

**IN THE PRE-TRIAL CHAMBER OF
THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

<p>ឯកសារបញ្ជាក់ថាខ្លឹមសារតាមច្បាប់ដើម CERTIFIED COPY/COPIE CERTIFIÉE CONFORME</p> <p>ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 19 / 02 / ២០០៧</p> <p>មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA</p>
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**In the Matter of the appeal by Ieng Sary
against the order of provisional detention
by the Office of the Co-Investigating Judges dated 14 November 2007**

Case No. 002/19-09-2007-ECCC-OCIJ(PTC03)

<p>ឯកសារដើម ORIGINAL DOCUMENT/DOCUMENT ORIGINAL</p> <p>ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 19 / 02 / 2០០៧</p> <p>ម៉ោង (Time/Heure): 14 : 35 PM</p> <p>មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA</p>

*A submission from Anne Heindel, Documentation Center of Cambodia (DC-Cam) Legal
Advisor, in her personal capacity*

February 18, 2008

I. INTEREST OF AMICUS CURIAE

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II. SUMMARY OF ARGUMENT

This brief is submitted pursuant to the public notice of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) dated 5 February 2008, allowing submission by *amicus curiae* pursuant to Rule 33 of the ECCC Internal Rules.

The Charged Person Ieng Sary is seeking provisional release to his home on the basis of, *inter alia*, his fragile state of health. The ECCC Internal Rules do not address the circumstances or conditions under which a Charged Person may be provisionally released on medical grounds. Cambodian law also does not address the question. For that reason, it is necessary to refer to the procedural rules of international criminal tribunals. Like the ECCC, none of these tribunals explicitly allows provisional release on the basis of health concerns. However, in practice they have allowed release in three circumstances: when medical treatment is unavailable at the detention unit or in the host country, on humanitarian grounds when an accused's condition is incompatible with any form of detention, and when an accused is found unfit to stand trial.

When accused have been released for the purpose of receiving necessary medical treatment, release has been made conditional on the restriction of their liberty to the medical facility providing treatment, and on their return to the court's detention unit immediately after the completion of treatment. Accused have been released to their family home on the basis of medical concerns only in a few cases when they have been found to suffer from inoperable and incurable cancer with a prognosis of at most a few months to live. If Mr. Ieng's condition is not untreatable and imminently terminal — which appears to be the case since the Defense motion characterizes his health as “fragile” — he should not be released from the ECCC detention unit and placed under house arrest on the sole basis of his health concerns.

III. ARGUMENT

A. ECCC Procedures Do Not Specify the Criteria for Determining When Provisional Release Is Appropriate on Medical Grounds

1. Defense counsel for Ieng Sary challenge the finding of the Co-Investigative Judges that “[t]o date, none of the documents produced by the defense lead[s them] to believe that the Charged Person’s state of health is incompatible with detention.”¹ The Defense argues that due to Mr. Ieng’s heart condition,

he is in need of not only constant and appropriate medical assistance, but also of a living environment most suited for his fragile health. While medical treatment is being made available ... , the detention conditions are sub-standard for someone of [his] ill health.²

The Defense consequently request that Mr. Ieng be placed under house arrest.³

2. The Law on the Establishment of the Extraordinary Chambers provides that “[c]onditions for the arrest and the custody of the accused shall conform to existing law in force.”⁴ The law in force includes both the ECCC Internal Rules⁵ and the Cambodian Code of Criminal Procedure.⁶
3. The ECCC Internal Rules state that a Charged Person shall be released when the enumerated conditions for detention — none of which involve health considerations — are no longer satisfied.⁷ The Rules also provide that the Court may order a medical or psychiatric examination to determine whether “a Charged Person ... is physically and mentally fit to stand trial, or for any other reasons.”⁸ However, the Rules do not provide any guidance on the appropriate standard for determining when ill health would make a Charged Person unfit to stand trial, or if or when ill health could be a ground for provisional release.

