



**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

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Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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**DECISION ON THE IENG SARY DEFENCE REQUEST TO AUDIO AND/OR VIDEO RECORD
IENG SARY IN THE HOLDING CELL**

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1. INTRODUCTION

1. The IENG Sary Defence (“Defence”) requests that it be permitted to audio and/or video record IENG Sary (“the Accused”) in the holding cell, from where he currently participates in proceedings.¹ The Trial Chamber rejects the Defence’s request for the reasons that follow.

2. PROCEDURAL BACKGROUND

2. On 26 November 2012, the Chamber affirmed its earlier findings that the Accused is fit to stand trial.² Pursuant to Internal Rule 81(5), the Chamber also held that the Accused may be ordered to participate in proceedings by audio-visual means from the holding cell and gave notice that it may so order where the Accused has been deemed fit to stand trial, 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.³ The Chamber also rejected a Defence submission that the Accused should be video-recorded in the holding cell, finding that video-recording was unnecessary to ensure that the Accused is appropriately monitored because the holding cell is always accessible to members of the Defence team and the ECCC Medical Unit.⁴

3. On 3 December 2012, the Accused notified the Chamber that, rather than participate in proceedings from the holding cell, he wished to be physically present in the courtroom during witness testimony.⁵ Before proceedings commenced on 4 December 2012, however, one of the Accused’s treating physicians, Dr. CHHEA Kuntheavy, reported that the Accused’s physical condition was “not good”. He recommended that the Accused remain in the holding cell and participate in proceedings from there as this would allow the treating physicians to monitor the Accused’s health status.⁶ On this basis, and pursuant to ECCC Internal Rule 81(5), which envisages that the Chamber may order that an accused participate in proceedings

¹ IENG Sary’s Submissions on the Law Permitting Him to be Audio and/or Video Recorded in the Holding Cell, E254/1, 14 December 2012 (“Defence Submissions on Audio and/or Video Recording”).

² Decision on Accused IENG Sary’s Fitness to Stand Trial, E238/9, 26 November 2012 (“Decision on Fitness”).

³ Decision on Fitness, para.37.

⁴ Decision on Fitness, para. 36.

⁵ IENG Sary’s Withdrawal of Waivers of Right to be Present, E237/2, 3 December 2012; *see* IENG Sary’s Notice of Withdrawal of Waivers of Right to be Present During the Testimony of Certain Witnesses and Civil Parties, E249, 6 December 2012.

⁶ Strictly Confidential Medical Report for IENG Sary before the trial proceedings on 4 December 2012, E1/147.2, 12 December 2012.

via appropriate audio-visual means, the Chamber so ordered.⁷ The Chamber rejected a further Defence request to video-record the Accused on the basis that it would rely on the medical observations made of the Accused's condition by available medical staff.⁸

4. On 5 December 2012, the Defence notified the Chamber that their Case Manager was in the holding cell "taking notes" and that the Defence would file a daily record of its observations of the Accused's condition.⁹ The Defence allege that this was "consistent with what the Trial Chamber ruled yesterday" and purported to give evidence as to the contents of a conversation with one of the Accused's treating physicians.¹⁰ Although the Accused's treating physician issued a report on the morning of 5 December 2012 recommending that the Accused participate in proceedings from the holding cell, the Defence suggested that the treating physician "was of the opinion that it was difficult to tell whether [the Accused] was capable of following the proceedings or not."¹¹ Later on 5 December 2012 the Defence circulated its Case Manager's observations of the Accused from the previous day.¹²

5. Thereafter, the Defence circulated further written observations of the Accused's medical condition in the holding cell from both 5 and 6 December 2012. These indicate that the Defence on 5 December 2012 made nine and then on 6 December 2012 made 11 audio tapes.¹³ The Chamber received medical reports from the Accused's treating physicians before proceedings began on each of those days.¹⁴

6. On 7 December 2012, the Chamber ordered the Defence to cease recording the Accused, including conversations with treating physicians. In the event the Defence sought to argue that recording of the Accused in the holding cell was necessary or appropriate, the Chamber invited written submissions. The Chamber prohibited further recordings or

⁷ T. 4 December 2012, p.2, pp. 17-20.

