

**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:** 5 March 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:**


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**IENG SARY'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO "IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S 16 JANUARY 2013 DECISION TO DENY HIS REQUEST TO BE AUDIO AND/OR VIDEO RECORDED IN THE HOLDING CELL"**

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**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Article 8.4 of the Practice Direction on Filing of Documents Before the ECCC, hereby replies to the Co-Prosecutors’ Response to his Appeal against the Trial Chamber’s 16 January 2013 Decision to Deny his Request to be Audio and/or Video Recorded in the Holding Cell (“Response”).<sup>1</sup> This Reply is made necessary to address inaccurate, misleading and unfounded submissions made by the OCP in the Response.

## **I. REQUEST FOR LEAVE TO FILE IN ENGLISH ONLY**

1. The Defence respectfully requests permission to file in English only, with the Khmer version to follow as soon as possible, in accordance with Article 7.2 of the Practice Direction on the Filing of Documents Before the ECCC. The deadline to file Replies is within 5 days following notification of a Response. The Response was notified on 28 February 2013, making the Reply due on 5 March 2013. Two days of this five day period fell over the weekend, when the Interpretation and Translation Unit does not work. Since the Reply is 14 pages, it should normally, without accounting for any backlog, take four days to translate (assuming five pages of translation per day, plus one day for revision). Translation by the filing deadline was therefore impossible.

## **II. REPLY**

### **A. Introduction and procedural history**

*Introduction and Procedural History – Response paragraphs 1-5*

2. In paragraphs 1-4, the OCP correctly sets out a brief procedural history.
3. In paragraph 5, the OCP incorrectly submits that the Appeal should be dismissed as inadmissible or unfounded. The Appeal is admissible as an appeal on decisions on detention and bail under Rule 82 of the ECCC Internal Rules (“Rules”), under Rule 104(4)(b), and as an appeal on a decision on interference with the administration of justice, under Rule 104(4)(d). The Appeal is well founded because the Trial Chamber has erred in law and in fact and abused its discretion by prohibiting the Defence from audio and/or video recording Mr. IENG Sary in the holding cell.<sup>2</sup>

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<sup>1</sup> Co-Prosecutors’ Response to “IENG Sary’s Appeal against the Trial Chamber’s 16 January 2013 Decision to Deny his Request to be Audio and/or Video Recorded in the Holding Cell”, 27 February 2013, E254/3/1/2.

<sup>2</sup> See grounds of appeal set out in paragraph 1 of IENG Sary’s Appeal against the Trial Chamber’s 16 January 2013 Decision to Deny his Request to be Audio and/or Video Recorded in the Holding Cell, 5 February 2013, E254/3/1/1 (“Appeal”).

## B. Admissibility of the Appeal

### *Admissibility under Rule 104(4)(b) – Response paragraph 6*

4. In paragraph 6, the OCP correctly asserts that Rule 82 does not explicitly refer to modalities of detention. The OCP incorrectly asserts that issues concerning modalities of detention are therefore not open to immediate appeal. Rule 74(3)(f), like Rules 82 and 104(4)(b), does not explicitly refer to modalities of detention. There is no reason to interpret Rule 104(4)(b) differently from Rule 74(3)(f). The Defence refers to paragraph 6 of its Pending Appeal Reply<sup>3</sup> concerning the proper interpretation of Rule 104(4)(b).

### *Admissibility under Rule 104(4)(d) – Response paragraphs 7-8*

5. In paragraph 7, the OCP incorrectly interprets Rule 104(4)(d) (that it does not apply because there is no underlying Rule 35 request or reference to Rule 35). This interpretation is too narrow and is impracticable. The Supreme Court Chamber should adopt a broader interpretation of Rule 104(4), to allow for appellate review in the foreseeable future. This would be consistent with the OCP's recent position, accepted by the Supreme Court Chamber,<sup>4</sup> that "a reasonable reading of Rule 104 must allow for an effective right to appellate review."<sup>5</sup> The Defence refers to paragraphs 7-9 of its Pending Appeal Reply<sup>6</sup> concerning the need for an underlying Rule 35 request or mention of Rule 35 in the Impugned Decision. The broad interpretation of Rule 104(4) suggested by the Defence is consistent with the Supreme Court Chamber's interpretation of Rule 104(1) so as to comport with international jurisprudence.<sup>7</sup> While this ruling is confined to Rule

<sup>3</sup> 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, 9 January 2013 ("Pending Appeal Reply"), E238/9/1/3.

