

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC **Party Filing:** Co-Prosecutors

Filed to: Supreme Court Chamber **Original Language:** English

Date of document: 27 February 2013

CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC

Classification by Supreme Court Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



**CO-PROSECUTORS' RESPONSE TO "IENG SARY'S APPEAL AGAINST THE
TRIAL CHAMBER'S 16 JANUARY 2013 DECISION TO DENY HIS REQUEST TO
BE AUDIO AND/OR VIDEO RECORDED IN THE HOLDING CELL"**

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distribute to:

Supreme Court Chamber
Judge KONG Srim, President
Judge C. N. JAYASIINGHE
Judge SOM Sereyvuth
Judge A. KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence MUMBA
Judge YA Narin

Accused
IENG Sary

Lawyers for the Defence
ANG Udom
Michael
KARNAVAS

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The defence for Ieng Sary (“Defence”) have filed an immediate appeal¹ (“Appeal”) from a Trial Chamber decision² (“Impugned Decision”) denying the Defence’s request to audio and/or video record Ieng Sary in the holding cell.
2. The Defence had previously filed an immediate appeal³ against the Trial Chamber’s oral decision on the same issue⁴ (“Prior Appeal”), to which the Co-Prosecutor’s responded (“Prior Response”).⁵ That appeal remains pending. After the issuance of the Impugned Decision, the Defence inquired by email whether it was preferable to supplement their earlier appeal, or to file a new appeal.⁶ The Supreme Court Chamber Legal Officer advised the Defence to file a new appeal, but that to avoid repetition, the Defence and any responding parties should refer to their previous filings on overlapping issues.⁷ The Co-Prosecutors responded to the Prior Appeal on admissibility only,⁸ and will reference those arguments below.
3. The Co-Prosecutors summarized the relevant procedural history up to the issuance of the Impugned Decision, which was notified to the Parties on 17 January 2013,⁹ in their Prior Response.¹⁰ The Defence subsequently filed a reply to the Co-Prosecutor’s Prior Response.¹¹

¹ **E254/3/1/1** Ieng Sary’s Appeal Against the Trial Chamber’s 16 January 2013 Decision to Deny His Request to be Audio and/or Video Recorded in the Holding Cell, 5 February 2013 (hereinafter “Appeal”). Notified in English only, 7 February 2013. Notified in Khmer, 21 February 2013.

² **E254/3** Decision on the Ieng Sary Defence Request to Audio and/or Video Record Ieng Sary in the Holding Cell, 17 January 2013 (hereinafter “Impugned Decision”). Notified 17 January 2013.

³ **E238/9/1/1** 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, 18 December 2012 (hereinafter “Prior Appeal”).

⁴ **E1/147.1** Transcript of Proceedings, 4 December 2012, pp. 17-19.

⁵ **E254/2** Co-Prosecutors’ Response to “Ieng Sary’s Submissions on the Law Permitting Him to be Audio and/or Video Recorded in the Holding Cell”, 21 December 2012.

⁶ Email of 23 January 2013 from Tanya Pettay, Legal Consultant, Ieng Sary Defence Team.

⁷ Email 23 January 2013 from Sheila Paylan, Legal Officer and Greffier, Supreme Court Chamber.

⁸ **E238/9/1/2** 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, 3 January 2013 (hereinafter “Previous Response”).

⁹ **E254/3** Impugned Decision.

¹⁰ **E238/9/1/2** Prior Response, at paras. 3-12.

¹¹ **E238/9/1/3** 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, 9 January 2013.

4. On 29 January 2013, the Defence made a request to file in English only by the filing deadline, with Khmer translation to follow.¹² That request was granted by the Supreme Court Chamber on 30 January 2013.¹³
5. The Co-Prosecutors hereby submit that the Appeal should be dismissed as inadmissible, or, in the alternative, as unfounded.

