BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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

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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 Decision on Fitness to Stand Trial ("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 3-11

1. In paragraphs 3-11, the OCP sets out the procedural history. While this procedural history may be seemingly accurate, it is incomplete and, in some instances, misleading.[2]

Admissibility under Rule 104(4)(b) – Response paragraphs 12-15

2. In paragraph 13, the OCP asserts that Rule 104(4)(b), which allows appeals of "decisions on detention and bail," refers *only* to substantive decisions to detain or release an Accused. The OCP is incorrect (*see* paragraphs 3-5 *infra*). Moreover, the OCP assertion is irrelevant in this instance because the Impugned Decision *is* a decision on detention; the finding that Mr. IENG Sary is fit to stand trial ensures that he will remain in detention. Were Mr. IENG Sary found unfit to stand trial, the Trial Chamber would be required to consider whether it could continue to hold him in detention. This is demonstrated by the Trial Chamber's two decisions on Ms. IENG Thirith's fitness. Upon reaching a decision that she was not fit to stand trial, the Trial Chamber immediately and within the same decisions considered whether Ms. IENG Thirith must be released.[3]

3. In paragraph 13, the OCP asserts that Rule 82 makes no mention of modalities or conditions of detention. The OCP, while correct in its assertion that Rule 82 does not explicitly refer to modalities of detention, is incorrect to conclude that issues concerning modalities of detention are therefore not open to immediate appeal. For example, Rule

[1] Co-Prosecutors' Response to IENG Sary's Appeal Against the Trial Chamber's Decision on Fitness to Stand Trial, 18 January 2013, E238/9/2/2.

[2] This procedural history is nearly identical to the procedural history set out in a different OCP Response: 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, paras. 3-10. For explanations of the portions the Defence considers inaccurate, incomplete and misleading, *see* IENG Sary's Reply to 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, 9 January 2013, E238/9/1/3, para. 1.

[3] Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, E138, paras. 60-82; Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, 13 September 2012, E138/1/10, paras. 26-31.

74(3)(f), (the Rule allowing for appeals of decisions relating to detention or bail at the pre-trial stage) similarly does not refer to modalities of detention. The Pre-Trial Chamber has nonetheless held that modalities of detention may properly be appealed pursuant to Rule 74(3)(f), despite the lack of explicit mention of modalities in Rule 74(3)(f).[4] There is no reason to interpret Rule 82 differently from Rule 74(3)(f).

4. In paragraph 14, the OCP asserts that Rule 74(3)(f) is a broader provision than Rule 104(4)(b). The OCP is incorrect. Providing no authority or logical reasoning, the OCP merely asserts that "[t]he legal interests protected by Rule 74(3)(f), during pre-trial detention, are only partially overlapping with those protected during trial, which include the rights of the Co-Accused to fair and expeditious proceedings, as the Trial Chamber rightly concluded in the Impugned Decision."[5] The interests protected at both stages are the same: Mr. IENG Sary has the right to a fair and expeditious process at both the pre-trial and trial stages.[6] Mr. IENG Sary's Co-Accuseds' right to fair and expeditious proceedings would be in no way infringed by admitting the Appeal. On the contrary, it is in all parties' interest to have the issue of Mr. IENG Sary's fitness to stand trial resolved as expeditiously as possible. Not only will immediate appeal protect Mr. IENG Sary's fundamental right not to be tried when he is not fit, but considerable trial time will be saved if he is found unfit *during* trial, rather than after an appeal of the judgement.

5. In paragraph 15, the OCP asserts that the Pre-Trial Chamber decision allowing the Defence to appeal modalities of detention was limited to the issue of bringing recording devices into the Detention Unit to record the Defence's meetings with Mr. IENG Sary.

