preserving any errors for appellate review.

I. BACKGROUND

1. On 26 November 2012, after a hearing was held on Professor Campbell’s examination of Mr. IENG Sary, the Trial Chamber issued a decision finding that Mr. IENG Sary was capable of meaningfully participating in his own defence and was, therefore, fit to stand trial.³ The Trial Chamber held that it may order Mr. IENG Sary’s participation via audio-visual means from the holding cell in the interests of justice, and gave notice to the parties that it may do so “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 the trial.”⁴ As the holding cell is accessible at all times by members of the Defence and the ECCC Medical Unit, “the Chamber [did] not consider video-recording of the holding cell to be necessary to ensure that the Accused is properly monitored.”⁵

¹ Trial Chamber Memorandum titled “Order for Submission”, 12 December 2012, E254.

² Transcript, 4 December 2012, E1/147.1, p. 19, 27-28; Email from Trial Chamber Legal Officer to the Defence, “Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility”, 7 December 2012; Draft Transcript, 11 December 2012, p. 2; Trial Chamber Memorandum titled “Order for Submission”, 12 December 2012, E254.

³ Decision on Accused IENG Sary’s Fitness to Stand Trial, 26 November 2012, E238/9.

⁴ *Id.*, para. 37.

⁵ *Id.*, para. 36.

2. On 3 December 2012, Mr. IENG Sary withdrew the waivers⁶ he had issued of his right to be present during the testimony of certain witnesses and Civil Parties. He notified the Trial Chamber that he intended to exercise his right to be present in the courtroom during all witness testimony.⁷
3. On 4 December 2012, when trial proceedings resumed, Mr. IENG Sary was not brought into the courtroom as he had requested but was instead brought to a holding cell. International Co-Lawyer Michael G. Karnavas requested that Mr. IENG Sary be present in the courtroom.⁸ Alternatively, Mr. Karnavas requested the Trial Chamber turn the monitor on in the courtroom so that Mr. IENG Sary could be observed in the holding cell,⁹ or that a member of the Defence video record Mr. IENG Sary in the holding cell.¹⁰ The purpose of these requests was to ensure that there was a record of Mr. IENG Sary's condition.¹¹ The Trial Chamber refused to allow Mr. IENG Sary to be present in the courtroom or to be video recorded in the holding cell, ruling that "[i]t will rely on his treating doctor to bring any concerns about Ieng Sary's physical condition to its attention."¹² Mr. Karnavas again asked that a member of the Defence be allowed to video record Mr. IENG Sary to make a record of his condition.¹³ The Trial Chamber replied that a Defence team member may stay in the holding cell and may draw any concerns about Mr. IENG Sary's physical condition to the treating doctor.¹⁴ The Trial Chamber prohibited the Defence from videotaping Mr. IENG Sary in the holding cell.¹⁵
4. On 5 December 2012, Mr. Karnavas informed the Trial Chamber that the Case Manager was in the holding cell with Mr. IENG Sary, taking notes, and that a report would be filed based on the Case Manager's daily observations so that there is a record of the Defence's

⁶ IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 18 September 2012, E229; IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 1 October 2012, E237; IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 30 October 2012, E237/1.

⁷ IENG Sary's Withdrawal of Waivers of Right to be Present, 3 December 2012, E237/2; IENG Sary's Notice of Withdrawal of Waivers of Right to be Present During the Testimony of Certain Witnesses and Civil Parties, 6 December 2012, E249.

⁸ Transcript, 4 December 2012, E1/147.1, p. 4.

⁹ *Id.*, p. 3-4.

¹⁰ *Id.*, p. 4, 14.

¹¹ *Id.*, p. 4-5, 13-14, 21.

¹² *Id.*, p. 19.

¹³ *Id.*, p. 20-21.

¹⁴ *Id.*, p. 27.

¹⁵ *Id.*, p. 27-28.

observations.¹⁶ The Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on 4 December 2012.¹⁷ After the first morning break, National Co-Lawyer Ang Udom notified the Trial Chamber that Mr. IENG Sary had fallen asleep during the morning session.¹⁸ Judge Cartwright, on behalf of the Trial Chamber, stated: "There is a simple solution; your case manager could wake him up.... [F]alling asleep may simply indicate that Ieng Sary has no direct interest in the testimony of this civil party."¹⁹

5. On 6 December 2012, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.²⁰ Dr. Lim Sivutha had indicated to the Case Manager that he could not assess Mr. IENG Sary's mental ability to follow the proceedings since he is not a psychiatrist.²¹
6. On 7 December 2012, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.²² The log indicated that Dr. Kim Samsan stated he was not able to assess Mr. IENG Sary's ability to follow the proceedings.²³ On the same date, the Defence received an email from a Trial Chamber Legal Officer ordering the Defence to immediately stop audio recording Mr. IENG Sary and the Defence's conversations with his treating doctors, and to seek leave pursuant to Rule 92 to resume such audio recordings. The email further stated that "any further such observations of IENG Sary's condition, whether based on audio-recordings, video recordings, the observations of the IENG Sary Defence team, or otherwise, are prohibited until the permissibility of these practices is resolved by the Trial Chamber."²⁴

II. LAW AND ARGUMENT

¹⁶ Transcript, 5 December 2012, E1/148.1, p. 2.