II. THE APPEAL IS MANIFESTLY INADMISSIBLE.

a. The Appeal is not admissible under Rule 104(4)(b)

6. The Defence argue that their appeal is admissible under Rule 104(4)(b).¹⁴ In response, the Co-Prosecutors refer the Supreme Court Chamber to paragraphs 17-20 of their Prior Response. The Co-Prosecutors re-emphasize that contrary to the Defence's claim that "[a]dmissibility under Rule 74(3)(f) should not be interpreted as being broader than under Rule 104(4)(d),"¹⁵ the text of the two provisions indicate that such an interpretation is warranted. Rule 74(3)(f) allows for appeal of decisions that are merely "related to" detention and bail, whereas Rule 104(4)(b) applies only to decisions "on" detention and bail, and then only in relation to such decisions "under Rule 82", which Rule concerns only detention or release, not the conditions or modalities thereof.¹⁶

b. The Appeal is not admissible under Rule 104(4)(d)

7. The Defence argue that the Appeal is admissible under Rule 104(4)(d).¹⁷ The Co-Prosecutors refer the Supreme Court Chamber to paragraphs 21-25 of their Prior Response.¹⁸ The Co-Prosecutors note that the Defence submission to the Trial Chamber was not made on the basis of Rule 35 and did not reference that Rule at any point,¹⁹ nor did the Impugned Decision reference Rule 35.²⁰
8. The Co-Prosecutors have also recently addressed, in response to a separate appeal filed by the Defence, the same erroneous admissibility argument premised on Rule 104(4)(d)

¹² E254/3/1/1.1 Ieng Sary's Expedited Request to File Appeal in English Only with Khmer Translation to Follow, 29 January 2013.

¹³ E254/3/1/1.2 Decision on Ieng Sary's Expedited Request to File Appeal in English Only with Khmer Translation to Follow, 30 January 2013.

¹⁴ E254/3/1/1 Appeal, at paras. 12-16.

¹⁵ E254/3/1/1 Appeal, at para. 16.

¹⁶ Internal Rule 82.

¹⁷ E254/3/1/1 Appeal, at paras. 17-20.

¹⁸ E238/9/1/2 Prior Response, at paras. 21-25.

¹⁹ 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.

²⁰ E254/3 Impugned Decision.

the Defence raise here.²¹ The Defence's attempts to re-litigate issues regarding the adequacy of the medical staff or of the medical reporting regime do nothing to advance their admissibility argument.²²

III. STANDARD OF REVIEW AND BURDEN

9. This Chamber has ruled that Internal Rules 104(1) and 105(2) allow for the following three disjunctive grounds for appeal:
 - a. An error on a question of law invalidating the decision;
 - b. An error of fact which has occasioned a miscarriage of justice; and
 - c. A discernible error in the exercise of the Trial Chamber's discretion, which resulted in prejudice to the appellant.²³
10. The Defence's Appeal, at various points, alleges all three of these grounds of error, in each case shortening the respective standard to some variation of "an error of law", "an error of fact", or "an abuse of discretion".²⁴ While these phrases are convenient shorthand for the applicable standard, it is important to remain cognizant that they do not fully capture the standards mandated by the Rules that must be met to justify Supreme Court Chamber reversal of a Trial Chamber decision.
11. Rules 104(1)(a) and 105(2)(a) provide for appellate review of "an error on a question of law *invalidating the judgement or decision*".²⁵ Thus, not every error of law will satisfy this standard. The error of law, even if found, must be so fundamental and dispositive as to *invalidate* the decision.²⁶ An error of law that nevertheless would not have resulted in a different decision should therefore not be subject to reversal.
12. Rules 104(1)(b) and 105(2)(c) provide for appellate review of "an error of fact *which has occasioned a miscarriage of justice*".²⁷ Thus, not every error of fact will satisfy this standard. The error of fact must have been so central and dispositive as to meet the

²¹ E251/1/2 Co-Prosecutors' Response to "Ieng Sary's Appeal Against the Trial Chamber's 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), 21 January 2013.

