

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 6 December 2012**CLASSIFICATION****Classification of the document  
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**IENG SARY'S NOTICE OF WITHDRAWAL OF WAIVERS OF RIGHT TO BE  
PRESENT DURING THE TESTIMONY OF CERTAIN WITNESSES AND CIVIL  
PARTIES**

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ANG Udom  
Michael G. KARNAVASDistribution to:**The Trial Chamber Judges:**  
Judge NIL Nonn  
Judge YOU Ottara  
Judge YA Sokhan  
Judge Silvia CARTWRIGHT  
Judge Jean-Marc LAVERGNE  
Reserve Judge THOU Mony  
Reserve Judge Claudia FENZ**Co-Prosecutors:**  
CHEA Leang  
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby gives NOTICE to the Trial Chamber of his WITHDRAWAL of any waivers he has executed of his right to be present during the testimony of certain witnesses and Civil Parties,<sup>1</sup> and further gives NOTICE of his intent to exercise his constitutionally guaranteed fundamental fair trial right to attend the proceedings *directly* by being present in the courtroom during the testimony of all witnesses, experts and Civil Parties. Should Mr. IENG Sary elect to attend the proceedings *indirectly* via audio-visual means in his holding cell, he will execute a waiver and seek leave from the Trial Chamber, in keeping with the practice established since the commencement of the proceedings.

### I. BACKGROUND

1. On 7 September 2012, Mr. IENG Sary was hospitalized due to extreme fatigue and weakness.<sup>2</sup> Mr. IENG Sary remained hospitalized for just over two months, until 8 November 2012, when he was returned to his cell at the ECCC Detention Facility.<sup>3</sup>
2. On 17 September 2012, the Defence sent a letter to the Trial Chamber Senior Legal Officer informing the Trial Chamber that Mr. IENG Sary would agree to waive his right to be present during the testimony of eight witnesses and Civil Parties in the interests of allowing the trial to proceed expeditiously.<sup>4</sup> The Defence stated that Mr. IENG Sary had also agreed to waive his presence during procedural matters, such as witness statement objections hearings. The Defence noted that when team members met with Mr. IENG Sary on 15 September 2012, he was weak and unable to concentrate for more than 10 or 15 minutes without experiencing dizziness and confusion. The Defence therefore urged the Trial Chamber to give strong reconsideration to rescheduling the testimonies of Experts Philip Short and Elizabeth Becker, who were both scheduled to testify in October 2012.

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<sup>1</sup> IENG Sary’s Limited Waiver of Right to be Present During Court Proceedings, 18 September 2012, E229; IENG Sary’s Limited Waiver of Right to be Present During Court Proceedings, 1 October 2012, E237; IENG Sary’s Limited Waiver of Right to be Present During Court Proceedings, 30 October 2012, E237/1.

<sup>2</sup> Email from Senior Detention Liaison Officer Claude Bouchard, 7 September 2012; Transcript, 21 September 2012, EI/125.1, p. 12.

<sup>3</sup> Transfer of IENG Sary to ECCC Detention Facility for 8 November 2012 Hearing, 7 November 2012, E239/2.

<sup>4</sup> See Letter from Defence to Trial Chamber Senior Legal Officer, “Notice Concerning Upcoming Witnesses and Mr. IENG Sary’s Waiver of his Right to be Present”, 17 September 2012. The following day, the waiver was filed. IENG Sary’s Limited Waiver of Right to be Present During Court Proceedings, 18 September 2012, E229.

3. On 19 September 2012, the OCP filed a Response to this waiver, in which it requested the Trial Chamber to request the Defence to advise whether Mr. IENG Sary would be willing to waive his presence for a number of additional, mostly crime base, witnesses.<sup>5</sup>
4. On 19 September 2012, the Defence filed a Notice by Mr. IENG Sary stating that he would not waive his right to be present during the testimony of Expert Philip Short.<sup>6</sup>
5. On 21 September 2012, while Mr. IENG Sary was still hospitalized, Drs. Lim Sivutha and Ky Bousuor, representing the Khmer-Soviet Friendship Hospital Governing Board for the Examination of the Health of the Accused at the ECCC Detention Facility, appeared before the Trial Chamber to update it and the parties as to Mr. IENG Sary's medical status.<sup>7</sup> Dr. Lim Sivutha testified that it was currently unclear how long Mr. IENG Sary would need to remain hospitalized.<sup>8</sup> The Trial Chamber then heard from the parties concerning whether to hear the testimony of Philip Short as scheduled. The OCP, supported by the Civil Parties,<sup>9</sup> stated that it did not oppose the adjournment of Philip Short's testimony,<sup>10</sup> noting that no trial time would be lost since Mr. IENG Sary had waived his right to be present for certain witnesses and the anticipated upcoming document hearings.<sup>11</sup> The NUON Chea and KHIEU Samphan Defence teams also supported the Defence's request to reschedule Philip Short.<sup>12</sup>
6. On 24 September 2012, the Trial Chamber announced that the testimonies of Philip Short and Elizabeth Becker would be deferred, presumably because all parties agreed deferral was appropriate and the Trial Chamber recognized Mr. IENG Sary's right to be present during the experts' testimonies. The Trial Chamber indicated that it would send the 21 September 2012 trial transcript as well as Mr. IENG Sary's medical reports to Professor A. John Campbell to provide advice.<sup>13</sup>

