

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:** 7 December 2012**CLASSIFICATION****Classification of the document
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**IENG SARY'S REQUEST FOR RECONSIDERATION OF THE TRIAL
CHAMBER'S DECISION FINDING HIM FIT TO STAND TRIAL AND REJECTING
HIS REQUEST FOR THE APPOINTMENT OF AN ADDITIONAL EXPERT TO
ASSIST IN DETERMINING FITNESS**

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests the Trial Chamber to reconsider its Decision on Accused IENG Sary’s Fitness to Stand Trial (“Decision”),¹ in which the Trial Chamber rejected the Defence’s oral request to appoint an additional medical expert and decided that Mr. IENG Sary was fit to stand trial. This Request is made necessary because the Decision was made without the Defence having been afforded the opportunity to present all the necessary information and arguments. Failure to reconsider the Decision will result in manifest injustice.

I. BACKGROUND

1. Mr. IENG Sary is an 87-year old man, in weak physical condition, with a documented history of heart problems, urological problems and arthritis.²
2. On 7 September 2012, Mr. IENG Sary was hospitalized due to extreme fatigue and weakness.³ 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.⁴ During his time at the Khmer-Soviet Friendship Hospital and subsequently, Mr. IENG Sary has experienced dizziness, shortness of breath, numbness in his limbs and he is unable to walk, or even sit up or stand, unassisted.⁵
3. 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 (“treating doctors”), appeared before the Trial Chamber to update it and the parties as to Mr. IENG Sary’s medical status.⁶ Dr. Lim Sivutha testified that a CT scan performed on Mr. IENG Sary revealed that he suffers from vertebrobasilar insufficiency syndrome. This is a condition in which insufficient blood reaches the head, causing dizziness, fatigue and numbness.⁷ After the testimony of the treating doctors concluded, the OCP requested that the Trial Chamber appoint a national and international neurologist “with the greatest

¹ Decision on Accused IENG Sary’s Fitness to Stand Trial, 26 November 2012, E238/9.

² See, e.g., *id.*, paras. 1-2.

³ Email from Senior Detention Liaison Officer Claude Bouchard, 7 September 2012; Transcript, 21 September 2012, E1/125.1, p. 12.

⁴ Transfer of IENG Sary to ECCC Detention Facility for 8 November 2012 Hearing, 7 November 2012, E239/2.

⁵ See Mr. IENG Sary’s daily medical reports submitted by the Khmer Soviet Friendship Hospital, (e.g., E1/86.1); Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4; Transcript, 21 September 2012, E1/125.1, p. 12, 14, 62-63; Transcript, 8 November 2012, E1/142.1, p. 78, 106.

⁶ Transcript, 21 September 2012, E1/125.1.

⁷ *Id.*, p. 19-20, 48-49.

of urgency” in order to get a better understanding of Mr. IENG Sary’s health situation.⁸ The Defence agreed with this request.⁹

4. On 24 September 2012, the Trial Chamber announced that it would send the 21 September 2012 trial transcript and Mr. IENG Sary’s medical reports to Professor A. John Campbell, a geriatrician who has examined Mr. IENG Sary in the past, to “advise as to what further medical expertise is required in relation to the Accused IENG Sary, should this be necessary.”¹⁰
5. On 8 October 2012, after Professor Campbell indicated that he found it difficult to be certain of the reasons for a change in Mr. IENG Sary’s diagnosis since he last examined him, the Trial Chamber appointed Professor Campbell to:
 - a. Examine IENG Sary, and review all recent medical information and tests conducted on him since Professor Campbell last reported.
 - b. Conduct or have conducted any additional testing that he considers appropriate to assist in reaching a diagnosis.
 - c. Consult with any other qualified person (such as a radiologist) whose assistance might be helpful in interpreting or confirming his conclusions on test results or on the local availability of specific medical tests he considers essential for a diagnosis of IENG Sary’s current health status.
 - d. Advise the Trial Chamber if any such medical tests are not available in Phnom Penh and/or whether there is a sufficient medical or technological skill base in Phnom Penh to administer those tests adequately.
 - e. Report to the Trial Chamber on where and under what conditions medical tests that he considers are essential for confirming a diagnosis of IENG Sary’s current health status might be carried out.
 - f. Report to the Trial Chamber his expert opinion on the current state of IENG Sary’s health, and on when he might reasonably be discharged from hospital-based care.
 - g. Advise the Trial Chamber of any changes he would recommend in IENG Sary’s medical care.¹¹
6. On 5 and 6 November 2012, Professor Campbell examined Mr. IENG Sary. Professor Campbell’s report was provided to the parties on the afternoon of 6 November 2012.¹² In this report, Professor Campbell concluded that Mr. IENG Sary was not suffering from vertebrobasilar insufficiency syndrome, but was instead experiencing benign paroxysmal