²² E254/3/1/1 Appeal, at para. 20.

²³ E116/1/7 Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012 paras. 24, 25; E176/2/1/4 Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Internal Rule 35 Applications for Summary Action, 14 September 2012, para. 19.

²⁴ See, e.g., E254/3/1/1 Appeal, at p. 14 ("The Trial Chamber erred in law and in fact and abused its discretion"), para. 24 ("The Trial Chamber's errors of law and fact...").

²⁵ Emphasis added.

²⁶ See *Simeon Nchamihigo v. The Prosecutor*, ICTR-2001-63-A, Appeals Judgement, 18 March 2010, paras. 31-32 (finding a "discernible error of law" but holding that "[n]onetheless, the Appeals Chamber is not convinced that the Trial Chamber's error invalidates the Trial Judgement").

²⁷ Emphasis added.

high threshold that a miscarriage of justice occurred as a result. If a Trial Chamber would have reached the same decision in the absence of the error, there has been no miscarriage of justice.

13. Rule 105(2)(b) provides for appellate review of “a discernible error in the exercise of the Trial Chamber’s discretion *which results in prejudice to the appellant*”²⁸. The moving party must therefore not only show a specific, concrete error, but also must show that it resulted in prejudice to that party. If a Trial Chamber would have reached the same decision in the absence of the demonstrated error, or if the error has been cured, there has been no prejudice.
14. In sum, while for each respective standard an “error of law”, an “error of fact”, or an “abuse of discretion” is necessary, it is not sufficient. The Co-Prosecutors note the correct standards for the completeness of this Response. However, in the view of the Co-Prosecutors, the Defence have failed to demonstrate any error whatsoever under any standard.
15. The burden of demonstrating error rests with the Defence, as the appealing party.²⁹

IV. THE DEFENCE FAIL TO MEET THEIR BURDEN OF DEMONSTRATING ERROR MERITING RELIEF

a. Allegation of Error Concerning Misconduct under Rule 38

16. The Trial Chamber noted that the Defence proceeded to audio-record the Accused in the holding cell after being instructed not to video-record the Accused in the holding cell, and observed that “the Defence’s approach to this matter verges on misconduct pursuant to Internal Rule 38”.³⁰ Rule 38 allows for a Chambers to impose sanctions against a lawyer following a warning if “in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings or is otherwise contrary to Article 21(3) of the Agreement.”³¹ Article 21(3) of the Agreement³² states that all counsel appearing before the ECCC must comport, *inter alia*, with “recognized standards and ethics of the legal profession”. The Defence object to the Trial Chamber’s characterization of their conduct, claiming it is “spurious” because “the

²⁸ Emphasis added.

²⁹ E50/1/1/4 Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release, 3 June 2011, at para. 29.

³⁰ E254/3 Impugned Decision, at para. 11.

³¹ Internal Rule 38(1).

³² Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.

Trial Chamber had only prohibited the Defence from video recording Mr. Ieng Sary in the holding cell”.³³

17. The Co-Prosecutors first note that in addition to the general inadmissibility of the Appeal as a whole, Rule 38 warnings are not subject to immediate appeal.³⁴ As to the substance of the claim, the Defence’s hair-splitting and wilful disobedience of the clear intention of the Trial Chamber’s instruction demonstrates that the Trial Chamber’s characterization of their behaviour as verging on misconduct pursuant under Rule 38 was correct. The Co-Prosecutors have brought to the attention of the Supreme Court Chamber similar behaviour by the Defence in wilfully misinterpreting the holdings of the Supreme Court Chamber.³⁵ As the Co-Prosecutors previously noted, such behaviour “at the very least, verges on bad faith”,³⁶ thereby bending, if not breaking, the “recognized standards and ethics of the legal profession” pursuant to Article 21(3). At the bare minimum, following the instruction from the Trial Chamber that they were not to video-record the Accused in the holding cell, the Defence were on notice that they should seek additional clarification or permission from the Trial Chamber in order to audio-record.
18. The Defence’s arguments that “there is a vast difference between video and audio recording”³⁷ and that it is the Defence’s reasons for engaging in the different forms of recording that are relevant³⁸ are untenable and only serve to highlight the disingenuous nature of their claim. The Defence also argue that “the Trial Chamber was fully apprised of the Defence’s intentions regarding recording Mr. Ieng Sary as reflected in the record.”³⁹ In support of this claim, the Defence cite to two transcript selections. The first selection⁴⁰ the Defence cite to only references videotaping,⁴¹ and in any event precedes the Trial Chamber’s ruling that videotaping is prohibited.⁴² The second