<sup>4</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, para. 26.

<sup>5</sup> See Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, E163/5/1/1, para. 14.

<sup>6</sup> See also IENG Sary's Reply to the Co-Prosecutors' Response to His Appeal against the Trial Chamber's 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), 28 January 2013, E251/1/3, paras. 2-6. In its Reply, the Defence submitted that the Appeal is admissible under Rule 104(4)(d) because the underlying Requests could be characterized as requests for investigation pursuant to Rule 35. The Defence submitted that the OCIJ investigators' actions could be characterized as acts that violated Rule 35 (e.g., by conducting unrecorded and unacknowledged witness interviews prior to taking recorded statements the investigators essentially tampered with evidence). The Supreme Court Chamber has previously held that an Appeal is admissible if it "can be characterized at least in part as a request for investigation pursuant to Internal Rule 35." See Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, E137/5/1/3, para. 11.

<sup>7</sup> See *Case of Kaing Guek Eav, alias "Duch"*, 001/18-07-2007/ECCC/SC, Appeal Judgement, 3 February 2011, F28, para. 13. The Supreme Court Chamber held that "ICTY and ICTR jurisprudence is a source of guidance in the interpretation of Internal Rule 104(1)."

104(1), this is merely because this was the section of the Rule in issue in the decision. The Supreme Court Chamber should, in this instance, as it has in the past, seek guidance from procedural rules established at the international level, particularly in the Rules of Procedure and Evidence and jurisprudence of international criminal tribunals. It also merits noting that the Trial Chamber has found that “[t]he purpose of the Internal Rules is to consolidate applicable Cambodian procedure, *supplemented by international standards* where necessary and appropriate.”<sup>8</sup> Rule 104(4) should be read broadly, in accordance with international standards, to allow appeals in situations where the issue affects the “fair...conduct of the proceedings.”<sup>9</sup> This would include situations where an appeal is necessary to “avoid irreparable prejudice to a party.”<sup>10</sup> Hence, the Appeal.

6. In paragraph 8, the OCP incorrectly asserts that the Defence attempts to re-litigate issues concerning the adequacy of medical staff or reporting. The Defence has appealed against the Trial Chamber’s calculated attempt to prevent the Defence from acting with due diligence by ensuring that a record is being made of whether Mr. IENG Sary is fit and able to exercise his fundamental fair trial rights. The issue of the adequacy of medical staff and reporting was addressed to demonstrate the need for an adequate record of Mr. IENG Sary’s condition and the Trial Chamber’s willful blindness to this need and interference with the administration of justice.<sup>11</sup>

### C. Standard of Appellate Review

#### *Standard of Review and Burden – Response paragraphs 9-15*

7. In paragraph 9, the OCP correctly recites the three permissible grounds of appeal under Rules 104(1) and 105(2), though it incorrectly interprets these provisions. The OCP also incorrectly relies upon jurisprudence that is distinguishable from the present case, as discussed in paragraph 8 below.
8. In paragraph 10, the OCP picayunishly asserts that the Defence employed the shorthand “an error of law,” “an error of fact” or “an abuse of discretion” for the applicable standard. The Defence demonstrated in its Appeal that: **a.** the Trial Chamber’s errors of

<sup>8</sup> Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, E51/14, para. 7 (emphasis added).

<sup>9</sup> See International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rules 72 (B) and 73 (B), respectively.

<sup>10</sup> Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 73(B).

