

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors
Filed to: Trial Chamber **Original Language:** English
Date of document: 1 February 2011

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:



**CO-PROSECUTORS' OBSERVATIONS ON IENG SARY'S MOTION TO CONDUCT THE TRIAL THROUGH
HALF-DAY SESSIONS**

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:

Trial Chamber
Judge NIL Nonn. President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Copied to:

Accused
NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

Civil Party Lead Co-Lawyers

PICH Ang
Elisabeth SIMONNEAU FORT

Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT Pouy Seang
Diana ELLIS
SA Sovan
Jaques VERGES
Phillipe GRECIANO

I. INTRODUCTION

1. On 19 January 2011, the Accused Ieng Sary (“the Accused”) filed a Motion to Conduct the Trial Through Half-Day Sessions (“the Motion”)¹. The Co-Prosecutors oppose the request for half-day sessions because the claim with respect to the Accused’s health and physical condition is not supported by any medical evaluation.
2. In addition, the Co-Prosecutors will make submissions on the Accused’s participation in the proceedings from a remote location, using audiovisual means, in the event there is a substantial trial disruption by reason of the Accused’s absence from the Trial Chamber.

II. THE REQUEST FOR HALF-DAY SESSIONS MUST BE DISMISSED BECAUSE IT IS NOT SUPPORTED BY ANY MEDICAL EVIDENCE

3. The Accused claims that his medical and physical condition prevent him from sitting in the courtroom for an extended period of time. He alleges back problems, urological issues as well as troubles maintaining his energy and concentration for extended periods of time. However no medical evaluation substantiating this request has been submitted to the Trial Chamber. The only claim supporting this statement is that the Defence team is unable to meet with the Accused for more than approximately an hour at a time, and not more than two hours a day, and that he makes at least two trips to the toilet during each hour of the meeting.² This is not sufficient to support the Motion that would, if granted, double the length of time required for this trial.
4. International tribunals have granted motions for reducing the length of daily trial sessions, or adjourning the trial, but the practice is to do so on the basis of a written medical examination and/or the testimony of a medical practitioner.³ The Co-Prosecutors see no reason for departing from this practice in the present case.

¹ Ieng Sary’s Motion to Conduct the Trial Through Half-Day Sessions, Case No 002/19-09-2007-ECCC/TC, Office of the Co-Prosecutors, 19 January 2011, E20 [hereinafter “Ieng Sary’s Motion”].

² Ieng Sary’s Motion, footnote 8.

³ See for example *Prosecutor v. Milošević*, Reasons for Decision on Assignment of Defence Counsel, IT-02-54-T, ICTY Trial Chamber, 22 September 2004, paras. 13, 53-54 (The Court referred to a report from Dr. van Dijkman to adjourn the trial and instructed a cardiologist to carry out an examination of the Accused) and *Prosecutor v. Stanišić & Simatović*, Scheduling Orders, IT-03-69-PT, ICTY Trial Chamber, 3 April 2008 and 22 April 2008 (The Chamber heard a neuropsychiatrist appointed by the Registrar before making any determination on the fitness of the accused to be physically present at trial.)

5. Therefore since at this time there is no foundation to justify the reduction of trial time on the grounds of physical condition or ill-health the trial should run on a normal daily basis until there is sufficient evidence allowing the Trial Chamber to assess properly a request for a reduction in its sitting hours.

III. IN CASE THE ACCUSED'S CONDITION SERIOUSLY DISRUPTS THE PROCEEDINGS, THE TRIAL CHAMBER WILL BE ENTITLED TO ALLOW THE ACCUSED TO PARTICIPATE FROM A REMOTE LOCATION

6. The Accused suggests that remote participation by means of audio-video equipment cannot be a substitute for his right to be present at trial, unless he consents to such procedure.⁴ The Co-Prosecutors reject this proposition.
7. As a general matter, international fair trial standards safeguard the right of an accused to be tried in his or her presence. This right is guaranteed by article 35 new (d) of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea⁵ ("ECCC Law") and by article 14(3)(d) of the International Covenant on Civil and Political Rights⁶ ("ICCPR").
8. The International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have interpreted the right to be present at trial as implying the physical presence of the accused in the court room.⁷ However both of those Tribunals are largely based on the Anglo-Saxon common law system; the ECCC embraces the civil law tradition where the physical presence of the accused at trial is not necessarily critical for the accused's fair trial rights. For example, the French Criminal Code of Procedure states that a trial can proceed even if the accused

⁴ Ieng Sary's Motion, paras. 11-13.

⁵ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [hereinafter "ECCC Law"].

⁶ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976, article 14(3)(d).

