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

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CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON FITNESS TO STAND TRIAL

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I. INTRODUCTION

1. On 3 January 2013, the Defence for Ieng Sary (the "Defence") filed an immediate appeal ("Appeal") of a decision of the Trial Chamber: (i) affirming its previous findings on the fitness of Ieng Sary (the "Accused") to stand trial; (ii) denying the Defence request to appoint a new expert; (iii) rejecting the Defence request that the Accused be video-taped in the holding cell or that a hospital bed be provided in the courtroom; and (iv) determining that a stay of proceedings, adjournment or severance of the Accused's case to enable further medical testing or treatment would unreasonably infringe the right of all Accused in Case 002 to a fair and expeditious trial (the "Impugned Decision").[1] The instant Appeal is not concerned with the issue of videotaping, concerning which the Defence has raised a separate appeal.[2] The Defence now requests the Supreme Court Chamber ("Chamber") to annul the Impugned Decision and order the Trial Chamber and appoint additional expert(s) to assess the Accused's fitness to stand trial.[3]

2. The Defence purports to rely on Rules 104(4)(b) and 104(4)(d) as the grounds for admissibility of this Appeal. The Co-Prosecutors submit that the Appeal is manifestly inadmissible at this stage of the proceedings. On this basis, in the interests of judicial economy and without concession of the merits, the Co-Prosecutors will limit their written submissions to admissibility alone.

II. PROCEDURAL HISTORY

3. The Accused is now 87 years old and was first medically examined at the instance of the ECCC on 20 December 2007. At the time, he was diagnosed with a number of physical symptoms, such as long suffering lower spine arthritis, urological disorders and a cardiovascular condition.[4] While his condition at the time was stable, it was noted that this could change at any time. As such, the Accused was placed under "strict monitoring,"[5] which has continued since.

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1 **E238/9/2/1** Ieng Sary's appeal against the Trial Chambers decision that he is fit to stand trial and its refusal to appoint an additional expert to assess fitness, 3 January 2013 ("Appeal").

2 **E238/9/1/1** Ieng Sary's Appeal Against the Trial Chambers 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 ("Presence Appeal").

3 **E238/9/2/1** Appeal, *supra* note 1. at s. VI.

4 **A100/5** Medical Report, 18 January 2008, pp. 1-3.

5 **B15/1** Medical Report of Accused, 9 October 2008, pp. 4-5.

4. Following a request by the Defence for the trial to be conducted in half day sessions due to the Accused's health,[6] the Trial Chamber appointed Professor John Campbell, an international expert geriatrician, to examine Ieng Sary. After an examination conducted on 8 June 2011, Professor Campbell found that while the Accused suffered from congestive heart failure, degenerative back disease and urinary frequency secondary to prostatic obstruction, he was free of cognitive or memory impairment.[7] The Defence did not contest these findings.[8]

5. On 23 May 2012, Dr. Lim Sivutha, one of the Accused's treating physicians, was invited before the Chamber to report on the ability of the Accused to participate in the proceedings.[9] He recommended that the Accused participate in the proceedings by audiovisual means from the holding cell, where the treating doctors could monitor his health condition.[10]

6. Ieng Sary was examined again by Professor Campbell and two other experts in late August 2012. In their report dated 3 September 2012, the experts confirmed that the Accused remained physically and mentally fit to stand trial.[11]

7. On 7 September 2012, Ieng Sary was hospitalised, citing fatigue, weakness and shortness of breath.[12] He remained in hospital for approximately two months.

8. On 5 and 6 November 2012, the Accused was examined for a third time by Professor Campbell, and diagnosed with benign paroxysmal positional vertigo, a disorder involving the semicircular canals of the inner ear.[13] Professor Campbell recommended that hospitalisation was no longer necessary, but that the Accused should make full use of the facilities available in the holding cell – with recommended adaptations[14] – in order to participate in the proceedings.[15]