<sup>11</sup> See Appeal, paras. 19-20.

law invalidated its decision; **b.** its errors of fact occasioned a miscarriage of justice; and **c.** the discernible errors in the exercise of its discretion resulted in prejudice to Mr. IENG Sary. The Appeal sufficiently sets out, with particularity, the Trial Chamber's errors and the grounds of appeal.

9. In paragraph 11, the OCP incorrectly relies on *Nchamihigo v. Prosecutor* for the proposition that the error of law must "be so fundamental and dispositive as to invalidate the decision," but this case is easily distinguishable from the present case. *Nchamihigo* concerned an ICTR Trial Chamber's decision to start trial two days before all preliminary litigation had been decided. The Appeals Chamber found an error of law (through the Trial Chamber's violation of the Rule stating that all preliminary matters shall be decided before the start of trial), but did not invalidate the Trial Chamber's decision because the Trial Chamber had only heard the Prosecution's opening statement and the first part of a witness's testimony that was not material to any findings of fact.<sup>12</sup> Here, in contrast, the Trial Chamber's actions materially impact Mr. IENG Sary's fair trial right to prepare a defence, and concern whether Mr. IENG Sary is being tried while he is unfit. Fundamentally different rights are at issue here.
10. In paragraph 12, the OCP incorrectly asserts that the error of fact must be "so central and dispositive" as to be a miscarriage of justice. The OCP provides no legal authority for this assertion. The Appeal demonstrates that the errors of fact committed by the Trial Chamber are such that a miscarriage of justice has occurred: Mr. IENG Sary has been prevented from making a contemporaneous and complete record of his condition, preventing full enjoyment of his right to prepare a defence and to appeal. Without a correct, accurate and verifiable record of whether Mr. IENG Sary is actually able to follow the proceedings, the Defence will not later be able to fully raise issues on Appeal. This is why it is essential that the Trial Chamber's errors be corrected at *this* stage. While some errors of fact and / or law may later be discerned from reviewing the record of the trial proceedings, in this instance, the errors committed by the Trial Chamber are not obvious or manifest. The Supreme Court Chamber will be incapable of determining Mr. IENG Sary's actual condition and ability to follow the proceedings as they unfold during the trial without an objective record: for example, a video recording. Moreover,

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<sup>12</sup> *Nchamihigo v. Prosecutor*, ICTR-2001-63-A, Appeals Judgement, 18 March 2010, paras. 31-32.

without an audio recording of the physicians' observations as relayed to the Defence and / or without a log (albeit one prepared on the basis of Defence observations), the Supreme Court Chamber would equally be deprived of the ability to discern whether Mr. IENG Sary was indeed capable of following the proceedings, as claimed by the Trial Chamber.

11. In paragraph 13, the OCP incorrectly asserts that the Appellant must show a "specific, concrete" error that results in prejudice to that party. The OCP provides no legal authority for this assertion. Nonetheless, the Appeal demonstrates that the Trial Chamber abused its discretion by considering extraneous factors<sup>13</sup> and failing to consider factors relevant to Mr. IENG Sary's health and fitness,<sup>14</sup> such that it violated Mr. IENG Sary's right to prepare a defence by making a record.
12. In paragraphs 14-15, the OCP incorrectly asserts that the Defence failed to demonstrate any errors and that the burden of demonstrating error rests with the appealing party. The myriad of errors committed by the Trial Chamber has indeed been demonstrated by the Defence and will be additionally addressed in the "Merits" section *infra*.

#### **D. Merits**

13. The Supreme Court Chamber should dismiss the inaccurate, misleading and unfounded submissions made in the Response. The Defence submits that the OCP has:
  - a. Misrepresented the Defence's actions and misled the Supreme Court Chamber regarding Rule 38;
  - b. Misrepresented the Defence's submissions regarding Rule 55 and the Trial Chamber's findings;
  - c. Misinterpreted Pre-Trial Chamber jurisprudence;
  - d. Misrepresented the Defence's position regarding the adequacy of any record of Mr. IENG Sary's health and fitness;
  - e. Misrepresented the Defence's submissions regarding Mr. IENG Sary's fundamental rights to privacy and dignity;

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<sup>13</sup> See Appeal, paras. 40, 45, 48-49, 52.

