

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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

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## I. INTRODUCTION AND PROCEDURAL HISTORY

1. Pursuant to an Order<sup>1</sup> from the Trial Chamber, the defence for Ieng Sary (“Defence”) have submitted the purported legal justification allowing them to audio and/or video record Ieng Sary, as well as his treating physicians should they so consent, while Ieng Sary is in the holding cell (“Request”).<sup>2</sup> The Co-Prosecutors hereby respond pursuant to that same Order.
2. The Co-Prosecutors submit that the Defence have failed to substantiate any legal right to audio or video record Ieng Sary under the circumstances, and further submit that such practices are prohibited under the Internal Rules.
3. This Chamber has found Ieng Sary fit to stand trial following extensive examinations of the Accused by an international medical expert on 5 and 6 November 2012.<sup>3</sup> As the Trial Chamber noted:

*The Accused’s fitness to stand trial has been assessed by multiple psychiatrists and a geriatrician and has been the subject of expert reports on four separate occasions: in September 2009, June 2011 and most recently in September and November 2012. The reports resulting from these examinations show that the Accused has at no time during proceedings in Case 002 suffered from any cognitive or memory impairment beyond that expected of someone his age. Most recently, on 6 November 2012, the Expert Geriatrician determined that there had been no change in the Accused’s health warranting re-assessment of the court-appointed experts’ conclusion of 3 September 2012 that the Accused is fit to stand trial.*

*The IENG Sary Defence does not as such challenge the recent reports of the court-appointed experts and the Expert Geriatrician and offers neither any basis upon which the Trial Chamber could reasonably reject the expertise provided...<sup>4</sup>*

4. The Trial Chamber has also held that “[r]equiring the Accused to participate in proceedings from the holding cell, to which members of his Defence team also have access to at all times, is fully consistent both with his fundamental rights and the legal framework of the ECCC.”<sup>5</sup> The Trial Chamber further ruled that it did “not consider video-recording of the holding cell to be necessary to ensure that the Accused is appropriately monitored.”<sup>6</sup>

<sup>1</sup> E254 Order for Submissions, 12 December 2012.

<sup>2</sup> E254/1 Ieng Sary’s Submissions on the Law Permitting Him to be Audio and/or Video Recorded in the Holding Cell, 14 December 2012 (hereinafter “Request”).

<sup>3</sup> E238/9 Decision on Accused Ieng Sary’s Fitness to Stand Trial, 26 November 2012.

<sup>4</sup> E238/9 Decision on Accused Ieng Sary’s Fitness to Stand Trial, 26 November 2012, paras. 23-24 (internal citations omitted).

<sup>5</sup> E238/9 Decision on Accused Ieng Sary’s Fitness to Stand Trial, 26 November 2012, para. 21.

<sup>6</sup> E238/9 Decision on Accused Ieng Sary’s Fitness to Stand Trial, 26 November 2012, para. 36.

5. Nevertheless, dissatisfied with this assessment, the Defence now seek to gather video and/or audio recordings that they forthrightly state they intend to use to challenge the conclusions of the court-appointed experts and the Expert Geriatrician and the ruling of the Trial Chamber.<sup>7</sup> As International Co-Counsel for the Accused stated in court, the entire reasoning for making this Request is to substantiate a claim that “based on [Rule] 81.5, he [Ieng Sary] is not physically or mentally able to participate; that’s what this is all about.”<sup>8</sup>
6. In the absence of supportive jurisprudence on point, and in the face of Internal Rules prohibiting their actions, the Defence seek to wrap their claimed right to record in the cloak of of fair trial rights and the right to the assistance of counsel. These principles have no bearing on the Defence’s Request.

## II. ARGUMENT

### A. The Audio or Video Recordings are not Permissible Under the Internal Rules

7. The Defence are clear in their Request that the purpose that they want to make audio and video recordings for is evidentiary. However, this Chamber has stated explicitly that the parties are prohibited from conducting investigations for the purpose of gathering evidence.<sup>9</sup> There is no principle difference between allowing these recordings and allowing a party to conduct and record interviews for submission as evidence to the Trial Chamber. For this reason, the recordings should be prohibited.
8. Additionally, any recording of the treating physicians, with or without their consent, would constitute interference with potential witnesses in violation of Rule 35, which prohibits interference with the administration of justice including interference with “a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber.”<sup>10</sup> Treating physicians have been called to testify before<sup>11</sup>, and because Ieng Sary’s health is an ongoing issue, it is clear that his treating physicians may be again called upon as witnesses before the Trial Chamber. Indeed, the Defence themselves have previously requested to call the

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<sup>7</sup> **E254/1** Request at p. 1 (alleging the Defence’s “right to make a record” and “preserv[e] any errors for appellate review”).