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6 **E20** Ieng Sary's Motion to Conduct the Trial through Half-Day Sessions, 19 January 2011.
7 **E62/3/5** Geriatric Expert Report of IENG Sary dated on 13 June 2011 in Response to Trial Chamber's Order Assigning Expert, 13 June 2011.
8 **E110** Scheduling Order for Preliminary Hearing on Fitness to Stand Trial, 12 August 2011, p. 2.
9 **E197** Letter, Subject: "Invitation for Dr. LIM Sivutha, Head of the Emergency Section, Khmer-Soviet Friendship Hospital, to explain before the courtroom in the morning of Wednesday 23 May 2012", 21 May 2012.
10 **E1/75.1** Transcript, 23 May 2012, at p. 9.
11 **E11/86/1** Medical Report on Mr. Ieng Sary, 3 September 2012, at para. 41-42.
12 **E1/125.1** Transcript, 21 September 2012 at p. 12.
13 **E238/4** Expert Report Relating to Mr. Ieng Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012 at para. 9 ("Expert Report").
14 **E1/142.1** Transcript, 8 November 2012 at pp. 16-17.
15 **E238/4** Expert Report, *supra* note 13 at para. 21.

9. On 26 November 2012, the Trial Chamber issued a written decision finding Ieng Sary fit to stand trial.[16] It also noted that the Accused's frailty had directly resulted in the partial or total adjournment of 12 trial days,[17] and that the holding cell remained accessible at all times to the Defence and the ECCC Medical Unit,[18] and thus best suited Ieng Sary's current medical needs.[19]

10. On 4 December 2012, the Trial Chamber directed Ieng Sary to participate in proceedings from his holding cell, and declined the Defence request to videotape Ieng Sary.[20] That decision was based on a medical report from the Accused's treating physician, who requested that the Accused "be permitted to follow proceedings from the holding cells which would enable the doctor to more readily monitor Ieng Sary's physical condition."[21] The Trial Chamber noted the consensus of the medical experts that the Accused was better able to participate from his holding cell due to his "physical circumstances," the "difficulties" including a risk of "substantial delay to the trial" associated with bringing Ieng Sary into the courtroom, and that the Accused's doctors could better monitor his condition in the holding cell.[22] The Defence was permitted to have a staff member of its team in the holding cell in order to draw any concerns about Ieng Sary's physical condition to the treating doctor.[23] The Defence subsequently exceeded the scope of that right and drew a warning for misconduct from the Trial Chamber.[24]

11. On 7 December 2012, the Defence request the Trial Chamber to reconsider its 26 November 2012 Decision.[25] This underlying Request gave rise to the Impugned Decision.

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16 **E238/9** Decision on Accused Ieng Sary's Fitness to Stand Trial, 26 November 2012.
17 **E238/9** *Ibid.* at para 35.
18 **E238/9** *Ibid.* at para 36.
19 **E238/9** *Ibid.*
20 **E1/147.1** Transcript, 4 December 2012, at pp. 17-20, 27-28.
21 **E1/147.1** *Ibid.,* p. 18.
22 **E1/147.1** *Ibid.,* p. 18-19, 27.
23 **E1/147.1** *Ibid.,* p, 27.
24 **E254** Memorandum to the Parties, "Order for Submissions", 12 December 2012; see also **E254/3** Decision on the IENG Sary Defence Request to Audio and/or Video Record IENG Sary in the Holding Cell, 17 January 2013 at para. 11 ("Audio/Video Decision").
25 **E238/11** IENG Sary's Request for the 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.

III. THE APPEAL IS MANIFESTLY INADMISSIBLE.

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

12. The Defence suggests, at paragraph 23 of the instant Appeal, that the Impugned Decision, including not only the issue of fitness but also the appointment of additional experts, concerns the "modalities of pre-trial detention". As such, the Defence asserts that the Impugned Decision "*is a decision on detention because it has the effect of keeping Mr Ieng Sary in detention*,"[26] and thus falls under Rule 104(4)(b). The Defence advances an analogy from prior jurisprudence of the Pre-Trial Chamber in which that Chamber classified "the question of whether an item or device can be brought in and out of the Detention Facility by members of a defence team and used during their meetings with their client in pre-trial detention" as part of the "modalities of the Charged Person's detention."[27]

13. The Co-Prosecutors submit that this interpretation of Rule 104(4)(b) is wholly without basis in law. In allowing the immediate appeal of "decisions on detention and bail under Rule 82," Rule 104(4)(b) refers to substantive decisions to detain or release an Accused. It is such decisions "concerning provisional detention" that are, according to the explicit text of Rule 82, "open to appeal by the Accused or the Co-Prosecutors, as appropriate." Rule 82 makes no mention of modalities or conditions of detention or, indeed, decisions concerning the mode of participation at trial in case of "health reasons or other serious concerns", which are regulated by Rule 81(5), not Rule 82. A decision on fitness to stand trial, whether arising in the course of the Rule 81(5) inquiry or otherwise, cannot reasonably be construed as a *decision on detention*, and is logically and legally distinct from Rule 82 decisions subject to immediate appeal under Rule 104(4)(b).