³³ E254/3/1/1 Appeal, at para. 26.

³⁴ See Internal Rule 104(4).

³⁵ E251/1/2 Co-Prosecutors’ Response to “Ieng Sary’s Appeal Against the Trial Chamber’s 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), 21 January 2013, paras. 12-16.

³⁶ E251/1/2 Co-Prosecutors’ Response to “Ieng Sary’s Appeal Against the Trial Chamber’s 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), 21 January 2013, at para. 14.

³⁷ E254/3/1/1 Appeal, at para. 27.

³⁸ E254/3/1/1 Appeal, at para. 27.

³⁹ E254/3/1/1 Appeal, at para. 27.

⁴⁰ E1/147.1 Transcript of Proceedings, 4 December 2012, pp. 12-15.

⁴¹ E1/147.1 Transcript of Proceedings, 4 December 2012, p. 14.

⁴² E1/147.1 Transcript of Proceedings, 4 December 2012, p. 19.

selection⁴³ the Defence cite to makes no mention of recording of any kind. The Defence's arguments are therefore baseless.

19. Finally, the Defence argue that their actions do not constitute “offensive or abusive conduct”, “obstruct, inconvenience, or otherwise negatively impact the proceedings”, nor “bring the proceedings into disrepute or cause prejudice to anyone”⁴⁴ and therefore should not be subject to Rule 38. The Co-Prosecutors first note that by the plain language of Rule 38, the determination that a party has violated the Rule is a purely a discretionary one for the relevant Chamber.⁴⁵ Furthermore, a party acting in bad faith and violating a directive of the Chambers clearly does obstruct proceedings and violate Article 21(3) of the Agreement.

b. Allegation of Error Concerning the Defence's Collection of Evidence

20. The Trial Chamber held that the Defence's request was in substance a request to gather its own evidence, and therefore was prohibited.⁴⁶ The Defence claim that the Trial Chamber erred, without stating what type of error occurred, because: (1) the Trial Chamber did not rule sooner that their activities constituted prohibited collection of evidence;⁴⁷ and (2) that their actions did not constitute “an ‘investigation’ within the meaning of Rule 55”.⁴⁸
21. The Defence's argument that this Chamber should overrule the Trial Chamber because it is “incongruous” that if the audio and video recordings were “as patently investigative as the Trial Chamber *now* suggests, then it logically follows that the Trial Chamber would have expressed the obvious when first informed by the Defence that it would notify the Trial Chamber of its Case Manager's observations”⁴⁹ is absurd. First, it is only the Defence that uses the term “patently obvious” to describe the Trial Chamber's holding. The Trial Chamber simply made a finding.⁵⁰ Second, the Trial Chamber made its ruling having requested and received submissions from the Defence and the Co-Prosecutors on

⁴³ E1/148.1 Transcript of Proceedings, 5 December 2012, p. 5.

⁴⁴ E254/3/1/1 Appeal, at para. 30.

⁴⁵ Internal Rule 38 (“in their opinion”).

⁴⁶ E254/3 Impugned Decision, at para. 12.

⁴⁷ E254/3/1/1 Appeal, at para. 32.