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[4] Decision on IENG Sary's Appeal against the Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 11. In considering the admissibility, the Pre-Trial Chamber considered that Rule 21 required it to interpret the Rules in such a way as to protect Mr. IENG Sary's fair trial rights. *Id.*, paras. 13-18. The International Pre-Trial Chamber Judges have also indicated that ensuring respect for Rule 21 is of fundamental importance to securing procedural justice rather than result-oriented justice. Case 003/07-09-2009-ECCC/OCIJ (PTC 02), Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Opinion if Judges Lahuis and Downing, 24 October 2011, D11/2/4/4, para. 10.

[5] Response, para. 14.

[6] Rule 21(1): "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims…"; Agreement, Art. 12(2): "The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights ["ICCPR"], to which Cambodia is a party." *See also* ICCPR, Art. 9(3): "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release"; Art. 14(3): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (c) To be tried without undue delay."

The OCP is partially correct. While this was indeed the issue addressed in the Pre-Trial Chamber Decision,[7] the OCP is incorrect to assert that the Pre-Trial Chamber's Decision does not support the admissibility of the present Appeal. Nothing in the Pre-Trial Chamber's Decision indicated that recording Defence meetings can be the *only* modality of detention subject to appeal. On the contrary, the Pre-Trial Chamber held that "*[a]ny aspect* of the modalities of pre-trial detention … shall be under the effective control of the competent ECCC judicial authorities and strictly limited to the needs of the proceedings."[8]

Admissibility under Rule 104(4)(d) – Response paragraphs 16-22

6. In paragraph 16, the OCP asserts that the Defence requests the Supreme Court Chamber "to apply Rule 35 *to the Trial Chamber itself* … 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." The OCP is incorrect. Logic and common sense dictate that 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.[9] The interests of justice demands otherwise.

7. In paragraph 18, the OCP expresses "concern" that the Defence has engaged in "unsubstantiated attacks" upon the integrity of the Trial Chamber Judges. The OCP's "concern" is baseless. The Defence's allegations of the Trial Chamber's interference with the administration of justice are not unsubstantiated. The Trial Chamber's interference with the administration of justice is evident from a review of the Trial Chamber's decisions concerning Mr. IENG Sary's medical assessments.[10] These decisions point to a deliberate attempt to ensure that no evidence reaches the Trial or Supreme Court Chambers concerning Mr. IENG Sary's true state of health. A recent example occurred during trial on 23 January 2013. Mr. IENG Sary, attending the

[7] Decision on IENG Sary's Appeal against the Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12.
[8] *Id.*, para. 11 (emphasis added).
[9] *See* IENG Sary's Appeal against the Trial Chamber's Decision that he is Fit to Stand Trial and its Refusal to Appoint an Additional Expert to Determine Fitness, 3 January 2013, E238/9/2/1 ("Appeal"), para. 24, which describes the interrelated decisions which violated Mr. IENG Sary's fair trial rights to be mentally (as well as physically) present at trial, to participate in the proceedings, to communicate with counsel and to assist in his own defence.
[10] *Id.*

proceedings from his holding cell, was extremely fatigued and could not follow the proceedings because he kept falling asleep, despite his desire to stay awake and participate. The ECCC doctor refused to bring this matter (or the fact that Mr. IENG Sary was on oxygen) to the Trial Chamber's attention, asserting that he had already submitted his daily report and that the Trial Chamber had only instructed him to monitor Mr. IENG Sary's vital signs, which were normal.[11] The doctor would not report the fact that Mr. IENG Sary was on oxygen or asleep, considering this to be Mr. "IENG Sary's problem," and asserting that he was not capable of making such an assessment.[12] Thus, there was no record that Mr. IENG Sary was on oxygen or unable to follow the proceedings. To the extent that any of the Defence's submissions on interference with the administration of justice could appear to be unsubstantiated, this is because the Defence has been prohibited from making any record.