⁷ *Prosecutor v. Zigiranyirazo*, Decision on Interlocutory Appeal, ICTR-2001-73-AR73, ICTR Appeals Chamber, 30 October 2006, para. 12 [hereinafter "*Zigiranyirazo*, Appeals Chamber"]; *Prosecutor v. Stanišić & Simatović*, Decision on Defence Appeal of the Decision on Future Course of Proceedings, IT-03-69-AR73.2, ICTY Appeals Chamber, 16 May 2008, para. 6 [hereinafter "*Stanišić & Simatović*, Appeals Chamber"].

is absent for health reasons.⁸ Also, the Special Tribunal for Lebanon (“STL”) does not define “presence” exclusively in terms of physical presence, provided that the accused’s “legal presence” may suffice as “presence” under certain conditions.⁹ Rules 104 and 105 of the STL Rules of Procedure and Evidence provide that an accused is considered “present” whether he attends in person, via video-link, or through counsel.¹⁰

9. In any event, even under the stricter interpretation of “presence at trial” adopted by the ICTR and ICTY, it is recognized by both Tribunals that the right to be present at trial is not without limitation. For example, the Rules of the ICTY, the ICTR, the Special Court for Sierra Leone (“SCSL”) and the International Criminal Court (“ICC”) each permit trial in the absence of an accused in the event that the accused persistently disrupts the trial.¹¹ This has been interpreted by the ICTY and ICTR as permitting trial in the absence of an accused even where the disruptions in trial are not attributable to the intentional conduct of the accused.¹² The Appeals Chambers of the ICTY and the ICTR have each affirmed the notion that proceedings may be held in the absence of an accused for the purpose of avoiding “substantial trial disruptions”, even where the disruptions are not “intentional” on the part of the accused, so long as the restriction on the accused’s right to be tried in his presence is a proportional response.¹³ To judge whether the response is proportional,

⁸ France, Code de procédure pénale, art. 416 : “Si le prévenu ne peut, en raison de son état de santé, comparaître devant le tribunal et s’il existe des raisons graves de ne point différer le jugement de l’affaire, le tribunal ordonne, par décision spéciale et motivée, que le prévenu, éventuellement assisté de son avocat, sera entendu à son domicile ou à la maison d’arrêt dans laquelle il se trouve détenu, par un magistrat commis à cet effet, accompagné d’un greffier. Procès-verbal est dressé de cet interrogatoire. Le débat est repris après citation nouvelle du prévenu, et les dispositions de l’article 411, alinéas 1 et 2, sont applicables. Dans tous les cas, le prévenu est jugé contradictoirement.” The French Cour de Cassation found that it is not contrary to the Defense’s rights nor to article 6 of the European Convention of Human Rights to try an accused absent for health reasons even without his or her consent. (France, Cour de Cassation, Criminal Chamber, 22 January 2003, Bull. no 17)

⁹ Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal’s President, Special Tribunal for Lebanon, 10 November 2009, para. 41.

¹⁰ Special Tribunal for Lebanon, Rules of Procedure and Evidence, 10 June 2009, as revised on 29 November 2010, Rules 104-105.

¹¹ Internal Rules of the Extraordinary Chamber in the Courts of Cambodia, as revised on 17 September 2010, rule 37(2) [hereinafter “ECCC Rules”]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, adopted on 29 June 1995, amended on 1 October 2009, Rule 80(B); Special Court for Sierra Leone, Rules of Procedure and Evidence, Adopted on 16 January 2002, as amended 28 May 2010, Rule 80(B); International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, adopted 11 February 1994, amended on 8 December 2010, Rule 80(B); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998, entered into force on 1 July 2002, article 63(2).

¹² See for example *Prosecutor v. Milošević*, Reasons for Decision on Assignment of Defence Counsel, IT-02-54-T, ICTY Trial Chamber, 22 September 2004, para. 33: “There is no difference between deliberate misconduct which disrupts the proceedings and any other circumstance which so disrupts the proceedings as to threaten the integrity of the trial.”

¹³ *Zigiranyirazo*, Appeals Chamber, para. 11; *Stanišić & Simatović*, Appeals Chamber, para. 6.

the Appeals Chambers have looked to whether the limitation on the accused's right is "in the service of a sufficiently important objective" and "impair[s] the right no more than is necessary to accomplish the objective."¹⁴

10. Notably, the ICTY Appeals Chamber affirmed this principle in the context of a challenge by the accused to a decision in the *Stanišić & Simatović* case by which the Trial Chamber determined that the ill health of the accused *Stanišić* warranted a derogation from his right to be present in court and ordered the Registry to establish a video-conference link to enable the accused to participate in trial proceedings from his detention unit on the occasions he was too unwell to be physically present in court. While in this case, the Appeals Chamber overturned the Trial Chamber's decision, it did so on the basis of a finding that the derogation from the accused's right to be physically present in court was unreasonable under the circumstances of that case, not because the Trial Chamber would never be warranted to proceed in the absence of an accused on grounds of ill health.¹⁵ Specifically, the Appeals Chamber determined that, although the ill health of the accused had caused a delay of up to a month and a half in the commencement of trial, the period of delay had not "reached a level that was so substantial as to warrant derogation from the fundamental right of the Accused to be present at trial."¹⁶