⁴⁸ E254/3/1/1 Appeal, at para. 34.

⁴⁹ E254/3/1/1 Appeal, at para. 32.

⁵⁰ E254/3 Impugned Decision, at para. 12.

the legality of the Defence's proposed actions.⁵¹ It thereby gave the Defence the best opportunity to justify its actions rather than ruling immediately, and those justifications were found lacking. Indeed, the Trial Chamber's consideration of the Defence's best arguments in support of its practices demonstrate that it made its decision methodically and in consideration of all of the arguments. Third, the Defence complaint that the Trial Chamber's failure to rule immediately is an indication of error is premised on the Defence attempts to file "observation logs", whereas the Impugned Decision and Appeal concern audio and video recording.

22. The Defence's argument that what they seek is not an "investigation" within the meaning of Rule 55 is unsupported in their Appeal beyond the summary statement that "[a]ny suggestion to the contrary is fanciful".⁵² Rule 55 allocates to the various chambers the power to gather evidence, and parties who seek to do so must seek the assistance of the relevant chamber.⁵³ As the Co-Prosecutors noted to the Trial Chamber, the Trial Chamber's jurisprudence has also prohibited parties from gathering information to submit as evidence.⁵⁴
23. The Defence are clear that their intention in making recordings is to submit them as evidence. Throughout their filings to the Trial Chamber and the Supreme Court Chamber the Defence argue that they are attempting to make a "record" and even describe the recordings as "evidence" in their Appeal.⁵⁵
24. The Defence have therefore failed to show any error.

⁵¹ **E254** Trial Chamber Memorandum: Order for Submissions, 12 December 2012; **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 "Ieng Sary Submission on Recording Law"); **E254/2** Co-Prosecutors' Response to "Ieng Sary's Submissions on the Law Permitting Him to be Audio and/or Video Recorded in the Holding Cell", 21 December 2012 (hereinafter "Response on Recording Law").

⁵² **E254/3/1/1** Appeal, at para. 34. The referenced paragraphs of the Pending Appeal do not meaningfully advance this argument.

⁵³ Internal Rule 55(10).

⁵⁴ **E211/2** Trial Chamber Memorandum: Nuon Chea Defence Notice to the Trial Chamber Regarding Regarding Research at DC-Cam (E211), 13 August 2012; **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, at para. 37.

⁵⁵ See also **E254/3/1/1** Appeal, at para. 49 ("The Defence seeks to present its *observations* ..." (emphasis in original)); *ibid.* at para. 46 ("Evidence that demonstrates the impact of Mr. Ieng Sary's physical condition on his ability to participate in the proceedings is evidence that could assist the Defence in making a record ...").

c. Allegation of Error of Law Concerning the Trial Chamber's Interpretation of Non-Binding Jurisprudence

25. The Trial Chamber held that a Pre-Trial Chamber decision concerning recording in the detention centre⁵⁶ (“Pre-Trial Chamber Decision”) did not suggest a right for the Defence to record the Accused in the holding cell.⁵⁷ The Defence argue that “[t]he Trial Chamber is incorrect in finding that the Pre-Trial Chamber’s decision on the right to record Mr. Ieng Sary does not apply to this case.”⁵⁸ The Co-Prosecutors will proceed on the assumption that the Defence intended to argue that the rationale of the Pre-Trial Chamber Decision concerning recording in the detention centre also justifies recording in the holding cell. An argument that the Trial Chamber committed error merely by not following a decision of the Pre-Trial Chamber, even assuming, *arguendo*, that it is directly on point, is a non-starter. Pre-Trial Chamber decisions may be persuasive, but not binding, on the Trial Chamber.
26. The Co-Prosecutors submit that the Trial Chamber correctly noted the vastly different circumstances in respect to the Pre-Trial Chamber’s Decision versus the Impugned Decision, and in observing that the Pre-Trial Chamber’s Decision does not suggest a Defence right to audio- or video-record in the holding cell. The Co-Prosecutors previously explained why this is so in their filing to the Trial Chamber, to which they respectfully refer the Supreme Court Chamber.⁵⁹
27. The Defence’s argument in attempting to refute the Trial Chamber’s holding goes entirely to their purported right to create “a contemporaneous and objective record of Mr. Ieng Sary’s physical condition.”⁶⁰ As the Co-Prosecutors have previously submitted, however, the Defence have failed to substantiate a claimed “right to make a record” and are prohibited from collecting evidence to “make a record”.⁶¹ These arguments are circular, and unpersuasive.