¹ Provisional Detention Order, Office of the Co-Investigating Judges, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 19 (14 Nov. 2007). See Ieng Sary’s Appeal Against Provisional Detention Order, Case. No. 002/19-09-2007-OCIJ(PTC03), ¶¶ 42-44 (15 Jan. 2008).

² Ieng Sary’s Appeal Against Provisional Detention Order, *supra* note 1, ¶ 42.

³ *Id.* ¶ 44.

⁴ Law on the Establishment of the Extraordinary Chambers as amended 27 October 2004, No. NS/RKM/1004/006 [hereinafter Establishment Law], art. 33 new.

⁵ ECCC Internal Rules (*as adopted* 12 June 2007).

⁶ Cambodian Code of Criminal Procedure (*as adopted* 10 Aug. 2007).

⁷ See ECCC Internal Rules, *supra* note 5, R.64(1). The Internal Rules provide that the conditions for provisional detention are met when the Co-Investigating Judges have a well founded reason to believe that a Charged Person committed the crimes charged by the Prosecutor and consider his or her detention necessary to prevent pressure on witnesses, preserve evidence, ensure the presence of the Charged Person at proceedings, protect the Charged Person’s security, or preserve public order. See *id.*, R.63(3)(a),(b).

⁸ *Id.*, R.32.

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4. Cambodian law does not appear to provide rules or established norms that apply directly to the question at hand. The Cambodian Code of Criminal Procedure discusses health concerns only in the context of initial arrest, providing that the Prosecutor may have an arrested person examined in order to verify if his or her health condition is “suitable for arrest.”⁹ As with the Internal Rules, the Code does not provide any criteria for determining “suitability.”
 5. Due to this lacunae in procedural law applicable to the ECCC, it is necessary to seek guidance from “procedural rules established at the international level.”¹⁰
- B. International Criminal Tribunals Allow Provisional Release When Adequate Medical Treatment Is Otherwise Unavailable, on Humanitarian Grounds, and When an Accused Is Unfit to Stand Trial**
6. The Rules of Procedure of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) allow provisional release when a Trial Chamber is satisfied that an accused will appear for trial and will not pose a danger to victims and witnesses.¹¹ At the International Criminal Court (ICC), the Pre-Trial Chamber must release an arrested person unless the Chamber considers provisional detention necessary in order to ensure the person’s appearance at trial, to avoid endangering the investigation or court proceedings, or to prevent the commission of new crimes.¹² None of these courts’ statutes and rules explicitly allow provisional release on the basis of health concerns. Nevertheless, international courts have granted provisional release when an accused has been able to demonstrate that he or she requires medical treatment that cannot be obtained in the detention facility or host country, is suffering from a terminal illness and does not have long to live, or is unfit to stand trial.

⁹ See Code of Criminal Procedure, *supra* note 6, art. 99.

¹⁰ 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, art. 12(1), available at <http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf> [hereinafter Framework Agreement]. See also Establishment Law, *supra* note 4, arts. 20 new, 23 new, and 33 new.

¹¹ See International Criminal Tribunal for the Former Yugoslavia (ICTY), Rules of Procedure and Evidence, R.65(B) (*as amended* 12 July 2007); International Criminal Tribunal for Rwanda (ICTR), Rules of Procedure and Evidence, R. 65(B) (*as amended* 15 June 2007); Special Court for Sierra Leone (SCSL) Rules of Procedure and Evidence, R.65(B) (*as amended* 19 November 2007).

¹² See Rome Statute of the International Criminal Court, arts. 60(2), 58(1), *adopted* on July 17, 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* July 1, 2002.