11. The ECCC Rules also allow trial in the absence of an accused in the event that the accused disrupts the trial.¹⁷ This necessarily applies to intentional as well as unintentional disruptions such as illness. Indeed, in ECCC Rule 37, when the drafters intended to limit the circumstances to "deliberate" disruptions, they mentioned it in express terms.¹⁸ However, ECCC Rule 37(2), concerning disruptions caused by the accused, does not contain the word deliberate and is therefore not limited to intentional disruptions. The Accused also cites to ECCC Rule 81, which provides that if the accused cannot be present for health reasons, the trial can continue with the accused's consent. The apparent contradiction between ECCC Rule 81 and ECCC Rule 37(2) does not resist a purposive and contextual interpretation of both rules. The Co-Prosecutors suggest that as a general matter, the Accused's consent is required for the trial to continue when he is absent due to

¹⁴ *Stanišić & Simatović*, Appeals Chamber, para. 6; *Zigiranyirazo*, Appeals Chamber, para. 11.

¹⁵ *Stanišić & Simatović*, Appeals Chamber, para. 18.

¹⁶ *Stanišić & Simatović*, Appeals Chamber, para. 18.

¹⁷ ECCC Rules, Rule 37(2).

¹⁸ See for example ECCC Rules, Rule 37(3).

proven health issues. However, when the circumstances reach the threshold for ECCC Rule 37(2) to be applicable and for limitations to the right to be physically present at trial to be permissible – that is when there would be substantial trial disruptions – the Trial Chamber can order the trial to continue in the accused’s absence and without the accused’s consent, so long as this restriction on the accused’s right to be tried in his presence is proportional. This interpretation of the ECCC Rules is consistent with the decisions of the international tribunals, which, as is noted above, recognize that the right to be present at trial is not without limitation. It is also cognizant of the fact the ECCC embraces the civil law tradition, which recognizes the accused’s right to be present in the courtroom is not absolute.

12. Therefore, if the Accused’s proven physical and health conditions were to prevent him from attending full day sessions, the Co-Prosecutors submit that the Trial Chamber has the authority to order that the trial continue and the accused participate via audio-video equipment from the detention unit. In this case, the Trial Chamber should take into account the following considerations which, the Co-Prosecutors submit, may justify an exception to the Accused’s right to be physically present at trial.
13. First, the Chamber should assess if requiring the accused to be physically present at all times during the trial is expected to cause considerable delays in the proceedings. In the *Stanišić & Simatović* case, the delays were up to one and a half months. Where such circumstances arise in this case, the Trial Chamber would need to make a determination as to whether the potential length of the Accused’s absence would cause considerable delays to the trial.
14. Second, the Chamber should consider whether the conditions preventing the Accused being physically present at trial are likely to be persistent. If so, the current situation would be substantially different from the cases *Stanišić & Simatović* and *Zigiranyirazo* in which remote participation was considered unjustified because the conditions preventing the accused being physically present at trial were not of such a degree to be regarded as persistent.
15. Third, the Chamber should give due weight to the fact that disruptions in the proceedings caused by the ill health of the Accused may not only substantially hinder the

expeditiousness of proceedings, but also possibly prevent the ECCC from reaching final judgment in this case. Such situation would be contrary to the “public interest, national and international, in the expeditious completion of the trial”,¹⁹ as well as the entire purpose of the ECCC, which is to “bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”²⁰

16. Fourth, the Trial Chamber would have to balance the Accused’s right to be present at trial with the rights of the other accused, Ieng Thirith, Nuon Chea and Khieu Samphan (“the Co-Accused”). In particular, the Co-Accused’s right to be tried within a reasonable time may be jeopardized by not ordering the Accused to follow the trial and communicate with his counsel from a remote location. This right is guaranteed by the article 35(new) of the ECCC Law, ECCC Rule 21(4) and article 14(3)(c) of the ICCPR.
17. In conclusion, the Co-Prosecutors submit that the Trial Chamber has the authority to allow the Accused to follow the proceedings and communicate in real time with his counsel, via audiovisual equipment, if his age and medical condition, based on proper proof, were to substantially disrupt the conduct of the trial. The Co-Prosecutors do not accept the Accused’s submissions in the Motion that remote participation is only permissible upon consent of the accused.


IV. CONCLUSION

18. For the foregoing reasons, the Co-Prosecutors respectfully request that:
 - (1) the Trial Chamber reject the Accused’s request for the conduct of the trial through half-day sessions; and
 - (2) the Trial Chamber, when necessary, orders the Accused to participate in the trial via audio-video equipment from the detention unit in the event that his age and medical condition, based on proper proof, were to substantially disrupt the conduct of the trial.

¹⁹ *Prosecutor v. Norman*, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court, SCSL-04-14-T, SCSL Trial Chamber, 8 June 2004, para. 26.

²⁰ ECCC Law, article 1.

Respectfully submitted,

Date	Name	Place	Signature
1 February 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		