<sup>14</sup> See *id.*, paras. 40-42.

f. Misinterpreted the applicability of Rules 55 and 93 to the issue of making a record of Mr. IENG Sary's health and fitness and misrepresented the Defence's submissions regarding exculpatory evidence; and

g. Incorrectly asserted that the Defence made an unsubstantiated claim regarding Rule 21(1).

The central issue before the Supreme Court Chamber is *whether the Trial Chamber engaged in calculated efforts to prevent the Defence from doing its due diligence in ensuring the existence of a contemporaneous and objective record – for both the Trial Chamber's and the Supreme Court Chamber's review – of whether Mr. IENG Sary was, at all stages, capable of meaningfully participating in the trial proceedings. Curiously, the OCP does not address this issue in its Response.* The OCP relies upon unsupported assertions and misrepresentations regarding alleged investigative activities by the Defence. By disingenuously making such assertions and misrepresentations, the OCP is inviting the Supreme Court Chamber to adopt positions or interpret the applicable Rules in such a way as to cause a chilling effect on the Defence. The OCP seeks to deflect the Supreme Court Chamber's attention from the real issue at hand by making vacuous assertions of inappropriate conduct by the Defence and alluding to the need for the imposition of stimulative measures. Each of the OCP's arguments will be addressed in the order raised. General paragraphs making conclusions at the end of each argument will not be addressed individually. Paragraphs which merit no reply are ignored.

*Error Concerning Misconduct under Rule 38 – Response paragraphs 16-19*

14. In paragraph 17, the OCP gratuitously asserts that Rule 38 warnings are not subject to appeal. The Defence did not base the admissibility of its Appeal on Rule 38, but on Rule 104(4). The OCP incorrectly characterized the Defence's actions in audio recording its observations of Mr. IENG Sary after being prohibited from video recording him as "hair-splitting and willful disobedience of the clear intention of the Trial Chamber's instruction." The Defence sought to *video* record Mr. IENG Sary so that the Trial Chamber and parties would be able to see whether he was able to follow the proceedings during trial and so that an adequate record would exist to preserve errors for appeal. The Defence, in contrast, sought to *audio* record its observations of Mr. IENG Sary and interactions with his doctors in order to make a record. The "clear intention" behind the Trial Chamber prohibiting video recording of Mr. IENG Sary is that it prevents the Trial

Chamber, parties and public from viewing his condition and, presumably, because the Trial Chamber considered that it would be disruptive to the proceedings. The Defence has never willfully disobeyed a Trial Chamber instruction.

15. In paragraph 17, the OCP incorrectly asserts that the Defence has “willfully misinterpret[ed]” the holdings of the Supreme Court Chamber. In this regard, the Defence refers the Supreme Court Chamber to paragraphs 7-11 of its Reply to the Co-Prosecutors’ Response to IENG Sary’s Appeal against the Trial Chamber’s 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).<sup>15</sup> The Defence further notes that the OCP’s argument that the Defence has misinterpreted Supreme Court Chamber jurisprudence is based on an assertion that the Defence has appealed a discrete Decision and not a “pattern” of conduct.<sup>16</sup> In fact, the Supreme Court Chamber has just recently affirmed that several related decisions can “constitute one comprehensive decision” for purposes of appeal.<sup>17</sup>
16. In paragraph 18, the OCP incorrectly asserts that the Trial Chamber was not fully apprised of the Defence’s intentions. Whether the Defence’s arguments on recording occurred before or after the Trial Chamber’s initial ruling is irrelevant to a consideration of whether the Trial Chamber knew of the reasons for the Defence’s request when it issued the Impugned Decision. The Trial Chamber was repeatedly made aware of the Defence’s intentions (and the reasoning behind them), both before and after the Trial Chamber’s initial ruling.<sup>18</sup> The OCP is correct that one of the transcript references cited by the Defence does not refer to recording. The Defence erred in the page number cited. The correct page reference should have been page 2, rather than page 5, of the 5

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<sup>15</sup> IENG Sary’s Reply to the Co-Prosecutors’ Response to His Appeal against the Trial Chamber’s 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), 28 January 2013, E251/1/3.