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7. Like the ECCC judges,¹³ in considering whether provisional release on medical grounds is appropriate, the ICC, ICTY, ICTR, and SCSL Chambers may order a medical, psychological, or psychiatric examination of persons who are the subject of a criminal investigation.¹⁴ These courts also consider medical and expert reports submitted by the parties and the testimony of expert witnesses.¹⁵

1. Provisional Release Generally Allowed Only When Adequate Treatment Is Otherwise Unavailable

8. The general rule applied by international courts is that “serious illness does not in itself justify the provisional release of an accused as long as adequate medical treatment can be administered to him by the Tribunal.”¹⁶ For example, at the Special Court for Sierra Leone, defendant Hinga Norman and another accused were transported to Senegal “for medical procedures which were considered routine, but which were unavailable in Sierra Leone.”¹⁷
9. In the *Stansic* case at the ICTY, the Defense argued “that the Accused could not be treated in detention and that if he remained, he would either die or be unable to participate effectively in trial.”¹⁸ The Trial Chamber found that the evidence clearly showed that the accused was “quite ill.”¹⁹ The parties, however, disagreed about the seriousness of his illness.²⁰ The Chamber emphasized that the relevant issue was “whether the Accused [could] be adequately treated while detained at the [United Nations Detention Unit].”²¹ The Trial Chamber ruled against allowing provisional release, basing its decision on the testimony of both prosecution and defense witnesses who agreed that

¹³ See ECCC Internal Rules, *supra* note 5, R.32.

¹⁴ See International Criminal Court, Rules of Procedure and Evidence, R.113(1), ICC-ASP/1/3 (2002); ICTY RPE, *supra* note 11, R.74bis.; ICTR RPE, *supra* note 11, R.74bis; SCSL RPE, *supra* note 11, R.74bis(A). For example, in the *Kovačević* case the Defense requested the provisional release of the accused for the purpose of receiving medical treatment at a specialized psychiatric facility in Serbia and Montenegro. In considering this request, the ICTY Trial Chamber ordered a medical examination of the accused “in order to provide a forensic psychiatric basis upon which ... [to] determine if ... [he] is fit to enter a plea and to stand trial[.]” *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2/I, Decision on Provisional Release, at 1 (Trial Chamber, 2 June 2004).

¹⁵ See, e.g., *Prosecutor v. Jovica Stansic*, Case No IT-03-68-PT, Decision on Provisional Release, ¶ 40 (Trial Chamber, 28 July 2004).

¹⁶ *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda (Trial Chamber, 7 Feb. 1997).

¹⁷ AllAfrica, “Sierra Leone; Victims of International Justice” (23 Feb. 2007) (reporting on Hinga Norman’s death subsequent to the operation).

¹⁸ *Stansic* Trial Decision on Provisional Release, *supra* note 15, ¶ 37.

¹⁹ *Id.* ¶ 39.

²⁰ See *id.*

²¹ *Id.*

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treatment could be carried out at facilities in the Netherlands and that the accused's condition was alleviated with the provision of medication.²²

10. Likewise, in the *Strugar* case, the ICTY Appeals Chamber considered the Defense's request that the accused be released in Montenegro for four months under detention conditions for the purpose of a total hip prosthesis implantation.²³ Although the Prosecution did not oppose a request for provisional release on this basis, the Appeals Chamber denied the motion because of the Defense's failure to demonstrate that the surgery and subsequent rehabilitation could not be "adequately" performed at health institutions at the seat of the tribunal in the Netherlands.²⁴

2. Release on Humanitarian Grounds Is Appropriate When a Detainee Suffers from an Immediately Life-Threatening Disease

11. The ICTY Trial Chamber has said that "release may be ordered when the accused's state of health is not compatible with any form of detention."²⁵ However, a serious illness on its own does not justify release where the condition is not shown to be terminal or immediately life-threatening, or untreatable in the state of detention.²⁶ "The fact that an accused who is ill would be in better spirits and more receptive to medical treatment in his home country with the support of his family does not ... amount to an exceptional circumstance..." justifying release.²⁷
12. In the *Rutaganda* case, the Defense argued that the accused had developed a serious illness after his transfer to the ICTR detention unit.²⁸ The Trial Chamber dismissed the request for release because the tribunal "had not been provided with satisfactory documentation of any general and serious regression in the accused's medical condition, calling for an immediate change of the conditions under which the accused is currently held in custody."²⁹ Likewise in the *Bicamumpaka* case, the Defense argued that "as a

²² See *id.* ¶¶ 40, 41.

²³ See Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Decision on Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions (Appeals Chamber, 8 Dec. 2005).