<sup>8</sup> **E1/147.1** Transcript of Proceedings, 4 December 2012, p. 14.

<sup>9</sup> **E211/2** Trial Chamber Memorandum Re: Nuon Chea Defence Notice to the Trial Chamber Regarding Research at DC-Cam (E211), 13 August 2012 (“the ECCC legal framework precludes investigations carried out by the parties”); **E251** Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, para. 37 (“The Co-Investigating Judges have already indicated that pursuant to Internal Rule 55, the parties are not authorized to conduct their own investigative actions. The IENG SaryDefence is well aware of this prohibition ...”).

<sup>10</sup> Rule 35(1)(d).

<sup>11</sup> **E1/125.1** Transcript of Proceedings 21 September 2012.

treating doctors as witnesses.<sup>12</sup> Seeking to record statements by the treating physicians and *ex parte* colloquys between the physicians and the Defence regarding the precise matters on which the physicians would opine in court would clearly constitute interference with the administration of justice.

9. The Trial Chamber has requested the treating physicians to report to it directly,<sup>13</sup> and it is not the role of the Defence to carry out parallel investigations. As the Defence were recently warned in a different context, “the conduct of the Ieng Sary Defence amounts to an interview with a potential witness on a matter which was already clearly under the Chamber’s consideration and extends beyond a preliminary inquiry ... [and] is therefore inappropriate and in breach of the Internal Rules.”<sup>14</sup>
10. The Co-Prosecutors also note that should the Defence ever seek to admit these recordings as evidence, as they have stated they intend to do, the recordings would be inadmissible under the Rules. Under Rule 87(3), the Chamber may reject a request for evidence on a number of grounds, almost all of which are applicable here. Recordings made by the Defence would be “irrelevant” and “unsuitable to prove the facts it purports to prove” in regards to Ieng Sary’s fitness for trial, and would also be “repetitious” of the medical reports provided on a daily and periodic basis.<sup>15</sup> The Trial Chamber has informed that “it needs to be emphasized that it is medical monitoring that is required, not monitoring by the Judges or defence counsel personally or by the public.”<sup>16</sup> The videos therefore provide no relevant information.
11. As Deputy Co-Prosecutor William Smith stated in court, “If the Accused chooses to fall asleep for an hour or two hours, decides to go to sleep rather than follow the proceedings, that really isn’t the issue. So your Honours have to think about the value of that videotape of a sleeping accused, bearing in mind the expert evidence stating that he has the ability to stay awake throughout the day.”<sup>17</sup> Such recordings would not be in the least objective, but rather, as the Defence’s Request shows, would be made with a particular purpose in mind, and certainly the primary subject of the recordings, Ieng Sary, would be well aware of being recorded and would perform in his perceived best interests.

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<sup>12</sup> E1/147.1 Transcript of Proceedings, 4 December 2012, p. 19.

<sup>13</sup> E238/12 Memorandum to the doctor treating Ieng Sary at the Detention Centre, 18 December 2012.

<sup>14</sup> E251 Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, para. 38.

<sup>15</sup> See Rule 87(3)(a) and (c).

<sup>16</sup> E1/147.1 Transcript of Proceedings, 4 December 2012, p. 19.

<sup>17</sup> E1/147.1 Transcript of Proceedings, 4 December 2012, pp. 22-23.

12. Furthermore, as explained in the immediately preceding paragraphs, such evidence is “not allowed under the law”<sup>18</sup>, and it would be evident that attempting to challenge the Trial Chamber’s decision regarding Ieng Sary’s fitness to stand trial in the absence of evidence of changed circumstances from medical staff would merely be “intended to prolong proceedings or ... frivolous”.<sup>19</sup>

### **B. The Defence Have Failed to Substantiate a Right to Record**

13. The Defence’s justification for audio and/or video recording rests on two grounds. First, the Defence claim that their “right to make a record”<sup>20</sup> justifies the recordings, and that this ground is supported by Ieng Sary’s “right to have adequate facilities to prepare a defence”<sup>21</sup> and to “defend himself through the assistance of counsel.”<sup>22</sup> Second, the Defence argue that prohibiting recording is “coercive” and therefore violates Rule 21(2) in that it disproportionately infringes on Ieng Sary’s “fundamental fair trial right to prepare his defence.”<sup>23</sup> The Co-Prosecutors will address each of these arguments in turn.