¹⁷ Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 4 December 2012, 5 December 2012, E248/2.1.

¹⁸ Transcript, 5 December 2012, E1/148.1, p. 36-37.

¹⁹ *Id.*, p. 38.

²⁰ Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 5 December 2012, 7 December 2012, E248.1.

²¹ *Id.*, at 8:55a-9:10a.

²² Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 6 December 2012, 7 December 2012, E248/1.1.

²³ *Id.*, at 10:36a-10:39a.

²⁴ Email from Trial Chamber Legal Officer, "Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility", 7 December 2012. On 12 December 2012, this email was notified to the parties as a Trial Chamber Memorandum. *See* E254.

A. The Defence's right to record observations of Mr. IENG Sary is inherent in Mr. IENG Sary's right to prepare a defence and the Defence's obligation to act with due diligence and protect his legal interests

7. Mr. IENG Sary has the fundamental rights to prepare a defence and to be assisted in doing so by counsel. These rights are guaranteed to him by the Cambodian Constitution,²⁵ the Agreement,²⁶ the Establishment Law,²⁷ the International Covenant on Civil and Political Rights ("ICCPR")²⁸ and the Universal Declaration of Human Rights ("UDHR").²⁹ These rights are also explicitly incorporated in the European Convention on Human Rights and Fundamental Freedoms ("ECHR").³⁰
8. A central part of Mr. IENG Sary's right to prepare a defence (and, therefore, his right to a fair trial) is the right to make a record.³¹ The purpose of making a record is two-fold: first, to enable the Trial Chamber to have all the evidence and parties' oral and written submissions before it when it deliberates prior to issuing a decision or Judgement; and, second, to enable Mr. IENG Sary to make a contemporaneous, objective and verifiable record and preserve any errors by the Trial Chamber so that, if an appeal is filed, the Supreme Court Chamber has all the evidence and parties' oral and written submissions before it when it scrutinizes the Trial Chamber's practices.³²
9. The Pre-Trial Chamber has decided that the right to audio and / or video record Mr. IENG Sary is part of Mr. IENG Sary's right to have adequate facilities to prepare a

²⁵ Cambodian Constitution, Art. 31, 38.

²⁶ Agreement, Art. 13(1).

²⁷ Establishment Law, Article 35 new (b), (d).

²⁸ ICCPR, Art. 14(3)(b), (d).

²⁹ UDHR, Art. 11(1).

³⁰ ECHR, Art. 6(3).

³¹ See The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Commission on Human Rights, *Note Verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva Addressed to the Secretary General*, UN Doc. E/CN.4/1985/4, Annex, 28 September 1984, para. 70 (emphasis added):

Although ... the right to a fair and public hearing in the determination of a criminal charge (article 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, *the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency, and respect for them is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation.* In particular: ...

(h) *An adequate record of the proceedings shall be kept in all cases.*

³² Illustrating the purpose of making a record to preserve errors for review on appeal, Judge Wiseman of the 5th Appellate District of the Court of Appeal of California observed: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." *Protect Our Water et al. v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003).

defence.³³ The Pre-Trial Chamber's reasoning and decision provide *direct* guidance to the Trial Chamber, despite the Trial Chamber's finding, as expressed by Judge Cartwright, that the Pre-Trial Chamber's decision "does not appear to provide guidance regarding the specific practices at issue here."³⁴ The "specific practices at issue" – the Defence's audio and / or video recording of Mr. IENG Sary as part of preparing its defence – are, in substance, the same here as they were at the pre-trial stage. The rights that applied at the pre-trial stage continue to apply at the trial stage. It would be illogical and absurd to suggest that preparation of an Accused's defence ceases at the commencement of the trial proceedings.³⁵ Any claim to the contrary demonstrates an utter lack of appreciation of the duties and obligations of defence counsel.³⁶

