

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors
Filed to: Trial Chamber **Original Language:** English
Date of document: 14 December 2012

CLASSIFICATION

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

Classification by the Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



CO-PROSECUTORS' RESPONSE TO "IENG SARY'S SUPPLEMENTAL REQUEST FOR A QUALIFIED EXPERT TO MAKE DAILY MEDICAL EXAMINATIONS RELATED TO MR. IENG SARY'S CAPACITY TO ASSIST IN HIS OWN DEFENCE OR, IN THE ALTERNATIVE, REQUEST FOR THE TRIAL CHAMBER TO ORDER THE ECCC DOCTORS TO MAKE SPECIFIC OBSERVATIONS RELEVANT TO MR IENG SARY'S CAPACITY TO ASSIST IN HIS OWN DEFENCE"

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:

Trial Chamber
Judge NIL Nonn. President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Copied to:

Accused
NUON Chea
IENG Sary
KHIEU Samphan

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G.
KARNAVAS
KONG Sam Onn
Anta GUISSSE
Arthur VERCKEN
Jacques VERGES

I. INTRODUCTION AND PRELIMINARY OBSERVATIONS

1. On 26 November 2012, the Trial Chamber affirmed its earlier finding that the Accused Ieng Sary was able to meaningfully participate in the trial of Case 002/01, and is therefore fit to stand trial.¹ The Trial Chamber directed the ECCC Medical Unit and Detention Facility to implement certain accommodations, as recommended by the Chamber's medical expert, in order to ensure the Accused's comfort and appropriate health management.² One such measure was an indication that the Accused may need to follow the proceedings from the holding cell rather than the courtroom.³
2. On 7 December 2012, the defence for Ieng Sary ("Defence") circulated a courtesy copy of a request for various medical monitoring measures to be instituted ("Request").⁴ In anticipation of a continuation of evidentiary hearings on Tuesday, 11 December 2012, the Co-Prosecutors take this opportunity to provide a preliminary response to the Request.⁵ The Co-Prosecutors reserve the right to make further submissions on this matter, should that become necessary.
3. The Co-Prosecutors submit that the Defence's "ongoing request" that an expert be assigned on a daily basis to assess Ieng Sary's ability to participate in his defence is without basis. The 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. No new information has been put forward which would warrant a re-assessment of Ieng Sary's fitness.
4. The Court of course remains under an obligation to monitor Ieng Sary's health condition, and it is for that reason that it should continue to receive ongoing reports from the ECCC Medical Unit. As the Co-Prosecutors have indicated in court, it is desirable for the ECCC Medical Unit's reports to be sufficiently detailed to ensure the Chamber is properly informed

¹ E238/9 Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012.

² E238/9 Ibid. at paras. 29-31.

³ E238/9 Ibid. at para. 34.

⁴ Attached as Annex I.

⁵ Following the circulation of the Co-Prosecutors' preliminary response, but prior to its formal filing, the Defence filed their Request. E255 Ieng Sary's Supplemental Request For a Qualified Expert to Make Daily Medical Examinations Related to Mr. Ieng Sary's Capacity to Assist in His Own Defence Or, In the Alternative, Request for the Trial Chamber to Order the ECCC Doctors to Make Specific Observations Relevant to Mr. Ieng Sary's Capacity to Assist In His Own Defence, 12 December 2012 (notified 12 December 2012).

about Ieng Sary's overall health and any significant changes in his condition. While such reports should contain the Medical Unit's observations and advice, the Co-Prosecutors submit that, contrary to the Defence's submissions, the reports need not be done "continuously"⁶ or "throughout the day."⁷ The Co-Prosecutors further submit that "observations of Mr. IENG Sary's Defence team"⁸ are irrelevant to an objective analysis of Ieng Sary's medical condition.

5. Given the recent finding on fitness, the purpose of the daily medical observations should be to monitor Ieng Sary's health and point to any significant changes which may affect his *capacity* to participate in his defence (not his participation on an hourly basis, as the Defence has claimed). Even in the context of an assessment of *fitness to stand trial*, there is no requirement to gauge an accused's ability to follow the proceedings from one minute to the next. As an ICTY Trial Chamber stated in *Strugar*, the relevant legal standard looks to the "capacity of the accused to exercise his expressed and implied rights,"⁹ and that "threshold is met when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence."¹⁰
6. The Co-Prosecutors recall that the applicable international jurisprudence on fitness to stand trial requires consideration of whether an accused possesses:
 - (1) *A rational as well as a factual understanding of the charges against him;*
 - (2) *A rational as well as a factual understanding of the nature and object of the proceedings against him, and*
 - (3) *A present ability to consult with his lawyer and to assist in the preparation of his defense with a reasonable degree of rational understanding.*¹¹

⁶ Request at para. 7.

⁷ Request at para. 7.

⁸ Request at para. 7.

⁹ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 36.

¹⁰ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 37 (emphasis added).

¹¹ *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, para. 54. See also *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006, para. 5.