<sup>16</sup> See Response, para. 17, referring to Co-Prosecutors’ Response to “Ieng Sary’s Appeal against the Trial Chamber’s 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),” 21 January 2013, paras. 12-16. See especially para. 14.

<sup>17</sup> Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, para. 17.

<sup>18</sup> Transcript, 4 December 2012, E1/147.1, p. 12-15, 20-21, 24-26; Transcript, 5 December 2012, E1/148.1, p. 2.



December 2012 trial transcript. Despite the error, the Defence's reasons for seeking to record are clear from reading the entirety of the in-court exchange.<sup>19</sup>

17. In paragraph 19, the OCP incorrectly asserts that a determination that a party has violated Rule 38 is "purely a discretionary one." The Supreme Court Chamber has recently explained that the Trial Chamber's discretion is not absolute and unfettered when a violation of fair trial rights is at issue.<sup>20</sup> Furthermore, as demonstrated in the Appeal, the Defence *did not* violate a directive.<sup>21</sup> At the time of the audio recording, the only directive from the Trial Chamber had to do with video recording. The Defence complied with both Trial Chamber directives as soon as they were issued.

*Error concerning whether the Defence was conducting an investigation – Response paragraphs 20-24*

18. In paragraph 20, the OCP incorrectly represents the thrust of the Defence's arguments as to why the Trial Chamber erred. The OCP selectively focused on a portion of paragraph 32 of the Appeal, while conveniently omitting to review paragraphs 33-34, which contextually puts into perspective the errors claimed and reasoned by the Defence. The Defence did not submit that the Trial Chamber erred because it did not rule quickly enough on the permissibility of the Defence's recordings. The Defence submitted that the Trial Chamber erred in finding that the Defence was conducting its own investigation. The Defence was actually seeking to make a record of Mr. IENG Sary's health and fitness to ensure that the Trial Chamber had all the relevant evidence before it to assess his fitness and his actual ability to meaningfully participate in the proceedings, and so that the Trial Chamber's actions were accurately recorded for scrutiny by the Supreme Court Chamber. The Defence explained that such actions did not fall under Rule 55, which relates to the investigation of crimes within the ECCC's jurisdiction.<sup>22</sup>
19. In paragraph 21, the OCP incorrectly asserts that "it is only the Defence that uses the term 'patently obvious' to describe the Trial Chamber's holding. The Trial Chamber simply made a finding." The Defence did not use the term "patently obvious" and did

<sup>19</sup> Transcript, 5 December 2012, E1/148.1, p. 2-8.

<sup>20</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, para. 40.

<sup>21</sup> See Appeal, paras. 26-30.

<sup>22</sup> See *id.*, para. 34.

not refer to a holding rather than a finding.<sup>23</sup> The OCP incorrectly asserts that the Defence's complaint of error is based on its attempts to file observation logs, whereas the Impugned Decision and Appeal concern video recording and audio recording. The Defence's submissions were based on the Trial Chamber's finding with regard to its requests to *video record* Mr. IENG Sary (for the purposes of allowing the Trial Chamber and parties to view whether Mr. IENG Sary is able to follow the proceedings and to have a record of this) and *to audio record* (for the purposes of having a record from which an appeal could be based), *and* its request to file observation logs.<sup>24</sup>