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<sup>5</sup> Co-Prosecutors' Response to Notice Concerning Upcoming Witnesses and Mr. IENG Sary's Waiver of his Right to be Present and Request to Consider Calling Further First Phase and Crime Base Witnesses During October and November Period, 19 September 2012, E229/1.

<sup>6</sup> Notice of Mr. IENG Sary's Non-Waiver of Right to be Present During the Proceedings When Philip Short Testifies, 19 September 2012, E229/2.

<sup>7</sup> Transcript, 21 September 2012, E1/125.1.

<sup>8</sup> *Id.*, p. 67.

<sup>9</sup> *Id.*, p. 76-77.

<sup>10</sup> *Id.*, p. 70.

<sup>11</sup> *Id.*, p. 72.

<sup>12</sup> *Id.*, p. 86-87.

<sup>13</sup> Directions to the Parties Following Hearing of 21 September 2012, 24 September 2012, E233, para. 2.

7. On 1 October 2012, Mr. IENG Sary submitted another waiver of his right to be present, waiving his presence during the testimony of 18 witnesses and Civil Parties proposed by the OCP.<sup>14</sup>
8. On 2 October 2012, the Trial Chamber issued a memorandum indicating the witnesses and Civil Parties it intended to hear concerning movement of the population.<sup>15</sup> The Trial Chamber requested the Defence to indicate whether Mr. IENG Sary would agree to waive his presence during the testimony of any of the witnesses or Civil Parties indicated in the memorandum.<sup>16</sup>
9. On 30 October 2012, Mr. IENG Sary submitted a third waiver of his right to be present during the testimony of 14 Civil Parties listed in the Trial Chamber's 2 October 2012 memorandum.<sup>17</sup> This brought the total number of witnesses and Civil Parties who could testify without Mr. IENG Sary's presence in court to 40.
10. On 5 and 6 November 2012, Professor Campbell examined Mr. IENG Sary, and on 6 November 2012, provided his report to the parties.<sup>18</sup> In this report, Professor Campbell concluded that Mr. IENG Sary was competent to stand trial, recommending only minor modifications in his care.<sup>19</sup> On 8 November 2012, Professor Campbell testified in court.<sup>20</sup> His testimony was consistent with his 6 November 2012 report.
11. On 12 November 2012, the Defence orally requested that the Trial Chamber appoint an additional expert to examine Mr. IENG Sary to assess his fitness to stand trial.<sup>21</sup> The Defence stated that Mr. IENG Sary was currently unfit for trial, but that the trial could go forward with the witnesses for whom Mr. IENG Sary had waived his presence, in the hope that Mr. IENG Sary's health could improve.<sup>22</sup> The OCP submitted that the trial

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<sup>14</sup> IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 1 October 2012, E237.

<sup>15</sup> Preliminary Indication of Individuals to be Heard During Population Movement Trial Segments in Case 002/01, 2 October 2012, E236/1.

<sup>16</sup> *Id.*, para. 5.

<sup>17</sup> IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, 30 October 2012, E237/1.

<sup>18</sup> Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4.

<sup>19</sup> *Id.*, p. 2-6.

<sup>20</sup> Transcript, 8 November 2012, E1/142.1.

<sup>21</sup> Transcript, 12 November 2012, E1/143.1, p. 7-11.