⁵⁶ 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.

⁵⁷ E254/3 Impugned Decision, at para. 13.

⁵⁸ E254/3/1/1 Appeal, at para. 35.

⁵⁹ E254/2 Response on Recording Law, at paras. 15-22.

⁶⁰ E254/3/1/1 Appeal, at para. 37; *ibid.* para. 38 (“if no recording is allowed...then there is no contemporaneous record”); *ibid.* para. 39 (“no complete and accurate record is being made as to Mr. Ieng Sary’s actual state”).

⁶¹ E254/2 Response on Recording Law, at paras. 13-14.

28. The Defence have thus failed to show any error of law, and regardless the parties' prohibition on collecting evidence provides an adequate and independent reason for upholding the Trial Chamber's decision.

d. Allegation of Error of Fact and Abuse of Discretion Regarding Finding of an Adequate Record of the Accused's Fitness for Trial

29. The Trial Chamber held that the Accused's assessment "by medical personnel who provide written records to the Chamber on each day of proceedings"⁶², his periodic assessment by court-appointed experts, and his treating physicians' ability to "bring any significant concern to the Chamber's attention whenever necessary"⁶³, provides an adequate record of the Accused's fitness to stand trial. The Defence challenge the adequacy of these reporting measures, arguing that the expert reports individually occur too sporadically to create an adequate record, the "daily reports *cannot and do not* provide a complete picture of Mr. Ieng Sary's actual ability to follow and participate in the proceedings throughout each trial day"⁶⁴, and the treating doctors "fail to bring significant changes in Mr. Ieng Sary's condition to the Trial Chamber's attention."⁶⁵

30. The Co-Prosecutors submit that the Defence have failed to substantiate their claim that the Trial Chamber committed an error of law or abused its discretion in finding that an adequate record of the Accused's fitness to stand trial is being created. The Defence's argument on this point essentially amounts to a complaint that the doctors and experts assessing the Accused have failed to agree with the Defence's own views regarding the Accused's fitness for trial, or as to which considerations are relevant in that assessment⁶⁶, and is merely an attempt to re-litigate the Accused's fitness to stand trial. In support of their argument, the Defence reference claims they have made to the court, not factual evidence.⁶⁷ As the Trial Chamber stated:

[V]ideo 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

⁶² E254/3 Impugned Decision, at para. 14.

⁶³ E254/3 Impugned Decision, at para. 14.

⁶⁴ E254/3 Impugned Decision, at para. 40.

⁶⁵ E254/3 Impugned Decision, at para. 41.

⁶⁶ See E254/3/1/1 Appeal, at para. 41 ("Mr. Ieng Sary's treating doctor recently refused to report to the Trial Chamber that Mr. Ieng Sary was being administered oxygen and could not follow the proceedings because of his extreme fatigue.").

⁶⁷ See E254/3/1/1 Appeal, at fn. 103 (citing alleged statements made to the Defence and a Defence "Observation Log"); *ibid.* at para. 41 ("As Mr. Karnavas informed the Trial Chamber...The treating doctor state to Mr. Karnavas...As. Mr. Karnavas informed the Trial Chamber...").