⁸ T. 4 December 2012, pp. 4-5, 13-14, 21, 27-28.

⁹ T. 5 December 2012, p. 2.

¹⁰ T. 5 December 2012, p. 2.

¹¹ T. 5 December 2012, p. 2; *see* Strictly Confidential Medical Report for IENG Sary before the trial proceedings on 5 December 2012, E1/148.2, 7 December 2012.

¹² Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 4 December 2012, E248/2.1, 5 December 2012.

¹³ Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 5 December 2012, E248.1, 7 December 2012; Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 6 December 2012, E248/1.1, 7 December 2012.

¹⁴ Strictly Confidential Medical Report for IENG Sary before the trial proceedings on 6 December 2012, E1/149.2, 7 December 2012; and Strictly Confidential Medical Report for IENG Sary before the trial proceedings on 5 December 2012, E1/148.2, 7 December 2012.

observations until it ruled on the permissibility of this practice.¹⁵ The Chamber issued a memorandum on 12 December 2012 confirming the prohibition and invited written submissions on the permissibility of audio-recording, video-recording or other evidentiary observations made by the Defence.¹⁶ The Defence filed written submissions on 14 December 2012 to which the Office of the Co-Prosecutors responded on 21 December 2012.¹⁷

7. Having made written submissions to the Trial Chamber as ordered and despite the fact this matter remained pending before the Trial Chamber, the Defence appealed the Trial Chamber's earlier decisions prohibiting the Defence from video-recording the Accused in the holding cell on 18 December 2012.¹⁸

3. SUBMISSIONS

8. The Defence submits that it has a right to make audio and/or video recordings of the Accused in the holding cell, alleging that these are the "best and least intrusive means of making an objective and verifiable record" for appellate review of the Accused's fitness to be tried.¹⁹ It further contends that the right to record its observations of the Accused is inherent in the right to prepare a defence and indeed a lawyer's obligations to his or her client.²⁰ Relying on a Decision by the ECCC Pre-Trial Chamber, the Defence submits that to deny it the right to record the Accused in the holding cell denies it adequate facilities to prepare a defence.²¹ The Defence also contends that it is being denied exculpatory evidence.²² It further asserts that, under ECCC Internal Rule 21(2), any limitation on the right to record the

¹⁵ Email from Trial Chamber Legal Officer, "Re: Letter of Ieng Sary Defence in response to report from the Detention Facility", 7 December 2012.

¹⁶ Order for Submissions, E254, 12 December 2012.

¹⁷ Defence Submissions on Audio and/or Video Recording; Co-Prosecutors' Response to "IENG Sary's Submissions on the Law Permitting Him to be Audio and/or Video Recorded in the Holding Cell", E254/2, 21 December 2012 ("Co-Prosecutors' Response").

¹⁸ IENG Sary's Appeal Against the Trial Chamber's Oral Decision to Deny his Right to be Present in the Courtroom and to Prohibit him from Being Video Recorded in the Holding Cell, E238/9/1/1, 18 December 2012; *see also* Co-Prosecutors' Response to IENG Sary's Appeal Against the Trial Chamber's Oral Decision Concerning Mode of Participation and Video-Recording of the Holding Cell, E238/9/1/2, 3 January 2013; and IENG Sary's Reply to the Co-Prosecutors' Response to his Appeal Against the Trial Chamber's Oral Decision to Deny his Right to be Present in the Courtroom and to Prohibit him from Being Video Recorded in the Holding Cell, E238/9/1/3, 9 January 2013.

¹⁹ Defence Submissions on Audio and/or Video Recording, p. 1 and para. 8.

²⁰ Defence Submissions on Audio and/or Video Recording, para. 7.

²¹ Defence Submissions on Audio and/or Video Recording, p. 1 and paras. 9-11, relying on the Decision on IENG Sary's Appeal Against Co-Investigating Judge's Order Denying Request to Allow Audio/Video Recordings of meetings with IENG Sary at the Detention Facility, A371/2/12, 11 June 2010 ("PTC Decision on Audio and/or Video Recording"), especially paras. 35, 39.

²² Defence Submissions on Audio and/or Video Recording, p. 1 and para. 12.