7. This is not equivalent to “the capacity to *fully comprehend* the course of the proceedings in the trial,”¹² nor is it necessary to determine that an accused “operates at the highest level of functioning. Rather, the test is whether the defendant satisfies certain minimum requirements without which he cannot be considered fit for trial.¹³ In evaluating an accused’s capacity to exercise his/her fair trial rights, it is also appropriate to consider that he/she is represented by counsel “and in a particular case [that] may well adequately compensate for any deficiency of a relevant capacity.”¹⁴ Counsel obviously have an obligation to assist their client rather than remain passive and fail to facilitate their client’s comprehension of the proceedings.
8. As noted above, the Chamber has found Ieng Sary fit to stand trial. The Defence is now seeking to re-litigate issue of fitness on the basis of a misapplication of the relevant law, and in the absence of any legitimate change in the underlying circumstances. The Request should therefore be rejected.
9. Furthermore, the Co-Prosecutors consider that Ieng Sary Defence’s recording of their consultations with staff working in the ECCC Medical Unit is without authorisation and may constitute an interference with the mechanisms the Chamber has put in place to monitor Ieng Sary’s medical condition. The Defence Counsel were permitted to bring audio / visual recording equipment into the Detention Facility in accordance with the Pre-Trial Chamber’s decision of 11 June 2010. That authorisation extended to permitting the Defence to record their interviews *with their client*, in order to assist in the preparation of a defence and to facilitate communication between Ieng Sary and his counsel.¹⁵
10. Ieng Sary’s counsel have gone beyond the scope of that authorisation and engaged in the recording of their interviews with medical staff. This may have interfered with the proper functioning of the Medical Unit. It may also constitute an interference with potential witnesses, insofar as medical staff could be called upon to give evidence before the Trial Chamber. The Co-Prosecutors note that the Defence were recently warned, pursuant to

¹² *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 48.

¹³ *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, Findings and Order on Defendant Nahak’s Competence to Stand Trial, 1 March 2005, para. 121.

¹⁴ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial, 12 April 2006, para. 23.

¹⁵ **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, at para. 28, 33-35.

Internal Rule 38, that they are prohibited from conducting investigations and that any breach of this provision may result in the application of sanctions.¹⁶

11. It is not the role of the Defence to carry out parallel investigations by seeking to record interviews with medical staff who have been requested by the Chamber to report to it. In the exercise of their duties, the Defence are entitled to seek information as to their client's well-being. They are also entitled to make requests to the Chamber as to the categories of information that should be included in the Medical Unit's daily medical reports. However, to engage in unauthorised investigations simply because the Defence disagrees with the Chamber's decisions is to act contrary to Counsel's ethical responsibilities.

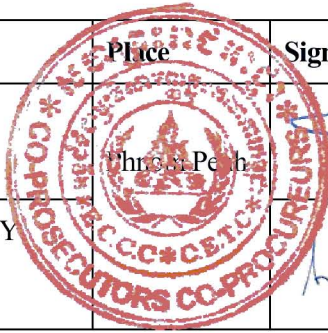

II. REQUESTED RELIEF

12. While the Co-Prosecutors reiterate that Ieng Sary Defence's requests for daily re-assessments of Ieng Sary's fitness to follow proceedings at all times are without basis, the Co-Prosecutors consider that the ECCC Medical Unit's daily reports on Ieng Sary's medical condition should include sufficient information to enable the Chamber to monitor his overall condition and identify any issues that may require a response from the Court. The Co-Prosecutors have not been receiving copies of the reports but submit that the Chamber may wish to require the following categories of information to be included in them:
- a. A summary of Ieng Sary's overall physical and mental condition on the day;
 - b. Observations as to whether Ieng Sary is generally able to follow the proceedings (understand what is being said, and by whom) when he is awake;
 - c. Observations as to whether Ieng Sary is able to communicate with those around him (express his requests, and understand the responses of those he is communicating with); and
 - d. A recommendation whether Ieng Sary would be accommodated better in the holding cell or in the courtroom, in light of Ieng Sary's health needs and comfort.
13. The Co-Prosecutors also respectfully request to be provided copies of the daily reports so that they can meaningfully respond to any requests by the Defence on the issue of Ieng Sary's ability to participate in the proceedings with the assistance of counsel.

¹⁶ 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 38.

14. Finally, the Co-Prosecutors are of the view that it may be prudent for the Chamber to appoint an independent medical expert (such as Dr Campbell, the expert most familiar with Ieng Sary's condition) to review Ieng Sary's overall condition either on a regular basis (for example, once every three months) or when advised by the ECCC Medical Unit that such an assessment would be useful. For the avoidance of doubt, the Co-Prosecutors are not suggesting that such reviews should amount to re-assessments of Ieng Sary's capacities to exercise his fair trial rights. The primary purpose of these periodic reviews would be to ensure that Ieng Sary's medical needs are managed in the best possible way, and that additional expert advice is available to the Chamber on a regular basis.

Respectfully submitted,

Date	Name	Place	Signature
14 December 2012	CHEA Leang Co-Prosecutor		
	Andrew CAYLEY Co-Prosecutor		