20. In paragraphs 22-24, the OCP incorrectly asserts that: **a.** the Defence's argument that it did not seek to conduct an investigation within the meaning of Rule 55 is unsupported; **b.** Rule 55 requires parties who seek to investigate to seek the assistance of the relevant Chamber; and **c.** the Trial Chamber's jurisprudence has prohibited parties from gathering information to submit as evidence. The Defence sought to memorialize its observations of Mr. IENG Sary due to the Trial Chamber's singular lack of interest in maintaining a contemporaneous record of Mr. IENG Sary's health and fitness. Recording such observations is not prohibited by Rule 55. Rule 55 deals with the investigation of facts set out in an Introductory or Supplementary Submission relating to crimes within the jurisdiction of the ECCC.<sup>25</sup> The Trial Chamber's jurisprudence referred to by the OCP relates to investigations into the authenticity and reliability of evidence before the Trial Chamber. The purpose of recording Mr. IENG Sary is to create a verifiable, immutable record for posterity. This is similar to the rationale for Rule 25, which requires the OCP and OCIJ to record their interviews whenever possible. The recordings themselves are not the "investigation," rather, they are the *means* for preserving a record of the investigation.

*Error concerning Trial Chamber's interpretation of Pre-Trial Chamber jurisprudence – Response paragraphs 25-28*

<sup>23</sup> The Defence stated: "At no time did the Trial Chamber, upon learning of these efforts, order the Defence to cease making observation logs and/or audio recordings *because* they amounted to impermissible investigative actions. Were these actions as patently investigative as the Trial Chamber *now* suggests, then it logically follows that the Trial Chamber would have expressed the obvious when first informed by the Defence that it would notify the Trial Chamber of its Case Manager's observations." *Id.*, para. 32.

<sup>24</sup> *Id.*, paras. 32-33.

<sup>25</sup> See Rule 55(1)-(2).

21. In paragraphs 25-28, the OCP incorrectly interprets the Pre-Trial Chamber's decision, although it is correct in stating that the Pre-Trial Chamber decision is not binding on the Trial Chamber, but is persuasive. The Trial Chamber held that a Pre-Trial Chamber decision allowing the Defence to record meetings with Mr. IENG Sary in the detention center<sup>26</sup> did not suggest a right to record Mr. IENG Sary in the holding cell.<sup>27</sup> The Defence refers to paragraphs 35-39 of the Appeal and paragraph 62 of the Pending Appeal concerning the proper interpretation and application of the Pre-Trial Chamber's decision.

*Error concerning an adequate record of Mr. IENG Sary's fitness to stand trial – Response paragraphs 29-33*

22. In paragraph 29, the OCP incorrectly represents the Defence's position with regard to the adequacy of the record of Mr. IENG Sary's health and fitness. The Defence did not only submit that the expert reports are too sporadic to create an adequate record and that the treating doctors fail to bring significant changes in Mr. IENG Sary's condition to the Trial Chamber's attention, as claimed by the OCP. The Defence also submitted that the treating doctors' reports contain misleading information, as they contain conclusions that Mr. IENG Sary can follow the proceedings from his holding cell when the treating doctors informed the Defence that they were not competent to make such conclusions.<sup>28</sup>

23. In paragraphs 30-31, the OCP incorrectly represents the Defence's submissions regarding the Trial Chamber's finding as to the adequacy of the record of Mr. IENG Sary's health and fitness. The Defence *did not* assert an error of law by the Trial Chamber; the Defence asserted an error of fact, based on the Trial Chamber's reliance on incorrect and insufficient medical information.<sup>29</sup> Nor was the Defence complaining that the doctors and experts had failed to agree with the Defence's views regarding Mr. IENG Sary's fitness or the considerations that are relevant for such an assessment.<sup>30</sup> As stated *supra*,

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<sup>26</sup> 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. 31.

<sup>27</sup> Decision on the IENG Sary Defence Request to Audio and/or Video Record IENG Sary in the Holding Cell, 16 January 2013, E254/3, para. 13.

<sup>28</sup> Appeal, para. 41.

<sup>29</sup> *Id.*, para. 40.