8. In paragraph 18, the OCP expresses "concern" that grounding the Appeal on interference with the administration of justice is part of a "strategy of rupture designed to bring the administration of justice before the Trial Chamber into disrepute." The OCP's concern is baseless and absurd. Simply, the OCP confounds a vigorous defence, as the Cambodian Constitution and ECCC applicable law and Rules afford to *all* Accused, with "rupture" tactics purportedly designed to disrupt the trial proceedings by any means, including by questioning the legitimacy of the judicial authorities. The Defence has never engaged in such tactics. The Defence appealed the Impugned Decision because the Trial Chamber violated Mr. IENG Sary's fundamental fair trial rights to be mentally (as well as physically) present at trial, to participate in the proceedings, to communicate with counsel

[11] The Trial Chamber originally requested Mr. IENG Sary's treating doctors to report to it only "significant changes" in Mr. IENG Sary's health. Memorandum to the Doctor Treating IENG Sary at the Detention Centre, 18 December 2012, E238/12. The Defence requested that the Trial Chamber instruct the Khmer-Soviet Friendship Hospital to assign qualified medical experts who are capable of assessing his ability to concentrate, recall witness testimony and fully follow the proceedings when he is fatigued or dizzy or in pain, or, in the alternative, to order Mr. IENG Sary's treating doctors to articulate in their reports the extent to which Mr. IENG Sary is able to follow the proceedings when he is dizzy or asleep or in pain, or suffering from any other condition. IENG Sary's Request for Modification of the Trial Chamber's Memorandum to his Treating Doctor at the Detention Facility, 20 December 2012, E238/12/1. The Trial Chamber rejected the Defence's request for modification of its memorandum. Trial Chamber Memorandum "IENG Sary's Request for Modification of the Trial Chamber's Memorandum to his Treating Doctor at the Detention Facility (E238/2/1)," 10 January 2013, E238/12/1/1.

[12] *See* Draft Transcript, 23 January 2013, p. 31-33. After Mr. Karnavas brought this matter to the Trial Chamber's attention, the Chamber requested that the doctor provide it with an additional report. This response was insufficient, considering that the doctor is incapable of assessing Mr. IENG Sary's ability to follow the proceedings, as he informed the Defence.

and to assist in his own defence.[13] The Defence similarly appealed the Trial Chamber's refusal to allow Mr. IENG Sary into the courtroom and its prohibition of video and audio recording him in the holding cell in order to protect 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] In filing these appeals, the Defence has acted with the due diligence required of counsel.[15] Were the Defence to wait until the final judgement to appeal the Trial Chamber's decision that Mr. IENG Sary is fit to stand trial, the OCP could, and assuredly would, argue that this ground of appeal is time-barred. By claiming that the Defence is engaged in *rupture strategy*, the OCP attempts to recruit the Supreme Court Chamber to its effort to cow the Defence into obsequiousness and acquiescence. Were the Supreme Court Chamber to accept the OCP's argument that pursuing the Appeal is actually an impermissible *rupture strategy*, this would have a chilling effect on the Defence's ability to robustly represent Mr. IENG Sary. Pursuing a strategy of transparency and accountability where the Defence insists that the Trial Chamber's judicial actions are accurately recorded for scrutiny by the Supreme Court Chamber cannot – under any circumstances – be considered a rupture strategy. Were that the case, any attempt to have a Trial Chamber decision reviewed by the Supreme Court Chamber would be impermissible and contemptuous as it would fall under the rubric of a *rupture strategy*.

9. Quite to the contrary of the OCP's assertion about the Defence's strategy, an argument could be advanced that the Trial Chamber, though the course of action it has adopted, risks tainting the results of the proceedings in Case 002/01. The Trial Chamber has embraced a strategy of deliberately shielding itself from evidence concerning Mr. IENG Sary's true state of health. By accepting daily reports from the ECCC doctors as proof that Mr. IENG Sary is able to follow the proceedings, despite the attending physicians' claims that they are not capable of making such a professional assessment,[16] the Trial