1. Mr. IENG Sary's right to adequate facilities to prepare a defence

10. Mr. IENG Sary has the right to have adequate facilities to prepare a defence. This right is guaranteed to him by the Cambodian Constitution,³⁷ the Agreement,³⁸ the Establishment Law,³⁹ the ICCPR⁴⁰ and the UDHR.⁴¹ This right is also explicitly incorporated in the ECHR.⁴²

11. The Pre-Trial Chamber found: "the use of audio/video recording equipment for the purpose of preparing the pre-trial defence of [Mr. IENG Sary] constitutes a facility for the preparation of the defence."⁴³ The Pre-Trial Chamber further found that permitting audio / video recording ensures that Mr. IENG Sary has adequate facilities at his disposal.⁴⁴ Here, permitting audio / video recording at the trial stage similarly ensures

³³ Decision on IENG Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010 ("Pre-Trial Chamber Decision on Audio/Video Recording"), A371/2/12, paras. 35, 39.

³⁴ Draft Transcript, 11 December 2012, p. 2.

³⁵ A robust defence includes the due diligence obligations to make a judicial record, object to questionable rulings and preserve errors for appeal. Errors at the trial level generally cannot be appealed unless the errors are raised and preserved as part of the judicial record. *See, e.g., Case of Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/SC, Appeal Judgement, 3 February 2012, para. 20, which implicitly requires that errors be preserved in the judicial record.

³⁶ It may be the practice in Cambodian courts for defence attorneys to be passive and defer to the predilections of judges. Such is not the case in domestic jurisdictions or international tribunals set up by or associated with the United Nations where there is consistent, uniform adherence to the rule of law.

³⁷ Cambodian Constitution, Art. 31, 38.

³⁸ Agreement, Article 13(1).

³⁹ Establishment Law, Art. 35 new (b).

⁴⁰ ICCPR, Art. 14(3)(b).

⁴¹ UDHR, Art. 11(1).

⁴² ECHR, Art. 6(3)(b).

⁴³ Pre-Trial Chamber Decision on Audio/Video Recording, para. 35.

⁴⁴ *Id.*

that Mr. IENG Sary has adequate facilities to prepare a defence, as it allows him to make a record.

12. The Human Rights Committee, a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia),⁴⁵ defines the right to “adequate facilities” as including the right to have access to documents and other evidence, including all materials that are exculpatory.⁴⁶ Exculpatory material “should be understood as including not only material establishing innocence but also *other evidence that could assist the defence* (e.g. indications that a confession was not voluntary).”⁴⁷ The Defence submits that “other evidence that could assist the defence” includes its own observations about Mr. IENG Sary’s condition.
13. Although the Agreement, Establishment Law and ICCPR do not explicitly grant the Defence the right to use recording equipment in preparing Mr. IENG Sary’s defence, this does not mean that such a right is not implicitly authorized by the ICCPR.⁴⁸ As the Pre-Trial Chamber has recognized, “a narrow interpretation of the rights of an accused is not compatible with the object and purpose of fair trial guarantees.”⁴⁹ Here, there is *no compelling justification* for preventing the Defence from compiling a contemporaneous, objective and transparent record. Such an action begs the question why the Trial Chamber opts for opacity over transparency.
14. The Human Rights Committee has observed that “[a]ccess to administration of justice must be effectively guaranteed ... to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice.”⁵⁰ This language parallels the European Court of Human Rights’ repeated findings regarding fair trial guarantees that: “The [ECHR] is intended to guarantee not rights that are theoretical or illusory but rights that are *practical and effective*.”⁵¹ The ECCC has, on numerous occasions, approvingly cited the

⁴⁵ See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, website, available at <http://www2.ohchr.org/english/bodies/hrc/>. Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992. See United Nations Treaty Collection, website, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#3.

⁴⁶ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 33 (“General Comment No. 32”).

⁴⁷ *Id.* (emphasis added).

⁴⁸ Pre-Trial Chamber Decision on Audio/Video Recording, para. 33.

⁴⁹ *Id.*, para. 31.

⁵⁰ General Comment No. 32, para. 9.

⁵¹ *Airey v. Ireland*, Appl. No. 6289/73, Judgement, 9 October 1979, para. 24 (emphasis added). See also *Kutić v. Croatia*, Appl. No. 48778/99, Judgement, 1 March 2002, para. 25; *Sukhorubchenko v. Russia*, Appl. No.

ECHR.⁵² The ECCC legal framework must similarly be interpreted and applied so as to guarantee rights that are practical and effective. Indeed, Rule 21(1) requires the Trial Chamber to interpret the ECCC legal framework so as to *always* safeguard the interests of the Accused and ensure legal certainty and transparency.