*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 Sary Defence.*⁶⁸

31. The Defence have failed to carry their burden to show that the Trial Chamber erred in determining that the daily, and if need be more frequently than that, medical assessment, combined with the more periodic expert assessments, adequately assess the Accused's fitness to stand trial.
32. Relatedly, elsewhere in their Appeal, the Defence argue that it was an error of fact and an abuse of discretion for the Trial Chamber to find that recording is "neither necessary nor relevant to the expert medical assessment of the Accused's fitness to stand trial."⁶⁹ The Defence, however, concede that this holding is correct,⁷⁰ choosing instead to argue a different point – that such recording "*is* necessary to have accurate and objective recordings so that Mr. Ieng Sary's condition and the treating doctors assessments are recorded."⁷¹ This argument is therefore repetitious of the Defence's arguments made elsewhere that it should be allowed to collect evidence.⁷²
33. The Defence have therefore failed to carry their burden to show an error of fact or abuse of discretion, and regardless the parties' prohibition on collecting evidence provides an adequate and independent reason for upholding the Trial Chamber's decision.

e. Allegation of Abuse of Discretion in Finding Potential Violation of Privacy

34. The Trial Chamber observed that "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."⁷³ The Defence argue that that holding is "illogical".⁷⁴ In support of this claim of abuse of discretion, the Defence claim that they have "repeatedly

⁶⁸ E254/3 Impugned Decision, at para. 16.

⁶⁹ E254/3/1/1 Appeal, at paras. 48-50.

⁷⁰ E254/3/1/1 Appeal, at para. 48 ("[T]he Defence concedes that audio and/or video recording may not be strictly necessary for an expert medical assessment").

⁷¹ E254/3/1/1 Appeal, at para. 48 (emphasis in original).

⁷² Additionally, the Defence aver that "[r]ecordings of Mr. Ieng Sary may be of great use to experts, particularly since they do not observe Mr. Ieng Sary every day or for a continuous period." E254/3/1/1 Appeal, at para. 48. The Trial Chamber noted, however, that "[t]he medical experts have not indicated that recording of the Accused is necessary for their assessment." E254/3 Impugned Decision, at para. 16.

⁷³ E254/3 Impugned Decision, at para. 16.

⁷⁴ E254/3/1/1 Appeal, at para. 43.

acted to protect Mr. Ieng Sary's fundamental rights to privacy and dignity"⁷⁵ and allege that the Trial Chamber has previously "violated Mr. Ieng Sary's dignity".⁷⁶ These claims are irrelevant, and fail to advance the Defence's argument that the Trial Chamber abused its discretion.

f. Allegation of Error of Law Regarding Exculpatory Evidence

35. The Trial Chamber held that the Defence's attempt to characterize the audio- or video-recording of the Accused in the holding cell as exculpatory evidence was unpersuasive.⁷⁷ The Defence argues that "[e]vidence that demonstrates the impact of Mr. Ieng Sary's physical condition on his ability to participate in the proceedings is evidence that could assist the Defence in making a record of Mr. Ieng Sary's unfitness for trial and preserving the Trial Chamber's errors for appeal."⁷⁸ The Defence also argue that their right to adequate facilities to prepare a defence allows them to record in the holding cell.⁷⁹
36. The Co-Prosecutors previously responded to the Defence's substantive arguments on this point in their response to the Trial Chamber, to which the Co-Prosecutors respectfully refer the Supreme Court Chamber.⁸⁰ The Co-Prosecutors also note that within the ECCC framework, the exculpatory evidence that the Defence have a right to access would, pursuant to Rules 55 and 93,⁸¹ be evidence collected by a Chamber, not evidence created by the Defence themselves. For example, the Defence would not be permitted to interview witnesses concerning the acts and conduct of the Accused, even if the information provided by those witnesses would be "exculpatory" in the core sense of the word. Furthermore, the assessments of the Accused's fitness to stand trial have generated extensive reports, testimony, and filings, all of which the Defence may access.
37. The Defence also claim that "[t]he ICCPR implicitly envisages the right to make a record as part of the rights to adequate facilities to prepare a defence and to have access to exculpatory evidence."⁸² The Co-Prosecutors also addressed in their filing to the Trial Chamber the reasons why the Defence's claimed "right to make a record" is misguided,

⁷⁵ E254/3/1/1 Appeal, at para. 44.