#### *i. The Defence’s Misguided “Right to Make a Record”*

14. The Defence claim a “right to make a record” that encompasses recording Ieng Sary in the holding cell. The Defence cite, for this principle, to paragraph 70(h) of The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.<sup>24</sup> That paragraph advises that “An adequate record of the proceedings shall be kept in all cases,”<sup>25</sup> and omits any reference to a party’s “right to make a record.” There can be no serious doubt that the daily transcripts as well as the documents placed on the Case File in Case 002/1 satisfy the “adequate record of the proceedings” that is non-derogable even in times of emergency under the Siracusa Principles, and thus the Defence’s right to a record of the proceedings has not been violated.

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<sup>18</sup> See Rule 87(3)(d).

<sup>19</sup> See Rule 87(3)(e).

<sup>20</sup> E254/1 Request at para. 8.

<sup>21</sup> E254/1 Request para. 10.

<sup>22</sup> E254/1 Request at para. 17.

<sup>23</sup> E254/1 Request at para. 20.

<sup>24</sup> See E254/1 Request at fn. 31.

<sup>25</sup> United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, 1984, para. 70(h) (emphasis added).

15. The Defence also rely heavily on a Pre-Trial Chamber decision that granted the Defence the right to record conversations with their client in the Detention Facility<sup>26</sup> (“Decision”) for the purposes of facilitating communication between the Accused and his counsel. The Pre-Trial Chamber determined that under the circumstances, allowing the recording was necessary to fulfill the guarantee of “adequate facilities” under Article 14(3)(b) of the ICCPR.<sup>27</sup> The Defence claim that that decision is directly applicable to their instant Request,<sup>28</sup> however a review of the Decision exposes the substantial dissimilarities.
16. In the Defence filings leading to the Decision, the Defence claimed the audio/video recordings were “necessary for the Charged Person to communicate with counsel of his own choosing”<sup>29</sup> and the Pre-Trial Chamber based its decision on the fact that allowing the recordings was “necessary for trial preparation and communication with counsel,”<sup>30</sup> especially because “the Appellant [was] providing instruction to his international Co-Lawyer residing abroad.”<sup>31</sup> By contrast, the current Request is explicitly made not to facilitate communication between the Accused and his counsel, but to create material to submit as evidence before the Trial Chamber or on Appeal.<sup>32</sup>
17. Furthermore, the Pre-Trial Chamber, and other international courts, have been clear that determining what amounts to adequate time and facilities must be assessed in context. “It is an inevitable result of this right and its underlying purpose that the issue of whether a request ... is necessary for adequate preparation, must be assessed on a case-by-case basis in light of the circumstances. Adjudging adequacy and necessity requires evaluation and not mere reliance on the fact that certain facilities or a certain amount of time had been provided.”<sup>33</sup> Thus, it would be wholly inappropriate to conclude, as the Defence requests, that because recording in one set of circumstances was considered a necessary “facility”, recording in a completely different set of circumstances, such as those presented here, is likewise a necessary “facility.”

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<sup>26</sup> A371/2/12 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 (hereinafter “Decision”).

<sup>27</sup> A371/2/12 Decision at para. 35.

<sup>28</sup> E254/1 Request at para. 9.

<sup>29</sup> A371/2/12 Decision at para. 28.

<sup>30</sup> A371/2/12 Decision at para. 35; see also *Ibid.* at paras. 33, 35.

<sup>31</sup> A371/2/12 Decision at para. 34.

<sup>32</sup> E254/1 Request at p. 1 (“Audio / video recording is the *best and least intrusive* means of making an *objective and verifiable record* and preserving any errors for appellate review.”); *Ibid.* at para. 3 (purpose of request to video tape was “to ensure that there was a record of Mr. IENG Sary’s condition”); *Ibid.* at para. 18 (recording is necessary “for use by the Trial Chamber and, if necessary, for review by the Supreme Court Chamber”); *Ibid.* at para. 24 (“The only method by which the Defence can make a record and preserve any potential errors for appeal is by recording Mr. IENG Sary.”).