<sup>22</sup> *Id.*, p. 11-12.

should proceed with Mr. IENG Sary attending from his holding cell and that it was unnecessary to hear from an additional expert.<sup>23</sup> The Civil Parties agreed with the OCP.<sup>24</sup>

12. On 26 November 2012, the Trial Chamber issued its Decision, finding Mr. IENG Sary fit to stand trial and rejecting the Defence's request to appoint an additional medical expert.<sup>25</sup> In its Decision, the Trial Chamber considered whether it could order Mr. IENG Sary to participate in the proceedings via his holding cell, and determined that it could do so, in the interests of justice.<sup>26</sup>

## II. LAW AND ARGUMENT

13. Mr. IENG Sary has a constitutionally protected<sup>27</sup> and unqualified right to participate in the proceedings and assist in his own defence. This right is guaranteed in the ECCC legal framework<sup>28</sup> and by the International Covenant on Civil and Political Rights ("ICCPR"),<sup>29</sup> which must be respected in accordance with the Cambodian Constitution.<sup>30</sup>
14. Mr. IENG Sary's right to participate directly in the proceedings includes certain minimum guarantees, including the right to be tried in his presence and to defend himself in person.<sup>31</sup> Pursuant to the Cambodian Constitution,<sup>32</sup> the Establishment Law,<sup>33</sup> the

<sup>23</sup> *Id.*, p. 25-30, 36-37.

<sup>24</sup> *Id.*, p. 39-42.

<sup>25</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9.

<sup>26</sup> *Id.*, paras. 32-34.

<sup>27</sup> Article 31 of the Cambodia Constitution provides: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." Article 14(3)(d) of the International Covenant on Civil and Political Rights states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) To be tried in his presence..."

<sup>28</sup> Article 35 new (d) of the Establishment Law states (emphasis added):

The accused shall be presumed innocent as long as the court has not given its definitive judgment. In determining charges against the accused, *the accused shall be equally entitled to the following minimum guarantees*, in accordance with Article 14 of the International Covenant on Civil and Political Rights. ... d. *to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing*, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it...

Rule 81(1) of the ECCC Internal Rules ("Rules") states: "The Accused shall be tried in his or her presence, except as provided in this Rule." Rule 81(5) states in pertinent part that:

[w]here, due to health reasons or other serious concerns, the Accused cannot attend in person before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused's absence with his or her consent or, where the Accused's absence reaches a level that causes substantial delay and, where the interests of justice so require, order that the Accused's participation before the Chamber shall be by appropriate audio-visual means.

<sup>29</sup> ICCPR, Art. 14(3)(d).

<sup>30</sup> Cambodian Constitution, Art. 31.

<sup>31</sup> Establishment Law, Art. 35 new (d); ICCPR, Art. 14(3)(d).

<sup>32</sup> Cambodian Constitution, Art. 31.

Rules<sup>34</sup> and the ICCPR,<sup>35</sup> Mr. IENG Sary has the right to be physically present in the courtroom during his trial.

15. The Trial Chamber has recognized this fundamental right on several occasions, including by partially or completely adjourning twelve days of trial proceedings.<sup>36</sup> Mr. IENG Sary intends to exercise this right, as further reflected in IENG Sary's Withdrawal of Waivers of Right to be Present executed on 3 December 2012, a copy of which is attached hereto.<sup>37</sup>
16. Pursuant to Rule 81(5), the Trial Chamber may order Mr. IENG Sary to participate in the proceedings via audio-visual means *only* where his "absence reaches a level that causes substantial delay *and*, where the interests of justice so require...."<sup>38</sup>
17. Two requirements must be met prior to ordering Mr. IENG Sary to participate via audio-visual means, as prescribed by Rule 81(5): Mr. IENG Sary's absence must cause a substantial delay, *and* ordering audio-visual participation must be in the interests of justice. The Trial Chamber has indicated that, in the interests of justice, it may order Mr. IENG Sary to participate from his holding cell "where [Mr. IENG Sary's] presence in the courtroom would be contrary to [his] medical interests and/or to the expeditious conduct of trial."<sup>39</sup> The Trial Chamber clarified that this is "without prejudice to [his] right to otherwise elect to be present in the courtroom during trial proceedings at all times...."<sup>40</sup>
18. Since Mr. IENG Sary will be present in the courtroom, there will be no substantial delay of the proceedings. Therefore, there is no need for the Trial Chamber to consider whether the interests of justice require ordering his participation via the holding cell. Minor inconveniences or delays to the daily proceedings are not cause to override Mr. IENG Sary's right to participate directly in his trial.

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<sup>33</sup> Establishment Law, Art. 35 new.

<sup>34</sup> Rule 81(1).

<sup>35</sup> ICCPR, Art. 14(3)(d).

<sup>36</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 32, *citing* trial days 21 May 2012, 22 May 2012, 23 May 2012, 24 May 2012, 13 August 2012, 12 September 2012, 13 September 2012, 17 September 2012, 18 September 2012, 19 September 2012, 26 September 2012, 27 September 2012. *See also id.*, para. 19; Transcript, 27 June 2011, E1/4.1, p. 62.

<sup>37</sup> *See Annex.*

<sup>38</sup> Rule 81(5) (emphasis added).

<sup>39</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 34.