15. The Defence is entitled to undertake substantive activities that are necessary to prepare a defence and to protect Mr. IENG Sary's fair trial rights.⁵³ This entitlement includes the right to make a record by audio and / or video recording observations of Mr. IENG Sary and, if his treating doctors consent, recording the Defence's conversations with them. The Defence must be given the opportunity to prepare Mr. IENG Sary's defence and put all relevant arguments before the Trial Chamber.⁵⁴ Such arguments would encompass whether Mr. IENG Sary is fully capable of enjoying all – as opposed to some – of his fair trial rights, and whether he does so on a continuing or occasional basis.
16. There is nothing more relevant to Mr. IENG Sary than the question of his health and fitness to stand trial. As the Trial Chamber and the OCP have acknowledged, Mr. IENG Sary's condition may change from day to day.⁵⁵ The Defence submits that his condition may change from hour to hour, or moment to moment.⁵⁶ Concerns regarding Mr. IENG Sary's health and fitness will continue to arise. For this reason, the Defence seeks to make an audio and / or video record of its observations of Mr. IENG Sary.

69315/01, Judgement, 10 February 2005, para. 43; *Galstyan v. Armenia*, Appl. No. 26986/03, Judgement, 15 November 2007 ("*Galstyan v. Armenia*"), para. 81.

⁵² See, e.g., Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2, paras. 16-18; Decision on Application for Disqualification of Judge Silvia Cartwright, 9 March 2012, E171/2, para. 14; Pre-Trial Chamber Decision on Audio/Video Recording, para. 32; Decision on the IENG Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, 14 June 2010, D353/2/3, paras. 24-26.

⁵³ See Pre-Trial Chamber Decision on Audio/Video Recording, para. 32, quoting in part *Galstyan v. Armenia*, para. 84: "Article 6 § 3 (b) [the right to have adequate time and facilities for the preparation of his defence] ... implies that the substantive defence activity on [the Accused's] behalf may comprise everything which is 'necessary' to prepare for the main trial."

⁵⁴ See *Galstyan v. Armenia*, para. 84 (emphasis added): "The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court." See also Pre-Trial Chamber Decision on Audio/Video Recording, para. 32.

⁵⁵ Transcript, 4 December 2012, E1/147.1, p. 17-18: "[Judge Cartwright]: With that as its starting point, however, [Professor Campbell] indicated that Ieng Sary's physical condition may well change from time to time and the Trial Chamber is conscious of that and of its responsibility to keep his physical condition under constant consideration"; *Id.*, p. 10: "[Senior Assistant Co-Prosecutor Smith]: You know, the Prosecution has always said that Mr. Ieng Sary's health is fragile and the doctors have said that, as well, but it must be looked at on a day-by-day basis."

⁵⁶ *Id.*, p. 12-13.

2. Mr. IENG Sary's right to defend himself through the assistance of counsel

17. Mr. IENG Sary has the right to defend himself through the assistance of counsel. This right is guaranteed to him by the Cambodian Constitution,⁵⁷ the Agreement,⁵⁸ the Establishment Law,⁵⁹ the ICCPR⁶⁰ and the UDHR.⁶¹ This right is also explicitly incorporated in the ECHR.⁶²
18. The Defence has a duty to represent Mr. IENG Sary's legal interests by assisting him in "every appropriate way, and taking legal action to protect [his] interests."⁶³ This duty necessarily includes raising concerns as to Mr. IENG Sary's fitness to stand trial and effectively participate in the proceedings. This duty also includes making a record for use by the Trial Chamber and, if necessary, for review by the Supreme Court Chamber.
19. The Defence's duty to protect Mr. IENG Sary's fair trial rights, including where there are concerns as to his health and fitness to stand trial, is a continuing one. This duty does not end simply because the Trial Chamber has issued a decision. As part of the Defence's duty to ensure that Mr. IENG Sary is not tried while he is unfit, the Defence must make a record of its arguments and observations as to Mr. IENG Sary's health and fitness to preserve this issue for appeal.⁶⁴ The Trial Chamber, in turn, must ensure that the Defence can perform its duties without restrictions or undue interference.⁶⁵

⁵⁷ Cambodian Constitution, Art. 31, which provides: "The rights of the accused enshrined in Articles 14 and 15 of the [ICCPR] shall be respected throughout the trial process" and provides for the right to engage counsel.

⁵⁸ Agreement, Article 13(1).

⁵⁹ Establishment Law, Art. 35 new (d).

⁶⁰ ICCPR, Art. 14(3)(d).

⁶¹ UDHR, Art. 11(1)

⁶² ECHR, Art. 6(3)(d).