<sup>33</sup> A371/2/12 Decision at para. 32.

18. Indeed, unlike recording to facilitate adequate communication between an Accused and his attorney, the Defence intends to use the instant recordings of the Accused, and potentially treating physicians, as party-collected evidence to challenge rulings of the Trial Chamber. The Pre-Trial Chamber stated that “if the recording is necessary, it is a facility under Article 14(3)(b) of the ICCPR.”<sup>34</sup> In the Decision, the recording was considered necessary because it was “necessary for trial preparation and communication with counsel.”<sup>35</sup> Under the instant circumstances, however, the underlying purpose of the recording is not “necessary”, in large part because it is an *ultra vires* investigation, and therefore is not encompassed by the ICCPR.
19. In regards to the guarantee of “adequate time and facilities”, the European Court of Human Rights (ECHR) has emphasized the relatively high threshold that must be met in order to substantiate a claim on this ground. Not only must the facility be “‘*necessary*’ to prepare the main trial”<sup>36</sup> in order to qualify, but the provision’s guarantees to “have the opportunity to organise [one’s] defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of proceedings ... is violated *only if this is made impossible*”<sup>37</sup>.
20. Demonstrating this high threshold, in a case before the ECHR where a petitioner made a claim of inadequate facilities based on conditions of detention inimicable to “a reasonable degree of concentration” necessary to prepare a defence, the Court found that “it is clear that the conditions of the applicant’s detention did not favour intense mental work.”<sup>38</sup> Despite this finding, however, it held that “[n]evertheless, the Court notes that no restrictions were placed on the applicant as regards access to the case-file and free and unrestricted legal aid assistance was placed at the applicant’s disposal ... . Accordingly, the Court is satisfied that appropriate facilities were available.”<sup>39</sup>
21. The Defence refer to General Comment No. 32 of the Human Rights Committee, which explains that “‘Adequate facilities’ must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. 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

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<sup>34</sup> A371/2/12 Decision at para. 35.

<sup>35</sup> A371/2/12 Decision at para. 35.

<sup>36</sup> *Case of Mayzit v. Russia*, Application No. 63378/00, Judgment, 20 January 2005, para. 78 (emphasis added).

<sup>37</sup> *Case of Mayzit v. Russia*, Application No. 63378/00, Judgment, 20 January 2005, para. 78 (emphasis added).

<sup>38</sup> *Case of Mayzit v. Russia*, Application No. 63378/00, Judgment, 20 January 2005, para. 81.

<sup>39</sup> *Case of Mayzit v. Russia*, Application No. 63378/00, Judgment, 20 January 2005, para. 81.

voluntary).”<sup>40</sup> Under the structure of the ECCC, all evidence to be used during trial is placed on the Case File by the Office of the Co-Investigating Judges or by the Trial Chamber, and the Defence have access to all of these materials, as well as to the process to make investigatory requests under the Rules.<sup>41</sup> There is no question that the Defence have access to both the materials that might be used against their client and to exculpatory material.

22. The Human Rights Committee has interpreted the rights guaranteed under Article 14 of the ICCPR “as designed to provide to a party rights and guarantees that are *procedural* in nature.”<sup>42</sup> The Defence are not precluded from “raising concerns as to Mr. IENG Sary’s fitness to stand trial and effectively participate in the proceedings”<sup>43</sup> under the Rules, or from any other evidentiary processes on a par with the Co-Prosecutors, and they have repeatedly done so to date. Indeed, the Defence’s frequent utilization of various procedural modalities to challenge the fitness of the Accused is the best indication of the procedural guarantees that are available to them.

