



Decision on Audio/Video Recording Ieng Sary's Trial Participation from the Holding Cell

Anne Heindel, Legal Advisor, Documentation Center of Cambodia

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The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has ruled for a third time that it will not authorize audio or video recording of accused Ieng Sary's mandatory trial participation from the holding cell.¹

In late November 2012, the Trial Chamber found Ieng Sary fit for trial upon his return to the Court's detention center after two months of hospitalization. It also determined that, due to his fragile health, should he refuse to waive his right to be physically present in the courtroom, it could order him to participate by two-way video-link from the holding cell.² Ieng Sary, who had voluntarily waived his right to attend the testimony of specific witnesses during his medical absence, then withdrew his remaining waivers. For each subsequent day of trial hearing he has been ordered to participate from the holding cell.³

The Ieng Sary Defense has appealed both that decision and the Trial Chamber's related oral decision⁴ refusing their request to audio and/or video record Ieng Sary in the holding cell during proceedings. As the ECCC is the first mass crimes court to mandate physical participation from outside the courtroom due to health concerns, both matters raise novel fair trial rights questions.

Ieng Sary's lawyers say he has a fundamental defense right to create a record of the quality of his participation and ensure that the Court is not engaging in a charade in which he is "fatigued, he's asleep, he's semi-conscious and yet ... we're pretending that he's actually following the proceedings and he's assisting in his own defence."⁵ They argue:

Since the ECCC doctor only sees Mr. IENG Sary briefly two or three times per day, there will be *no record* of whether Mr. IENG Sary is awake, asleep, feeling dizzy, or able to see the monitor or follow the proceedings. The Trial Chamber will be (as it desires to be) unaware of whether Mr. IENG Sary is able to follow the proceedings. The Supreme Court Chamber will have no record upon which to decide whether the Trial Chamber violated Mr. IENG Sary's fair trial rights.⁶

¹ Decision on the IENG Sary Defence Request to Audio and/or Video Record IENG Sary in the Holding Cell (Jan 16, 2013) [hereinafter Audio/Video Decision].

² Decision on Accused Ieng Sary's Fitness to Stand Trial (Nov. 26, 2012) [hereinafter Fitness Decision]. *See also* Expert Commentary on Legal Filings: *Trial Chamber Decides that Accused Ieng Sary Is Fit and May Be Ordered to Participate by Video-Link* (Nov. 30, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

³ *See, e.g.*, Order to Bring (Dec. 3, 2012).

⁴ Transcript of Trial Proceedings—Case 002, at 27 (Dec. 6, 2012).

⁵ *Id.* at 4.

⁶ Ieng Sary's Appeal Against the Trial Chamber's Oral Decision to Deny His Right in the Courtroom and to Prohibit Him from Being Video Recorded in the Holding Cell, ¶ 58 (Dec. 18, 2012) (emphasis in original).

In its fitness decision, the Trial Chamber found that video-recording is not “necessary to ensure that the Accused is appropriately monitored”⁷ as the Chamber can “rely on the medical observations made of the Accused's condition by available medical staff.”⁸ However, the Defense emphasizes that medical monitoring of Ieng Sary’s health is not equivalent to monitoring whether or not “he is fully capable of enjoying all—as opposed to some—of his fair trial rights, and whether he does so on a continuing or occasional basis.”⁹

The Trial Chamber allowed the Defense team case manager to observe Ieng Sary from the holding cell but was unmoved by his first report noting that the accused had fallen asleep during the morning hearing. Judge Cartwright said:

It is interesting that you raise the topic of Ieng Sary being asleep this morning. There is a simple solution; your case manager could wake him up. ... [F]alling asleep may simply indicate that Ieng Sary has no direct interest in the testimony of this civil party. The Trial Chamber is confident that the treating doctor will report to the Chamber if he observes any unusual and extreme fatigue on Ieng Sary's behalf.¹⁰

According to the case manager’s written reports, Ieng Sary’s attending physicians have said they are not qualified to assess his ability to follow the proceedings.¹¹ The Trial Chamber subsequently banned the case manager from recording conversations with the accused or his treating physicians or filing logs of his observations without prior Court authorization:

Any further such observations of IENG Sary's condition, whether based on audio-recordings, video recordings, the observations of the IENG Sary Defence team, or otherwise, are prohibited until the permissibility of these practices is resolved by the Trial Chamber.¹²

In response to this decision, the Defense and the Prosecution filed written arguments. The Co-Prosecutors argue that the Defense has not shown any legal basis for a fair trial right to audio or video record Ieng Sary and that doing so would in fact violate the Court’s civil-law based Internal Rules, which prohibit party-driven evidentiary investigations and party questioning of potential witnesses including medical staff. Moreover, in their view, the daily transcripts and documents in the Case File not only establish an adequate record of the proceedings, but also no relevant information would be provided by the requested audio/video recordings:

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

⁷ Fitness Decision, *supra* note 2, ¶ 33.

⁸ Audio/Video Decision, *supra* note 1, ¶ 3; Transcript of Trial Proceedings—Case 002, at 27 (Dec. 6, 2012).

⁹ Ieng Sary’s Submissions on the Law Permitting Him to Be Audio and/or Video Recorded in the Holding Cell, ¶ 15 (Dec. 14, 2012) [hereinafter Ieng Sary’s Submissions]; Transcript of Trial Proceedings—Case 002, at 21 (Dec. 6, 2012).

¹⁰ Transcript of Trial Proceedings—Case 002, at 37-38 (Dec. 5, 2012).

¹¹ Ieng Sary’s Submissions, *supra* note 9, ¶¶ 5-6.

¹² Memorandum from Trial Chamber President Nil Nonn, Order for Submissions (Dec. 12, 2012).

recorded and would perform in his perceived best interests.¹³

In its newly issued and most fully reasoned decision on this matter, the Trial Chamber agreed with the Co-Prosecutors that the “Defence’s request is in substance a request to gather its own evidence as to the Accused’s fitness to be tried” and is thus contrary to the ECCC’s legal framework. With regard to the alleged defense rights implicated by this prohibition, the Chamber found that recording Ieng Sary’s remote participation is neither necessary for nor relevant to the protection of his right to an “adequate record” of his fitness to be tried. Instead, “[s]hould 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.” The Chamber therefore once again prohibited the Defense team from filing either recordings or written observations of Ieng Sary’s participation from the holding cell.¹⁴

As the Ieng Sary Defense had already appealed the Chamber’s first oral ruling, the Supreme Court Chamber will soon address this issue of first impression; however, due to its narrow mandate to hear immediate appeals, it may well decide the question is inadmissible until judgment on appeal.

¹³ Co-Prosecutors’ Response to “Ieng Sary’s Submissions on the Law Permitting Him to Be Audio and/or Video Recorded in the Holding Cell,” ¶¶ 2, 7-8, 11, 14 (Dec. 21, 2012).

¹⁴ Audio/Video Decision, *supra* note 2, ¶¶ 12, 14, 17.