²⁴ *Id.* In a subsequent decision, the Appeals Chamber allowed Strugar's provisional release on this basis, apparently after receiving information from the Defense demonstrating that "it is necessary for a successful surgery and rehabilitation that the surgery be undertake ... in Montenegro[.]" Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Decision on Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro (Appeals Chamber, 16 Dec. 2005).

²⁵ Prosecutor v. Simo Drljaca & Milan Kovačević, Case No. IT-97-24-T, Decision on Defence Motion for Provisional Release, ¶ 12 (20 Jan. 1998).

²⁶ See *id.* ¶ 14.

²⁷ *Id.*

²⁸ See *Rutaganda* Trial Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda, *supra* note 16.

²⁹ *Id.*

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result of his detention, the Accused is in a precarious state of health.”³⁰ Following the reasoning of the *Rutaganda* Chamber, the Trial Chamber rejected the release request.³¹

13. By contrast, in the *Brdjanin et al.* case at the ICTY, the accused Talic requested provisional release to his family home in the municipality of Banja Luka in Bosnia and Herzegovina for the purpose of receiving medical care.³² Medical experts, including the medical officer of the detention unit, reported that the Talic was suffering from carcinoma, his cancer was “inoperable and incurable,” he had a prognosis of at the maximum several months, and any medical treatment would be merely palliative.³³ For these reasons, the medical experts agreed that he was not fit to remain in detention or to stand trial.³⁴ The Trial Chamber found that, because accused’s condition was incurable and he was unlikely to be alive at the end of his trial, it had the duty to intervene before he was “on the verge of death” and his unconditional release became a necessity.³⁵
14. Similarly, in the *Djukić* case where the accused was suffering from an incurable illness in its terminal phase, the Trial Chamber allowed provisional release on humanitarian grounds due to “the extreme gravity of the current medical condition.”³⁶

3. Release Due to Lack of Fitness to Stand Trial Appropriate Where the Accused Is Unable to Effectively Exercise His or Her Rights in the Proceedings

15. When accused have medical or mental health concerns impairing their capacity to effectively exercise their rights in the proceedings³⁷ they may be found unfit to stand trial and provisionally released. “[T]he issue is not whether the accused suffers from particular disorders, but ... whether he is able to exercise effectively his rights in the proceedings against him.”³⁸ A link must be made between the various medical diagnoses and “the actual affects experienced by th[e] Accused on his relevant capacities.”³⁹
16. The ICTY has identified the relevant capacities as including the ability to plead, understand the nature of the charges, understand the course of proceedings, understand

³⁰ Prosecutor v. Jérôme-Clément Bicomumpaka, Case No. ICTR-99-50-T, Decision on the Defense’s Motion for Provisional Release Pursuant to Rule 65 of the Rules (25 July 2001).

³¹ See *id.* ¶ 24.

³² See Prosecutor v. Radolav Brdjanin & Momir Talic, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, ¶ 1 (Trial Chamber, 20 Sept. 2002).

³³ See *id.* ¶¶ 2-8.

³⁴ See *id.* ¶ 9.

³⁵ See *id.* ¶¶ 32-33.

³⁶ Prosecutor v. Djordje Djukić, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release (Trial Chamber, 24 Apr. 1996).

³⁷ See Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, ¶ 35 (Trial Chamber, 26 May 2004).

³⁸ *Id.*

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the details of the evidence, instruct counsel, understand the consequences of the proceedings, and testify.⁴⁰ The burden is on the Defense to show by “the balance of probabilities” that the accused is not fit to stand trial.⁴¹