Accused must be proportionate. It suggests alternatives to public broadcasts of the Accused in the holding cell, such as providing daily recordings to the Chamber on a confidential basis.²³

10. The Co-Prosecutors respond that the legal framework of the ECCC prohibits the parties conducting investigations for the purpose of gathering evidence.²⁴ Should the Accused's treating physicians be called upon to give evidence to the Chamber, the Defence's actions may be construed as interfering with those witnesses.²⁵ The Co-Prosecutors further contend that the Defence's recordings are inadmissible as evidence.²⁶ The Co-Prosecutors respond that the daily transcripts and documents on the case file are sufficient for the purposes of making an adequate record.²⁷ The Pre-Trial Chamber's Decision on Audio and/or Video Recording dealt with dissimilar circumstances.²⁸ In relation to Rule 21(2), the Co-Prosecutors deny that the requested audio-visual recordings are a fundamental fair trial right.²⁹ Finally, they caution the Chamber against permitting the parties to conduct investigations and remind the Chamber of its previous decision to forbid recording in the holding cell.³⁰

4. FINDINGS

11. As a preliminary matter, the Chamber notes that on 4 December 2012, it specifically instructed the Defence not to video-record the Accused in the holding cell. The Defence then informed the Chamber that its Case Manager would remain with the Accused in the holding cell in order to take notes. In fact, the Case Manager made a number of audio recordings over the course of two days, including conversations with the Accused's treating physicians without their clear consent, and without filing an appropriate request to the Chamber.³¹ The Chamber considers the Defence's approach to this matter verges on misconduct pursuant to Internal Rule 38 and should not be repeated.

12. As the Co-Prosecutors note, the Defence's request is in substance a request to gather its own evidence as to the Accused's fitness to be tried. The Chamber reminds the parties that

²³ Defence Submissions on Audio and/or Video Recording, p. 1 and para. 23.

²⁴ Co-Prosecutors' Response, para. 7.

²⁵ Co-Prosecutors' Response, para. 8.

²⁶ Co-Prosecutors' Response, para. 10.

²⁷ Co-Prosecutors' Response, para. 14.

²⁸ Co-Prosecutors' Response, paras. 15-20.

²⁹ Co-Prosecutors' Response, paras. 23-26.

³⁰ Co-Prosecutors' Response, para. 27.

³¹ It appears that consent was given on one occasion, which the Defence relied on to record any further conversation.

the ECCC's legal framework precludes investigations carried out by them. In view of the Defence allegations that "[a]ny claim to the contrary [of the Defence's view] demonstrates an utter lack of appreciation of the duties and obligations of defence counsel" and that forbidding video and/or audio recording of the Accused "begs the question why the Trial Chamber opts for opacity over transparency", the Chamber shall nonetheless address the matters about which the Defence complains.³²

13. The Chamber considers that it does not follow from a right to have an adequate record of proceedings that the Defence may record the Accused in the holding cell, whether at all times or at a time of the Defence's choosing. The Chamber notes that the Pre-Trial Chamber Decision on Audio and/or Video Recording does not suggest such a right. That Decision merely allowed recordings of the Accused's meetings with his lawyers at the detention facility in order to help provide instructions to the Accused's international Co-Lawyer who then resided abroad.³³ The Pre-Trial Chamber noted "factors specific to the pre-trial proceedings" that meant that audio/video recording should be allowed to ensure that the Accused had adequate facilities to prepare his defence.³⁴ The present circumstances are different from those addressed by the Pre-Trial Chamber: the holding cell is directly below the courtroom, any member of the Defence team can be present with the Accused at any time, and there is a direct and confidential telephone line from the holding cell to the Accused's counsel.

14. Contrary to what is alleged by the Defence, the Trial Chamber is also not persuaded that video and/or audio-recording of the Accused in the holding cell is a right implicitly guaranteed by the International Covenant on Civil and Political Rights ("ICCPR"). The Chamber's finding does not deny the Accused an adequate record of whether or not he is fit to be tried. The Accused was assessed by the court-appointed experts to be fit to stand trial as recently as 26 November 2012. The Accused is regularly assessed by medical personnel who provide written records to the Chamber on each day of proceedings, and the Chamber recently re-appointed independent experts to review the health and fitness of the Accused in March 2013.³⁵ In the meantime, the Accused's treating physicians may bring any significant concern

³² Defence Submissions on Audio and/or Video Recording, paras 9 and 13.