14. The Defence's reliance on a Pre-Trial Chamber decision authorising the Defence to record meetings with their client during pre-trial detention is misplaced.[28] The appeal in that case fell under Internal Rule 74(3)(f), a different and broader provision authorising appeal at the pre-trial stage of orders or decisions "relating to provisional detention or bail." By contrast, Rule 104(4)(b) is more limited, only authorising immediate appeals of "decisions on detention and bail under Rule 82." The legal interests protected by

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26 **E238/9/1/1** Presence Appeal, *supra* note 2 at para. 24.
27 **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. 11
28 **A371/2/12** *Ibid.* at para. 24.

Rule 74(3)(f), during pre-trial detention, are only partially overlapping with those protected during trial, which include the rights of Co-Accused to fair and expeditious proceedings, as the Trial Chamber rightly considered in the Impugned Decision.[29]

15. The Co-Prosecutors further observe that the Pre-Trial Chamber decision cited by the Defence is limited to the issue of the bringing of devices into the Detention Unit by members of the Defence team and recording *their meetings* with an Accused in detention. This does not support the admissibility of an appeal concerning the Accused's rights relevant to Rule 81.[30] In regards to the latter issue, the Supreme Court Chamber has previously rejected an appeal by Ieng Sary on the issue of whether the Accused's presence was required in the courtroom, on the basis that such appeal did not fall within the "limited jurisdiction for immediate appeals under Rule 104(4)."[31] The Co-Prosecutors submit that the current Appeal must be dismissed for those same reasons.

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

16. The Defence asserts, at paragraph 24, that "through a series of interrelated decisions (including the Impugned Decision), the Trial Chamber has knowingly, wilfully and continuously interfered with the administration of justice,"[32] and that such decisions are thus subject to immediate appeal under Rule 104(4)(d). The Defence thus asks the Supreme Court Chamber to apply Rule 35 to the *Trial Chamber itself* –in the exercise of its judicial functions – on the false basis that the Trial Chamber judges have interfered with the administration of justice merely by exercising their proper judicial function and issuing the Impugned Decision.

17. The Defence further asserts, on the basis of its reading of a "series of interrelated Decisions":

    a. that the "Trial Chamber has attempted in *every* way possible shield itself from *any* information that would transparently and objectively dispel the myth that

29 **E238/9** Impugned Decision, *supra* note 6 at p. 16.
30 **E254/3** Audio/ Video Decision, *supra* note 24 at para. 13.
31 **E130/4/3** Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring His Presence in Court, 13 January 2012.
32 **E238/9/2/1** Appeal, *supra* note 2 at para. 24.

Mr Ieng Sary is actually able to…meaningfully participate in the trial proceedings";[33] and

b. that the Trial Chamber "has further done everything possible to ensure that there is little or no record of Mr Ieng Sary's actual condition"[34]

18. The Co-Prosecutors are concerned, at the outset, that such shameless and wholly unsubstantiated attacks upon the integrity of the judges of the Trial Chamber are part of an unfolding and improper strategy of rupture, designed to bring the administration of justice before the Trial Chamber into disrepute.

19. The Co-Prosecutors submit that there is manifestly no legal basis to ground the instant Appeal on Rule 104(4)(d). This Rule authorises immediate appeals to the Supreme Court Chamber of "decisions on interference with the administration of justice under Rule 35(6)." As this Chamber has previously ruled, such appeals are admissible "only if the [underlying] Request can be characterised at least in part as a request for investigation pursuant to Internal Rule 35."[35] Accordingly, the Supreme Court Chamber admitted an appeal of a decision rejecting a motion to disqualify Judge Silvia Cartwright, where "the Request before the Trial Chamber made limited reference to Internal Rule 35" and "sought an investigation under Internal Rule 35(2)" of alleged *ex parte* meetings.[36]