*ii. Rule 21(2) is not Applicable*

23. The Defence claim that refusing to allow them to record would violate Rule 21(2), which states:

*Any coercive measures to which [an Accused] may be subjected shall be taken by or under the effective control of the competent judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.*

24. The Defence claim that “Mr. IENG Sary’s fundamental fair trial right to prepare his defence”<sup>44</sup> would be infringed if they were not able to conduct recordings, and that this would therefore be coercive. This claim is not plausible. The Defence have been given every reasonable opportunity to prepare a Defence through filings and in court. The Defence cite no jurisprudence or authority for the principle that recording under the circumstances is a fundamental fair trial right. The Pre-Trial Chamber’s Decision was premised on the fundamental fair trial right of communication with counsel, but communication with counsel is not at issue in the instant Request. Again, under the

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<sup>40</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 2007, at para. 33.

<sup>41</sup> Rules 55(10), 93.

<sup>42</sup> *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, para. 50 (emphasis in original), *discussing B. d. B et al. v. The Netherlands*, Communication No. 273/1989, 30 March 1989, U.N. Doc. A/44/40, 442.

<sup>43</sup> E254/1 Request at para. 18.

<sup>44</sup> E254/1 Request at para. 20.

ECCC structure, the recordings the Defence seek to make here are not only not a fundamental fair trial right but are affirmatively prohibited. Because no fundamental fair trial right is being infringed, not allowing recording under the circumstances cannot be considered “coercive” under Rule 21.

25. The Defence further argue that “[t]he Defence’s recording of Mr. IENG Sary has *no* impact on the proceedings or the parties.”<sup>45</sup> However, as the Defence intend for these recordings to be used as evidence, such actions clearly would have an impact on the proceedings as they would in effect condone investigations by parties in violation of the Rules and would also interfere with witnesses.
26. The Defence next try to read into Rule 21(2) a principle of proportionality, claiming it is “implicit”.<sup>46</sup> Even if true, under the Defence’s argument this principle would only be triggered by a “restriction on a fundamental right,”<sup>47</sup> which a prohibition on recording under these circumstances does not implicate as explained above. The Defence’s own citations for the principle of proportionality fail to support the claim that a prohibition on recording under these circumstances is a fundamental fair trial right, and in fact these citations serve only to highlight the distance between restrictions on true fundamental fair trial rights and the right the Defence are trying to manufacture here. The *Milošević* decision the Defence refers to concerned the accused’s right to self representation.<sup>48</sup> The *Zigiranyirazo* and *Stanišić* decisions the Defence rely on concern the right of an accused to be tried in his or her presence.<sup>49</sup> The Defence claim a right to make audio and/or video recordings for evidentiary purposes under Rules that prohibit them from doing so.

### C. The Trial Chamber Has Inherent Trial Management Discretion

27. The holding cell is an extension of the court when it is being used for the participation of an Accused due to medical, or other, necessities,<sup>50</sup> and the Trial Chamber has

<sup>45</sup> E254/1 Request at para. 21 (emphasis in original).

<sup>46</sup> E254/1 Request at para. 22.

<sup>47</sup> E254/1 Request at para. 22.

<sup>48</sup> See E254/1 Request at fn. 67, citing *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, para. 17.

<sup>49</sup> See E254/1 Request at fn. 67, citing *Zigiranyirazo v. Prosecutor*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 14, and *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.

<sup>50</sup> E238/9 Decision on Accused Ieng Sary’s Fitness to Stand Trial, 26 November 2012, para. 21 (“The ECCC courtroom infrastructure includes specially-equipped holding cell...”).

previously held under its trial management discretion that no recording in the holding cell by the parties would be permitted.<sup>51</sup> The Defence have presented no reason to alter that decision here.

### III. CONCLUSION

28. The Trial Chamber has recently dismissed other attempts by the Defence to effectively challenge decisions regarding Ieng Sary's fitness, and the qualifications and effectiveness of the medical doctors assessing the Accused, in the absence of any legitimate justification.<sup>52</sup> It should do the same to the similar attempt at the root of the Request here. The Co-Prosecutors respectfully submit that the Defence's Request should be dismissed.

Date	Name	Place	Signature
21 December 2012	CHEA Leang Co-Prosecutor	Phnom Penh C.C.C * C.E.T. CO-PROSECUTORS CO-PROSECUTORS	
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<sup>51</sup> **E1/147.1** Transcript of Proceedings, 4 December 2012, pp. 27-28.

<sup>52</sup> **E238/11/1** Decision on Ieng Sary's Request for Reconsideration of the Trial Chamber Decision on the Accused's Fitness to Stand Trial and Supplemental Request, 19 December 2012, paras. 9, 10.