⁷⁶ E254/3/1/1 Appeal, at paras. 43, 44.

⁷⁷ E254/3 Impugned Decision, at para. 15.

⁷⁸ E254/3/1/1 Appeal, at para. 46.

⁷⁹ E254/3/1/1 Appeal, at para. 47.

⁸⁰ E254/2 Response on Recording Law, at paras. 19-22.

⁸¹ See Internal Rules 55(5), 55(10), 93.

⁸² E254/3/1/1 Appeal, at para. 47.

and why recording in the holding cell does not fall under the right to adequate facilities under the ICCPR.⁸³

38. The Defence have therefore failed to carry their burden in showing an error of law, and the regardless the parties' prohibition on collecting evidence provides an adequate and independent ground for upholding the Trial Chamber.

g. Allegation of Abuse of Discretion Regarding Finding that Recording the Accused is not the Least Intrusive Means

39. The Trial Chamber held that it "is plainly not the case that a video and/or audio recording is the least intrusive means to create a record".⁸⁴ This was in response to the Defence's argument that not allowing them to conduct the recordings violated Rule 21(2)'s instruction that "[a]ny coercive measures to which [an Accused] may be subjected ... shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity."⁸⁵ The Defence argue that the Trial Chamber's observation is "specious" because the Defence suggested three conditions that in the Defence's view "would ensure no intrusion upon Mr. Ieng Sary, the Trial Chamber or the proceedings."⁸⁶

40. The Defence rest their argument on unsupported premises. First, the Defence fail to substantiate that prohibiting the Defence from recording in the holding cell is a "coercive measure" that is then subject to Rule 21(2). Second, the Defence claim, without support, that "the principle of proportionality ... is implicit in Rule 21(2)".⁸⁷ In fact, according to the Defence, the principle of proportionality requires measures that "impair the right no more than necessary"⁸⁸, while the plain language of Rule 21(2) applies a "strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity" standard. Third, even according to the Defence if the "principle of proportionality" applies it is only triggered when there is a "restriction of a fundamental right"⁸⁹, and the Defence have failed to substantiate how recording in the holding cell is a fundamental right.⁹⁰ The Co-Prosecutors made further arguments on this

⁸³ E254/2 Response on Recording Law, at paras. 14, 19-22.

⁸⁴ E254/3 Impugned Decision, at para. 16.

⁸⁵ Internal Rule 21(2).

⁸⁶ E254/3/1/1 Appeal, at para. 51.

⁸⁷ E254/1 Ieng Sary Submission on Recording Law, at para. 22.

⁸⁸ E254/1 Ieng Sary Submission on Recording Law, at para. 22.

⁸⁹ E254/1 Ieng Sary Submission on Recording Law, at para. 22.

⁹⁰ See also E254/3/1/1 Appeal, at para. 52 (asserting an unsubstantiated connection between recording in the holding cell and the "right to prepare a defence").



point to the Trial Chamber, to which they respectfully refer the Supreme Court Chamber.⁹¹

41. The Defence have therefore failed to carry their burden in showing an abuse of discretion, and regardless the parties' prohibition on collecting evidence provides an independent and adequate ground for upholding the Trial Chamber decision.

V. CONCLUSION

42. For these reasons, the Co-Prosecutors respectfully request the Chamber to:
- a. find the Appeal wholly inadmissible; or
 - b. dismiss the Appeal; and
 - c. dismiss the Defence's request for a public, oral hearing.

Respectfully submitted,

Date	Name	Place	Signature
27 February 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

⁹¹ E254/2 Response on Recording Law, at paras. 23-26.