⁸ *Id.*, p. 74.

⁹ *Id.*, p. 83.

¹⁰ Directions to the Parties Following Hearing of 21 September 2012, 24 September 2012, E233, para. 2.

¹¹ Re-appointment of Professor John A. Campbell (IENG Sary), 8 October 2012, E238.

¹² Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4.

positional vertigo.¹³ Professor Campbell noted that dizziness was common in the elderly and found that Mr. IENG Sary was competent to stand trial, recommending only minor modifications in his care.¹⁴ Upon receiving Professor Campbell's report, the Defence contacted the Trial Chamber Senior Legal Officer to request permission to share the report with an expert medical consultant to assist the Defence in preparing for Professor Campbell's examination.¹⁵

7. On 7 November 2012, the Trial Chamber granted the Defence's request to share Professor Campbell's report with a medical expert.¹⁶ The Defence immediately contacted Dr. Harold Bursztajn, a forensic neuropsychiatric expert,¹⁷ to see if he could review Professor Campbell's report and provide assistance in preparing for Professor Campbell's examination the following day.¹⁸ Dr. Bursztajn briefly (due to time constraints and inherent limitations)¹⁹ examined Professor Campbell's 6 November 2012 report and provided a brief analysis.²⁰ Dr. Bursztajn found Professor Campbell's methodology unacceptable and pointed out that Professor Campbell:

1. [Failed to p]rovide a competency specific mental status examination relative to [Mr. IENG Sary's] capacity to assist counsel such as a check of his autobiographical memory.
2. [Failed to p]rovide a systematic assessment of the limits of [Mr. IENG Sary's] attention, concentration, language and executive functions relative to his endurance in relation to fatigue and pain as the trial progresses and information complexity increases.
3. [Engaged in a] blanket dismissal of potential medication side effects based on the ipse dixit assumption that since [Mr. IENG Sary's] medications have not been changed, a gradual emergence of subtle yet significant medication related neurotoxicity can simply be pulled out or would be noticed by his treating

¹³ *Id.*, p. 3-5.

¹⁴ *Id.*, p. 2-6.

¹⁵ See Email from Defence to Trial Chamber Senior Legal Officer, "Request to Share Expert Report E238/4", 6 November 2012.

¹⁶ See Email from Trial Chamber Legal Officer Roger Phillips, "Re: Request to share expert report E238/4", 7 November 2012.

¹⁷ Dr. Bursztajn is a Harvard Medical School-trained specialist in the field of forensic neuropsychiatry and has extensive experience in this area. See Dr. Bursztajn's *curriculum vitae*, E115.2.2.

¹⁸ See Email exchange between the Defence and Dr. Bursztajn, E238/6.2.

¹⁹ See Transcript, 8 November 2012, E1/142.1, p. 49; Transcript, 12 November 2012, E1/143.1, p. 8, where International Co-Lawyer Michael G. Karnavas noted that Dr. Bursztajn's letter to the Defence was not an expert report, since Dr. Bursztajn was not provided with all the necessary information or time in which to prepare an expert medical report.