<sup>40</sup> *Id.*

19. Mr. IENG Sary insists upon exercising his right to be present in the courtroom. As the Trial Chamber has determined that he is fit to participate in the proceedings and to participate effectively in his own defence,<sup>41</sup> the Trial Chamber *must* respect Mr. IENG Sary's exercise of his rights.
20. Based on the Trial Chamber's determination (made in reliance on Professor Campbell's report) that Mr. IENG Sary is fit to stand trial, Mr. IENG Sary should have no problem following the proceedings in court as long as he wears a neck brace and lies down. If circumstances were to show otherwise, i.e., if Mr. IENG Sary (despite willing himself to remain fully engaged at all times) is unable to follow the proceedings, it would assuredly be in the interests of justice for the Trial Chamber to be made aware of this through observing him. In the holding cell, Mr. IENG Sary would be invisible to the Co-Lawyers, thus depriving them of the opportunity to exercise due diligence in protecting Mr. IENG Sary's constitutionally guaranteed fair trial rights. More ominously, by dispatching Mr. IENG Sary to the holding cell, the Trial Chamber would be purposely concealing from itself Mr. IENG Sary's true state of being. The deleterious effect of such an action by the Trial Chamber would lead to a miscarriage of justice.
21. In the past, the Trial Chamber has required Mr. IENG Sary's physical presence in the courtroom, even when he had chosen to participate via his holding cell, to "illustrate to the parties and the public that the accused indeed hear the charges against them."<sup>42</sup> Here, it would *not* be in the interests of justice to order Mr. IENG Sary's remote participation, particularly because the Trial Chamber would be unable to verify whether Mr. IENG Sary is actually following the proceedings and participating in his own defence if he is in a holding cell.<sup>43</sup>

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<sup>41</sup> *Id.*, para. 26.

<sup>42</sup> On 21 November 2011, during opening statements in Case 002/01, Mr. IENG Sary requested to participate in the proceedings from his holding cell, due to back pain. Transcript, 21 November 2011, E1/13.1, p. 36. This request was denied by the Trial Chamber due to the need "to illustrate to the parties and the public that the accused indeed hear the charges against them." *Id.* The same request to participate via the holding cell was denied by the Trial Chamber the following day. Transcript, 22 November 2011, E1/14.1, p. 8. The Defence appealed this decision to force Mr. IENG Sary to remain in court, but the appeal was found inadmissible. See IENG Sary's Appeal against the Trial Chamber's Decision Denying his Right to Waive his Presence in the Courtroom During Trial and Denying his Constitutional Right to Assist in his own Defence, 5 January 2012, E30/4/1; Decision on IENG Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court, 13 January 2012, E130/4/3.

<sup>43</sup> Furthermore, the Trial Chamber has previously noted that in determining fitness to stand trial, a Trial Chamber may rely on its own observations of an Accused during the proceedings. Decision on NUON Chea's

22. The Trial Chamber has alluded to the possibility that it may not allow a hospital bed to be used in the courtroom.<sup>44</sup> Considering that Mr. IENG Sary has chosen to exercise his right to be physically present in the courtroom, reasonable accommodations to allow his presence must be made.<sup>45</sup> It would be an inexcusable violation of Mr. IENG Sary's fair trial rights to deny his right to be present in the courtroom simply because the Trial Chamber may find it inconvenient to bring a hospital bed into the courtroom.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully NOTIFIES the Trial Chamber that Mr. IENG Sary will WITHDRAW the waivers of his right to be present during the testimony of any witnesses or Civil Parties and intends to be present in the courtroom during all testimony.

Respectfully submitted,

  
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 ANG Udom



  
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 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 6<sup>th</sup> day of **December, 2012**

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Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 18. It is important that the Trial Chamber observe Mr. IENG Sary because, although it has determined that Mr. IENG Sary is currently fit for trial, given his fragile state of health, he may not remain fit. Observation by the Trial Chamber will assist it in making future determinations as to Mr. IS's fitness to stand trial.

<sup>44</sup> In its Decision concerning Mr. IENG Sary's fitness for trial, the Trial Chamber stated that Professor Campbell did not "include the provision of a hospital bed in the courtroom among the list of recommendations considered either to enhance the Accused's welfare or to be medically appropriate." Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 33.

<sup>45</sup> The Trial Chamber has in the past made reasonable accommodations so that Mr. IENG Sary could be present in the courtroom, such as arranging for a reclining chair, and moving Mr. IENG Sary's seat to the portion of the courtroom nearest to the bathroom. *See, e.g.*, Email from Trial Chamber Greffier to Defence, "Implementation of Expert Medical Report/Re 'Reclining Chair' for IENG Sary", 10 August 2011.