17. For example, in the *Stanisic* case, the Defense argued that “the medical condition of the Accused and in particular his debilitating intestinal disease ha[d] left him in a declining physical condition and thus significantly impaired in his ability to engage in meaningful preparations for his case.”⁴² However, the ICTY Trial Chamber found that none of the three medical reports submitted by the defense showed by a balance of probabilities that the accused was unable to participate in his defense and therefore did not “demonstrate an ‘adequate reason’ to hold an inquiry into the Accused’s competence to stand trial.”⁴³
18. On the other hand, in the *Kovačević* case the ICTY considered whether provisional release was appropriate due to the accused’s mental condition.⁴⁴ The Defense requested release so that the accused could receive medical treatment at a specialized psychiatric facility in Serbia and Montenegro.⁴⁵ The reports of two medical experts appointed by the Tribunal, a psychiatrist appointed by the Defense, and the consulting psychiatrist of the detention unit all indicated that the accused “suffer[s] from a serious mental disorder which presently renders him unfit to enter a plea and to stand trial” and recommended that he be treated in a health facility where his native language was spoken.⁴⁶ The Chamber granted release on this basis.⁴⁷

C. Conditions of Release on Medical Grounds Generally Require Restriction of the Accused to a Medical Facility

19. Where accused have been provisionally released by international tribunals on the basis of health concerns, the conditions of release generally restrict them to the confines of the medical center at which they will be receiving treatment and require them to return to the tribunal detention unit after treatment is completed. For example, in the *Strugar* case where the accused was released for surgery in Montenegro, he was required “to remain

³⁹ *Id.* ¶ 47.

⁴⁰ *See id.* ¶ 36. *See also* Deputy General Prosecutor for Serious Crimes v. Jusep Nahak, Case No. 01A/2004, Findings and Order on Defendant Nahak’s Competence to Stand Trial, ¶¶ 53-56 (Special Panels for Serious Crimes, 1 Mar. 2005).

⁴¹ *Strugar* Decision Re the Defence Motion to Terminate Proceedings, *supra* note 37, ¶ 38.

⁴² Prosecutor v. Jovica Stanisic & Franko Simatovic, Case No. IT-03-69-T, Decision on Stanisic Defence’s Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes (Trial Chamber, 27 Apr. 2006).

⁴³ *Id.* (citation omitted)

⁴⁴ *See Kovačević* 2004 Trial Decision on Provisional Release, *supra* note 14.

⁴⁵ *See id.*, at 1.

⁴⁶ *See id.*

⁴⁷ *See id.*, at 2.

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within the confines of the Clinical Center ... and the rehabilitation center” and then to return to the detention unit.⁴⁸ Likewise, in the *Kovačević* case, where the accused was found unfit to stand trial due to a serious mental disorder, the Trial Chamber allowed his provisional release to a specialized mental facility on the condition that he not leave the premises.⁴⁹ Moreover, it required a review of the accused’s mental condition after six months to assess whether his condition had changed sufficiently to render him fit to return for trial.⁵⁰ Only in the *Brdjanin et al.* and *Djukić* cases, where the accused were diagnosed with terminal and inoperable cancer and given at most a few months to live, was confinement to a residence considered appropriate.⁵¹

IV. CONCLUSION

20. The jurisprudence of the international criminal tribunals is consistent in allowing provisional release on health grounds only where adequate treatment is otherwise unavailable, an accused is diagnosed with a terminal disease and has only a short time to live, or he or she is found unfit to stand trial. In the case of Mr. Ieng, there has apparently been no suggestion that his medical condition prevents him from effectively participating in his defense and is therefore unfit to stand trial. If he again requires necessary medical treatment that is unavailable at the ECCC detention unit, release to the confines of a medical facility for the purpose of and period required for receiving treatment would be appropriate. However, if the Defense cannot show that Mr. Ieng’s condition is terminal and will result in his imminent demise, Mr. Ieng should not be granted provisional release to his residence solely on the basis of his medical condition.

Respectfully submitted,



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Signed in Phnom Penh, Cambodia, 18 February 2008

⁴⁸ See *Strugar* Appeals Decision on Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro, *supra* note 24, ¶ 5(d).

⁴⁹ See *Kovačević* 2004 Trial Decision on Provisional Release, *supra* note 14, at 3.

⁵⁰ See *id.*, at 2.

⁵¹ See *Brdjanin et al.* Trial Decision on the Motion for Provisional Release of the Accused Momir Talic, *supra* note 32, ¶ 35; *Djukić* Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, *supra* note 36.