⁶³ United Nations Basic Principles on the Role of Lawyers, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August – 7 September 1990, Principle 13(a) ("Basic Principles on the Role of Lawyers"). *See also* Rule 22(4), which states, in relevant part: "[Lawyers] have an obligation to promote justice and the fair and effective conduct of proceedings"; Cambodian Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia (2004), Art. 6: "In all circumstances, the lawyer must respect the obligations of his or her oath and the principles of conscience, humanity and tact." Newly admitted Cambodian lawyers must swear to "implement [their] profession with dignity, conscientiousness, honesty, humanity, and with an independent mind, and in observance of the Constitution and Laws of the Kingdom of Cambodia." *See also* Cambodian Law on the Statutes of the Bar (1995), Art. 34.

⁶⁴ Without a record of what was "said" (via transcripts) and "read" (via motions, statements and other written materials put before the Trial Chamber), there is simply nothing to review. The lack of a judicial record would prevent the Supreme Court Chamber from performing its functions, which include correcting errors committed by the Trial Chamber.

⁶⁵ General Comment No. 32, para. 34.

B. Any restrictions the Trial Chamber places upon Mr. IENG Sary's fundamental fair trial rights must satisfy Rule 21(2) and the principle of proportionality

1. The Trial Chamber's refusal to allow the Defence to audio and / or video record its observations of Mr. IENG Sary violates Rule 21(2)

20. Rule 21(2) prohibits coercive measures that are not strictly limited to the needs of the proceedings, proportionate to the gravity of the offenses charged, or fully respectful of human dignity. The Pre-Trial Chamber has determined that coercive measures include measures that restrict the rights of the Accused.⁶⁶ The Trial Chamber's decision restricts Mr. IENG Sary's fundamental fair trial right to prepare his defence, in violation of Rule 21(2).

21. The Trial Chamber's refusal to allow the Defence to audio and / or video record its observations of Mr. IENG Sary is not "strictly limited to the needs of the proceedings." The Defence's recording of Mr. IENG Sary has *no* impact on the proceedings or the parties. There is no prejudice to the Trial Chamber or the parties as a result of the Defence's recordings.

2. The Trial Chamber's refusal to allow the Defence to audio and / or video record its observations of Mr. IENG Sary violates the principle of proportionality

22. Pursuant to the principle of proportionality, which is implicit in Rule 21(2), 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 that objective.⁶⁷ The Trial Chamber has not demonstrated the existence of a sufficiently important objective that justifies denying Mr. IENG Sary's right to prepare a defence.

23. Neither the Detention Facility nor the Trial Chamber have demonstrated that audio and / or video recording of Mr. IENG Sary would present: **a.** a security concern; **b.** a risk to any

⁶⁶ Pre-Trial Chamber Decision on Audio / Video Recording, para. 37; Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7, paras. 15-17.

⁶⁷ *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Appeals Chamber, 1 November 2004, para. 17; *Zigiranyirazo v. Prosecutor*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 14. *See also Prosecutor v. Stanišić & Simatović*, IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, paras. 16-20.

other person; or **c.** a risk to the integrity of the proceedings.⁶⁸ The Defence, on the other hand, has offered to place the following conditions on its audio recording of Mr. IENG Sary: **a.** if the Trial Chamber sees fit, it could destroy the recordings if it determined that they were inadmissible;⁶⁹ **b.** the recordings will not be made public;⁷⁰ and **c.** the Defence can provide the recordings to the Trial Chamber at the end of each day.⁷¹ These conditions would assuage any concerns about security or a risk to others or the proceedings. Rather than accept these conditions, or impose alternative conditions, the Trial Chamber instead disproportionately prohibited any form of recording by the Defence.

III. CONCLUSION AND RELIEF SOUGHT

24. Making a record and preserving errors for appeal is part and parcel of Mr. IENG Sary's fundamental rights to prepare a defence and his right to be assisted in doing so by counsel. These rights are explicitly guaranteed in the ECCC legal framework. The Defence has a duty to protect Mr. IENG Sary's fair trial rights, central to which is the obligation to make a record. The only method by which the Defence can make a record and preserve any potential errors for appeal is by recording Mr. IENG Sary. The Defence must be allowed to exercise its right to make a record.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to permit the Defence to audio and / or video record Mr. IENG Sary, including the Defence's conversations with his treating doctors, if they consent.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary
Signed in Phnom Penh, Kingdom of Cambodia on this 14th day of **December, 2012**

⁶⁸ See Pre-Trial Chamber Decision on Audio / Video Recording, para. 39.

⁶⁹ Draft Transcript, 11 December 2012, p. 3.

⁷⁰ *Id.*

⁷¹ *Id.*, p. 3-4.