

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC-TC/SC () **Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 9 January 2013**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

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

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Judge Florence Ndepele Mwachande MUMBA**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Practice Direction 8.4 of the Practice Direction on Filing of Documents Before the ECCC, hereby replies to the 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 (“Response”).¹ This Reply is made necessary to address inaccurate, misleading and unfounded submissions made by the OCP in the Response.

I. REPLY

Procedural History – Response paragraphs 3-12

1. In paragraphs 3-12, the OCP sets out the procedural history. This procedural history, while seemingly accurate, is incomplete and in some instances is misleading. For example, in paragraph 5, the OCP states that on 23 May 2012, Dr. Lim Sivutha recommended that Mr. IENG Sary participate in the proceedings from his holding cell. Dr. Lim Sivutha did make this recommendation, but it was because Mr. IENG Sary was recovering from the flu and bronchitis at that time.² It was *not* a generalized recommendation meant to apply during *all* trial proceedings. The OCP also fails to mention material facts in its procedural history, such as the fact that representative doctors of the Khmer-Soviet Friendship Hospital Governing Board for the Examination of the Health of the Accused at the ECCC Detention Facility testified in court after Mr. IENG Sary’s hospitalization.³

Admissibility under Rule 104(4)(a) – Response paragraphs 13-16

2. In paragraph 13, the OCP asserts that the Defence’s interpretation of Rule 104(4)(a) is spurious and would admit any appeal “by substituting a purely subjective and unsubstantiated belief of the Defence for an objective legal threshold.” This is incorrect. The Defence asserted that the proceedings would be effectively terminated for Mr. IENG Sary if he were forced to remain in his holding cell where he cannot follow the proceedings. The Defence based this assertion on Mr. IENG Sary’s treating doctors’ observations that he cannot concentrate for extended periods as well as the Defence’s

¹ 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, E238/9/1/2.

² Transcript, 23 May 2012, E1/75.1, p. 8.

³ See Transcript, 21 September 2012, E1/125.1.

own observations of Mr. IENG Sary's ability to concentrate.⁴ The interpretation of Rule 104(4)(a) as encompassing situations where the proceedings would be *effectively* terminated is necessary to protect Mr. IENG Sary's fundamental fair trial rights and is thus required by Rule 21.⁵ This interpretation does not allow for the admission of any appeal on the mere whim of the Accused, as asserted by the OCP.

3. In paragraph 14, the OCP asserts that the Defence's assessment of Mr. IENG Sary's medical condition "diverge[s] markedly from the current assessments of both his treating physicians and the expert appointed by the Chamber..." To support this assertion, the OCP does not actually cite *any* assessments of Mr. IENG Sary's treating physicians. Instead, it cites only the outdated 3 September 2012 pre-hospitalization report by Professor Campbell and Drs. Fazel and Huot and the later 6 November 2012 report by Professor Campbell.⁶ Mr. IENG Sary's treating physicians have not reached the same conclusions as Professor Campbell or Drs. Fazel and Huot.⁷ Doctors Lim Sivutha and Ky Bousuor have recognized that Mr. IENG Sary is unable to concentrate for more than 10-15 minutes at a time.⁸
4. In paragraph 14, the OCP also asserts, citing the ICTY *Strugar* Appeals Judgement, that Defence assertions as to Mr. IENG Sary's medical condition can be given no weight as medical evidence. *Strugar* does not support this proposition. *Strugar* states that mere assertions that Trial Chambers have failed to give sufficient weight to evidence are liable to be dismissed.⁹ *Strugar* does not refer to whether counsel may provide medical evidence. The Defence *did not* assert that the Trial Chamber had failed to give sufficient weight to the Defence's observations of Mr. IENG Sary's health. Rather, the Defence asserted that the Trial Chamber abused its discretion by giving weight to extraneous or irrelevant considerations and by failing to give weight to relevant considerations, such as

⁴ See 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, E238/9/1 ("Appeal"), n. 60.

⁵ See *id.*, paras. 26-31.

⁶ Note that the OCP erroneously refers to E11/86/L, which is not a valid document number, rather than E11/86/1.

⁷ See IENG Sary's Request for Reconsideration of the Trial Chamber's Decision Finding Him Fit to Stand Trial and Rejecting His Request for the Appointment of an Additional Expert to Assist in Determining Fitness, 7 December 2012, E238/11, paras. 22-28.

⁸ Transcript, 21 September 2012, E1/125.1, p. 62-63.

⁹ *Prosecutor v. Strugar*, IT-01-42-A, Appeal Judgement, 17 July 2008, para. 21.

whether Mr. IENG Sary's medical needs could be met from the courtroom.¹⁰ Observations of Defence counsel concerning the health of their clients may be given evidentiary weight. Defence counsel, although not doctors, are officers of the court who have a duty of candor to the tribunal.¹¹ The Defence counsel also regularly interact with Mr. IENG Sary. They are therefore in a unique position to provide insight into the impact that an Accused's physical condition has on his mental state, insofar as it concerns his ability to be alert and to concentrate in following the proceedings.

5. In paragraphs 15-16, the OCP asserts that the Trial Chamber has not terminated proceedings against Mr. IENG Sary and appeals of decisions where termination is only potentially at issue are not permitted. This is misleading. The Defence did *not* assert that proceedings *would have been* terminated had the Trial Chamber decided differently (which was the issue in the Supreme Court Chamber decision cited by the OCP). The Defence asserted that the proceedings had been effectively terminated for Mr. IENG Sary because, as a result of the Impugned Decision, he would be unable to meaningfully participate in them.