<sup>30</sup> The Defence would prefer that the Trial Chamber hear the doctors' views for itself to determine whether the doctors agree with the Defence. In this regard, the Defence requested that the Trial Chamber summon one of the doctors who examined Mr. IENG Sary, after International Co-Lawyer Michael G. Karnavas asked the doctor

the Defence raised valid and serious concerns about the information contained in the treating doctors' daily reports, which the Trial Chamber relies upon to determine whether Mr. IENG Sary is able to participate in and follow the proceedings. The OCP's assertion that the Defence refers to claims it made in Court, rather than factual evidence, is ridiculous. The very reason for the Appeal is that the Trial Chamber has prevented any evidence concerning Mr. IENG Sary's actual condition. The Defence cannot be expected to substantiate a claim that a record has not been made through references to a record that does not exist.

24. In paragraph 32, the OCP incorrectly represents the Defence's submissions regarding the necessity of recordings for expert medical assessments of Mr. IENG Sary's fitness to stand trial. The Defence submitted that the experts *may* not require a recording for their expert medical assessment.<sup>31</sup> Since the Trial Chamber has *never*, to the Defence's knowledge, inquired of the experts whether such recordings would be useful, the Trial Chamber erred in concluding that such information would not be necessary for them.

*Abuse of discretion concerning violation of privacy – Response paragraph 34*

25. In paragraph 34, the OCP incorrectly represents the Defence's submissions regarding the Trial Chamber's consideration of Mr. IENG Sary's fundamental rights to privacy and dignity. The Defence submitted that the Trial Chamber abused its discretion by relying on a supposed concern for Mr. IENG Sary's right to privacy as a reason to deny recordings of him. The Defence demonstrated that the Trial Chamber has not displayed regard for Mr. IENG Sary's rights to privacy and dignity in the past. Claiming the right to privacy as a justification for violating Mr. IENG Sary's other fundamental fair trial rights is an abuse of discretion, particularly where the right to privacy is not even in issue, as it is Mr. IENG Sary himself who desires to be recorded.

*Error regarding exculpatory evidence – Response paragraphs 35-38*

26. In paragraph 36, the OCP incorrectly interprets the applicability of Rules 55 and 93 to the issue of making a record of Mr. IENG Sary's health and fitness. Rule 55, as explained *supra*,<sup>32</sup> refers to the investigation of facts set out in an Introductory or Supplementary

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whether Mr. IENG Sary could follow the proceedings and the doctor laughed. *See* Transcript, 4 December 2012, E1/147.1, p. 3, 5. The Trial Chamber rejected this request. *See id.*, p. 19.

<sup>31</sup> Appeal, para. 48.

<sup>32</sup> *See supra* para. 20.

Submission relating to crimes within the jurisdiction of the ECCC. Rule 93 is similarly limited. Although not explicitly stated in the Rule itself, this is evident from the wording in Rule 93(2) that states that the Trial Chamber may conduct certain investigations “under the same conditions as the Co-Investigating Judges.” The Co-Investigating Judges are limited to investigating facts set out in an Introductory or Supplementary Submission.<sup>33</sup>

27. In paragraph 37, the OCP incorrectly asserts that “the Defence’s claimed ‘right to make a record’ is misguided” and refers to its previous submissions to the Trial Chamber.<sup>34</sup> The paragraphs referred to by the OCP do not address the Defence’s submission that the International Covenant on Civil and Political Rights implicitly envisages the right to make a record as part of the rights to adequate facilities to prepare a defence and to access exculpatory evidence.<sup>35</sup> The Defence does not submit that the Trial Chamber has prohibited it from accessing the Case File.<sup>36</sup> The Defence submits that the Trial Chamber has willfully acted to prevent it from making a contemporaneous and objective record as to Mr. IENG Sary’s actual state of health and fitness. The Defence refers to paragraphs 23-25 of its Appeal and paragraphs 56-63 of the Pending Appeal concerning the right to make a record of Mr. IENG Sary’s health and fitness and the need for such a record.