20. By contrast, in this instance, the Defence made no request to the Trial Chamber under Rule 35. Oral submissions made by Co-Lawyer Michael Karnavas on 4 December 2012 do not make reference, explicitly or implicitly, to Rule 35 or to the legal interests protected thereby.[37] At that time, Counsel only highlighted the Co-Lawyers' "duty and responsibility to protect their client's rights."[38] Similarly, neither the Request of 7 December 2012 nor any other relevant submission makes reference, explicitly or implicitly, to Rule 35 or the legal interests protected thereby. It is wholly improper for the Defence to seek reconsideration of a Trial Chamber decision and then construe any denial of their wishes as an interference with the administration of justice. On the

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33 **E238/9/2/1** *Ibid.*
34 **E238/9/2/1** *Ibid.*
35 **E137/5/1/3** Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012 ("Disqualification Decision").
36 **E137/5/1/3** *Ibid.* at para. 12 & 16.
37 **E1/147.1** Transcript, *supra* note 20 pp.12-15.
38 **E1/147.1** *Ibid.* at p.13; also cited in **E238/9/1/1** Presence Appeal, *supra* note 2 at para.16.

contrary, it is the Defence's assertions that are repugnant to the good administration of justice. On this basis, the Co-Prosecutors submit that the underlying request giving rise to the Impugned Decision was not a request under Rule 35.

21. Furthermore, the Supreme Court Chamber has held that an appeal brought under Rule 104(4)(d) should not present "allegations to which Internal Rule 35 is manifestly inapplicable".[39] As this Chamber ruled in dismissing as manifestly inadmissible a previous appeal by the Ieng Sary Defence concerning whether or not he should be required to be present in the courtroom:

> *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.*[40]

The Supreme Court Chamber has further held that "the applicability of Internal Rule 35 to judicial conduct is highly circumscribed,"[41] and therefore "an erroneous judicial holding is not, by itself, legally sufficient to satisfy the Internal Rule 35 standard."[42]

22. The Impugned Decision makes no reference to Internal Rule 35, to the concept of interference with the administration of justice or to any cognate matter.[43] The Co-Prosecutors therefore submit that there is no plausible legal basis to construe the Impugned Decision as a "decision on interference with the administration of justice under Rule 35(6)."[44]

c. The operative part of the Impugned Decision does not confer a sui generis *right of appeal outside the scope of Rule 104*

23. The Co-Prosecutors observe that the operative part of the Impugned Decision includes a note from the Trial Chamber that "any immediate appeal" of the Impugned Decision "would not stay proceedings" before that Chamber.[45] The instant Appeal advances no argument on this point. For the sake of completeness, the Co-Prosecutors submit that this formulation cannot confer upon the Defence a *sui generis* right of immediate appeal beyond the scope of Rule 104, which exhaustively sets out the permissible grounds for such appeals. This formulation may properly be construed as a note to the

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39 **E137/5/1/3** Disqualification Decision, *supra* note 35 at para. 12.
40 **E130/4/3** Presence Decision, *supra* note 30 at para. 2.
41 **E137/5/1/3** Disqualification Decision, *supra* note 35 at para. 13.
42 **E137/5/1/3** *Ibid.* at para. 13; quoting **E130/4/3** Presence Decision, *supra* note 30 para.2.
43 **E1/147.1** Transcript, *supra* note 20 at p.17-19 and 27-28.
44 Rule 104(4)(d).
45 **E238/9/2/1** Impugned Decision, *supra* note 6 at para. 16.

Defence issued out of abundance of caution and in deference to the exclusive jurisdiction of this Chamber to determine whether an immediate appeal is indeed available in the circumstances.

24. The Co-Prosecutors take the position that the relevant legal issues have been fully briefed in written submissions and that no further reply or public, oral hearing is required for the fair and expeditious determination of the instant Appeal.

IV. CONCLUSION

25. For these reasons, the Co-Prosecutors respectfully request the Chamber to:

a. notify the Parties that no replies will be entertained;

b. find the Appeal wholly inadmissible; and

c. dismiss the Co-Lawyers' request for a public, oral hearing.

Respectfully submitted,

Date	Name	Place	Signature
18 January 2013	**CHEA Leang** Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		