³³ PTC Decision on Audio and/or Video Recording, paras 34-35 and 41.

³⁴ PTC Decision on Audio and/or Video Recording, para. 33.

³⁵ Trial Chamber Memorandum on the "Re-Appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea during the week of 11 March 2013", E256, 18 December 2012. The Trial Chamber invited the parties to "make written submissions concerning the scope of this assessment no later than 21 January 2013."

to the Chamber's attention whenever necessary.³⁶ The Chamber therefore does not accept that a refusal to allow the Defence to video and/or audio record the Accused in the holding cell interferes with any of his rights, including the right to have an adequate record of these proceedings and may, to the contrary, jeopardize other rights, such as to privacy and dignity.

15. The Defence's alternative characterization of video and/or audio-recording of the Accused in the holding cell as exculpatory is similarly unpersuasive. The ordinary meaning of exculpatory evidence is that which tends to show that a person is innocent of an alleged crime.³⁷ The Chamber does not consider that material allegedly relevant to the issue of fitness to stand trial is germane to the Accused's innocence or guilt. The Defence relies on the ICCPR, to which Cambodia is a party, and in particular a statement by the Human Rights Committee in General Comment No. 32, to suggest that audio and/or video recording of the Accused in the holding cell would assist the Defence in demonstrating that the Accused is unfit to be tried.³⁸ However, the example given by the Human Rights Committee instead concerned indications that a confession was not voluntary and thus concerns rights different to those allegedly at issue here. The Defence essentially seeks to re-litigate the Accused's fitness to be tried, despite the fact that this matter must be evaluated on the basis of expert medical assessment, as the Chamber has very recently done.

16. The Chamber considers that video or audio recording of the Accused is neither necessary nor relevant to the expert medical assessment of the Accused's fitness to stand trial. The medical experts have not indicated that recording of the Accused is necessary for their assessment. Moreover, assessments by legal personnel or any other members of the IENG Sary Defence or others who are not medically trained are of no relevance to the Chamber. The appropriate individuals to provide evidence as to the Accused's fitness are the court-appointed and independent medical experts, and not legal personnel or any other members of the IENG

³⁶ See Memorandum to the doctor treating Ieng Sary at the Detention Centre, E238/12, 18 December 2012, directing the Treating Physician(s) to, among other things, report "daily and directly to the Trial Chamber before it convenes each morning and if necessary during the course of the day."

³⁷ Black's Law Dictionary (9th ed.) defines exculpatory evidence at p. 637 as "[e]vidence tending to establish a criminal defendant's innocence." See also ECCC Internal Rule 53(4); *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Case No. ICC-01/04-01/06), 13 June 2008, para. 59; *Prosecutor v. Krstić*, Judgement, ICTY Appeals Chamber (IT-98-33-A), 19 April 2004, paras. 178 and 204.

³⁸ 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: 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.)"

Sary Defence. Should the Defence have concerns as to the Accused's medical condition, the appropriate course of action is to seek medical attention rather than lodge selective observations made by a member of his Defence team. Further, the proposed observations would record the medical attention that the Accused receives in the holding cell, to which an expectation of privacy would usually attach, and it is plainly not the case that a video and/or audio recording is the least intrusive means to create a record. For the above reasons, the Chamber finds that it would be inappropriate to order that the Accused be recorded while in the holding cell, whether continuously or at intervals selected by his Defence counsel.

17. In conclusion, the Chamber rejects the Defence submission that the Accused IENG Sary has a right to be video and/or audio recorded in the holding cell, whether continuously or periodically, or that any of its proposals are appropriate in the circumstances.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES the Defence requests to audio or video-record the Accused in the holding cell;

AFFIRMS its finding of 26 November 2012 that the Accused may be ordered to participate in proceedings by appropriate audio-visual means from the holding cell where his presence in the courtroom would be contrary to his medical interests and to the expeditious conduct of proceedings; and

AFFIRMS its orders of 7 and 12 December 2012 prohibiting the Defence from filing recordings or observations of the Accused in the holding cell.

Phnom Penh, 16 January 2013
President of the Trial Chamber



Nil Nonn
Nil Nonn