[13] *See* Appeal, paras. 29-54.
[14] 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.
[15] In a different context, the OCP has recognized that the Defence acts with due diligence by raising matters in a timely manner. As International Co-Prosecutor Andrew Cayley explained to the Cambodia Daily in the wake of the Initial Hearing (over the course of which several jurisdictional challenges were discussed): "This court is uniquely placed and has linked to it some highly placed technical legal issues which must be addressed by the parties and then determined by the judges. Ang Udom and Michael Karnavas are simply doing their jobs – what is expected of them." Andrew Cayley, *IENG Sary Defence Team Need Not Apologise for Doing Its Job*, CAMBODIA DAILY, 12 July 2011.
[16] *See, e.g.*, Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 5 December 2012, 7 December 2012, E248.1, at 8:55a-9:10a; Observation Log concerning Mr. Ieng

Chamber deliberately relies on medical reports which it knows or ought to know (from the Defence)[17] are fictional and misleading. By preventing the Defence from making an accurate and objective record, the Trial Chamber, for all intents and purposes, risks de-legitimizing the proceedings and thus the final outcome of the trial in Case 002/01; *self-rupturing*, as it were. Moreover, based on the *law of unintended consequences*, an even greater harm is caused when considering that the Trial Chamber is explicitly proclaimed as the "model court" to be emulated at other national courts by national judges.[18] A dangerous precedent risks being set for the national judges to follow on how to purposefully avoid inconvenient evidence and deliberately prevent the making of a verifiable record for appellate review. Transgressing the fair trial rights of an accused under the perceived color of authority and legality should not be countenanced.

10. In paragraphs 19-22, 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 OCP's interpretation of Rule 104(4)(d) is narrow and impracticable. 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 Impugned 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,[19] by admitting appeals alleging interference with the administration of justice under Rule 104(4)(d). The OCP's argument that Rule 104(4)(d) does not allow appeals where there has been no underlying Rule 35 request is inappropriate to this situation and

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Sary's ability to follow the proceedings and participate in his Defence 6 December 2012, 7 December 2012, E248/1.1, at 10:36a-10:39a.

[17] *See* Draft Transcript, 24 January 2013, p. 58-59.

[18] The Trial Chamber has stated that, while the ECCC lacks the mandate to directly address alleged deficiencies in national mechanisms designed to uphold the independence of the judiciary, "[i]t may, *as a model court*, nonetheless serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity." Decision on IENG Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, para. 14 (emphasis added).

[19] 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.

would deny the Defence any remedy against interference with the administration of justice by the Trial Chamber.

11. In paragraph 21, 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."[20] The OCP is incorrect in its application of Supreme Court Chamber jurisprudence. As explained in paragraph 24 of the Appeal, the Impugned Decision was not an isolated incident that *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 fair trial rights to be mentally (as well as physically) present at trial, to participate in the proceedings, to communicate with counsel and to assist in his own defence.

Whether the Impugned Decision confers a sui generis *right of appeal outside the scope of Rule 104 – Response paragraph 23*

12. In paragraph 23, the OCP points out that the Impugned Decision states that it would not stay proceedings before the Trial Chamber and asserts that this language does not confer a *sui generis* right of appeal, beyond the scope of Rule 104. The OCP's argument is irrelevant. The Defence never asserted that the Impugned Decision conferred a *sui generis* right of appeal. This language in the Impugned Decision *is*, however, relevant to a consideration of the admissibility of the Appeal. It demonstrates that the Trial Chamber considered that the Appeal would be admissible pursuant to Rule 104.[21]

Respectfully submitted,

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Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **28th** day of **January, 2013**

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

[21] The Defence and the Trial Chamber are not alone in this opinion. Shortly after the Impugned Decision was issued, according to VOA Khmer, "[a] tribunal spokesman said Ieng Sary's defense will have an opportunity to appeal the chamber's decision." Kong Sothanarith, *Ieng Sary Found Fit To Stand Trial at Tribunal*, VOICE OF AMERICA KHMER, 26 November 2012.