Admissibility under Rule 104(4)(b) – Response paragraphs 17-20

6. In paragraphs 17-20, the OCP asserts that Rule 104(4)(b) only allows appeals of decisions on whether to detain or release an Accused. The OCP asserts that Rule 104(4)(b) is unlike Rule 74(3)(f) (the Rule allowing for appeals of such decisions at the pre-trial stage) in this respect, asserting that Rule 74(3)(f) is a broader provision.¹² The OCP fails to support its contention that Rule 104(4)(b) should be interpreted more narrowly than Rule 74(3)(f). Indeed, there is no justification for allowing appeals of this type at the pre-trial stage but prohibiting such appeals at the trial stage. The interests protected at both stages are the same.

Admissibility under Rule 104(4)(d) – Response paragraphs 21-25

¹⁰ See Appeal, para. 49.

¹¹ See 2012-2013 Alaska Rules of Professional Conduct, Rule 3.3 Candor Towards the Tribunal: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." See also American Bar Association Model Rules of Professional Conduct, Rule 3.3 (same language); Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 24 Relations with Judges: "[The lawyer] is strictly prohibited from engaging in disloyal and disruptive conduct..."

¹² Response, para. 19.

7. In paragraph 21, the OCP asserts that the Defence requests the Supreme Court Chamber to apply Rule 35 to the Trial Chamber itself in the exercise of its judicial functions. It is correct that the Defence seeks to apply Rule 35 to the Trial Chamber. It is never a proper exercise of judicial functions for the Trial Chamber to violate an Accused's fundamental fair trial rights, as the Trial Chamber has done through the Impugned Decisions and related decisions.¹³
8. In paragraphs 22, 23 and 25, the OCP asserts that the Appeal is inadmissible under Rule 104(4)(d) because it is not an appeal against an underlying request made pursuant to Rule 35. The underlying request to allow Mr. IENG Sary to be present in the courtroom or to video record him in the alternative was not made pursuant to Rule 35 because there had been no violation of Mr. IENG Sary's rights until the request was denied and thus no interference with the administration of justice at that time. It would be illogical to limit appeals under Rule 104(4)(d) to only decisions made pursuant to Rule 35 requests where, as in the present case, the decision *itself* interferes with the administration of justice. This would prevent parties from having any recourse if the Trial Chamber itself interferes with the administration of justice. The Trial Chamber cannot reasonably investigate itself pursuant to Rule 35; the Supreme Court Chamber must investigate an interference with the administration of justice perpetrated by the Trial Chamber.¹⁴
9. In paragraph 24, the OCP points to Supreme Court Chamber jurisprudence which states that "neither an error of fact or law nor an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and willful interference with the administration of justice within the meaning of Rule 35."¹⁵ As explained in paragraph 25 of the Appeal, the Impugned Decision was not an isolated incident which *by itself* interfered with the administration of justice. Instead, it was part of a series of interrelated decisions through which the Trial Chamber knowingly, willfully and continuously interfered with the administration of justice by violating Mr. IENG Sary's fundamental

¹³ See Appeal, para. 25, which describes the interrelated decisions which violated Mr. IENG Sary's fair trial rights to be physically present at his own trial and to prepare his defence through making a record.

¹⁴ The Pre-Trial Chamber has recognized, in a strictly confidential decision, that it would be improper for an organ of the court to investigate allegations that it interfered with the administration of justice as there may be a conflict of interest or a reasonable perception of bias in such cases. The Pre-Trial Chamber noted that Rule 35(2) does not refer to a specific Chamber, but simply states that "Chambers" may deal with interferences with the administration of justice. See Case 002/14-12-2009-ECCC/PTC (08), document number 3.

¹⁵ Decision on IENG Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court, 13 January 2012, E130/4/3, p. 1.

fair trial rights to be physically present at his own trial and to prepare his defence through making a record.

Whether the permissibility of video-recording Mr. IENG Sary remains pending before the Trial Chamber – Response paragraphs 26-31

10. In paragraphs 26-31, the OCP asserts that the issue of whether the Trial Chamber abused its discretion by refusing to allow Mr. IENG Sary to be video recorded during trial is not ripe because the Trial Chamber is currently reviewing the legality of audio and video recording. In support, the OCP points to the Trial Chamber's 12 December 2012 Order for Submissions.¹⁶ Through the Order for Submissions, the Trial Chamber "order[ed] the IENG Sary Defence to stop the *audio-recording* immediately" and stated that "[i]f the IENG Sary Defence wishes to resume *audio recording* of the Accused and/or his treating physician, the IENG Sary Defence shall seek leave pursuant to Internal Rule 92 specifying the reasons such practices are permissible under the ECCC legal framework."¹⁷ The only mention made of video recording Mr. IENG Sary was in the final sentence of the Order: "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." This Order deals with audio-recordings and the daily observation logs filed by the Defence. When the Trial Chamber issued the Impugned Decision, it did not state that its decision to prohibit video recording was provisional or pending further review.¹⁸ The Trial Chamber's refusal to allow Mr. IENG Sary to be video-recorded appears to be final. If the Supreme Court Chamber is inclined to reject this portion of the appeal because the matter is not yet ripe, the Defence requests that the Supreme Court Chamber first enquire with the Trial Chamber as to whether the Trial Chamber intends to reconsider its position on video-recording or whether the Order for Submissions instead refers only to audio-recordings and the daily observation logs.

Respectfully submitted,


 ANG Udom




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Signed in Phnom Penh, Kingdom of Cambodia on this 9th day of January, 2013

¹⁶ Order for Submissions, 12 December 2012, E254.

¹⁷ *Id* (emphasis added).

¹⁸ See Appeal, para. 16, quoting Transcript, 4 December 2012, E1/147.1.