*Abuse of discretion concerning the finding that recording Mr. IENG Sary is not the least intrusive means – Response paragraphs 39-41*

28. In paragraphs 39-41, the OCP incorrectly asserts that the Defence failed to substantiate its claim that the Trial Chamber’s prohibition on recording Mr. IENG Sary in his holding cell violates Rule 21(1). The term “coerce,” according to the Oxford English Dictionary, means “[t]o constrain or restrain (a voluntary or moral agent) by the application of superior force, or by authority resting on force; to constrain to compliance or obedience by forcible means; ‘to keep in order by force.’”<sup>37</sup> The Trial Chamber has constrained, by the application of its authority, the Defence’s ability to record Mr. IENG Sary. There is no evidence, and the Trial Chamber has never found, that this constraint is strictly limited

<sup>33</sup> Rule 55(2).

<sup>34</sup> The OCP refers to Co-Prosecutors’ Response to “IENG Sary’s Submissions on the Law Permitting Him to be Audio and/or Video Recording in the Holding Cell”, 21 December 2012, E254/2, paras. 14, 19-22.

<sup>35</sup> Appeal, para. 47.

<sup>36</sup> See Co-Prosecutors’ Response to “IENG Sary’s Submissions on the Law Permitting Him to be Audio and/or Video Recording in the Holding Cell”, 21 December 2012, E254/2, paras. 20-21.

<sup>37</sup> OXFORD ENGLISH DICTIONARY, available at <http://www.oed.com/view/Entry/35716#eid9060573>.

to the needs of the proceedings, proportionate to the offense charged or fully respectful of human dignity. It is not possible for the Defence to substantiate a negative.

### III. CONCLUSION

29. The Response is not only replete with inaccurate, misleading and unfounded submissions, it also fails to address several submissions by the Defence concerning the need for a contemporaneous and objective record of the impact of Mr. IENG Sary's physical condition upon his ability to meaningfully participate in the proceedings. Particularly, the OCP provides no submissions as to:

a. Paragraphs 23-25 of the Appeal, regarding Mr. IENG Sary's fundamental fair trial rights to prepare a defence, which includes the right to make a record upon which to base an appeal, and not to be tried while he is unfit.

b. Paragraphs 37-39 of the Appeal, regarding the circumstances cited by the Trial Chamber as distinguishing Mr. IENG Sary's present situation from that addressed by the Pre-Trial Chamber (the location of the holding cell compared to the courtroom; the fact that any member of the Defence team can be with Mr. IENG Sary at any time; and the existence of a direct and confidential phone line from the holding cell to the courtroom).

c. Paragraphs 41-42 of the Appeal, regarding the concern raised by the Defence that the Trial Chamber is relying on daily medical reports that contain inaccurate information; Mr. IENG Sary's treating doctors state in their daily reports that he can follow the proceedings from the holding cell *despite* having indicated that they are not competent to make such a determination.

d. Paragraph 45 of the Appeal, regarding the Defence's submission that considerations of the importance of the Case 002/01 proceedings and the victims' interest in seeing a resolution cannot outweigh Mr. IENG Sary's fair trial rights.

e. Paragraphs 48-49 of the Appeal, regarding the Defence's submissions that the Trial Chamber concluded that video and / or audio recordings of Mr. IENG Sary were not necessary for the experts' medical assessment without first hearing from the experts as to that question, and that the Defence is seeking to present the Trial Chamber with its observations of Mr. IENG Sary, *not* its medical assessments.

30. The Appeal should be admitted. The issues raised before the Supreme Court Chamber fall within the general criteria of Rules 104(4)(b) and 104(4)(d). To deny the admission of the Appeal would result in manifest injustice because the errors committed by the Trial Chamber would result in irreparable prejudice to Mr. IENG Sary. The Trial Chamber, by preventing the Defence from making an adequate, complete and objective judicial record, erred and has continued to err during each trial session. Accordingly, the Appeal should not only be admitted but the relief sought should be granted.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 5<sup>th</sup> day of **March, 2013**