²⁰ Letter from Dr. Bursztajn to the Defence, 7 November 2012, E238/6.

clinicians.²¹

8. On 8 November 2012, Professor Campbell testified in court.²² His testimony was consistent with his 6 November 2012 report. After Professor Campbell's testimony concluded, the parties were informed that on 12 November 2012 they would be provided a brief opportunity to provide remarks and observations concerning Professor Campbell's report.²³ It was never made clear to the parties that the 12 November 2012 hearing was specifically intended to be on the issue of Mr. IENG Sary's fitness to stand trial.
9. 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.²⁴ The Defence pointed out that it had not made submissions calling for the termination of the proceedings against Mr. IENG Sary and that submissions on competency would be "premature."²⁵ When questioned by Judge Cartwright, 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.²⁶ The OCP submitted that the trial should proceed with Mr. IENG Sary attending from his holding cell, and further submitted that the Trial Chamber must decide on Mr. IENG Sary's fitness to stand trial at this point, rather than waiting to see if his health improved.²⁷ The OCP submitted that it was unnecessary to call additional experts.²⁸ The Civil Parties supported the OCP.²⁹
10. On 19 November 2012, the Defence sent a letter to Dr. Bursztajn to request his assistance in providing, *inter alia*, "[a]ny guidance as to what we should point out to the Trial Chamber in support of our submission that the appointment of an expert such as yourself is necessary and reasonable in the circumstances."³⁰

²¹ *Id.*

²² Transcript, 8 November 2012, E1/142.1.

²³ *Id.*, p. 140.

²⁴ Transcript, 12 November 2012, E1/143.1, p. 7-11.

²⁵ *Id.*, p. 5-6. "[Y]ou must not lose sight of the fact that we -- that is the Ieng Sary defence, have not made submissions calling for the termination of the proceedings against Mr. Ieng Sary." *Id.*, p. 5.

²⁶ *Id.*, p. 11-12.

²⁷ *Id.*, p. 25-30.

²⁸ *Id.*, p. 36-37.

²⁹ *Id.*, p. 39-42.

³⁰ Letter from the Defence to Dr. Bursztajn, 19 November 2012, attached as Annex A.

11. On 21 November 2012, Dr. Bursztajn responded.³¹ In his opinion as an expert with extensive experience in dealing specifically with the issue of competency, an expert assessment of Mr. IENG Sary's fitness would likely take approximately five days to conduct, considering the complexity of the evaluation and potential issues such as fatigue and fluctuating mental status. He recommended:

- a. Familiarization with proceedings to assess whether [Mr. IENG Sary] is able to follow them well enough to assist counsel;
- b. Observation in court over time;
- c. Observation of attorney-client interactions;
- d. Forensic neuropsychiatric interviews;
- e. Ruling out faking or malingering; and
- f. Review and analysis of records from hospital and prison.

Further, Dr. Bursztajn stated that the expert:

needs to be a forensically trained neuropsychiatrist capable of systematic, neuropsychodynamically informed observations of the defendant's cognitive functioning in an extended legal proceeding, including the defendant's interactions with his attorneys. Specifically, the expert retained needs to be able to:

1. Provide a competency-specific mental status examination relative to capacity to assist counsel—which includes, for example, an assessment of his autobiographical memory. This requires a context-specific, task-specific (rather than generalized) understanding of competence.
2. Provide a systematic assessment of the limits of the defendant's attention, concentration, understanding and communication of relevant language, and executive functions relative to his endurance in the presence of fatigue and pain as the trial progresses and the complexity of the information presented increases.
3. Perform a culturally informed evaluation, taking into account the defendant's cultural background in relation to the cultural setting of the trial.
4. Rule out faking, exaggerating, or malingering (a subject on which [Dr. Bursztajn has] taught seminars for the U.S. Department of Justice).
5. Take a careful medical and mental-health history and consider the interaction between medical and neuropsychiatric impairments.
6. Assess potential side effects of a range of medications, whether acute or emerging gradually in the form of subtle yet significant medication-related neurotoxicity.
7. Consider any history of head injury (recent or remote) or other potential indicators of Organic Brain Syndrome.
8. Consider such collateral data as are relevant to the evaluation.

³¹ Letter from Dr. Bursztajn to the Defence, 21 November 2012, attached as Annex B.

9. Conduct an objective evaluation irrespective of retention by prosecution or defense (it helps to have been retained previously, in other cases, by both sides).³²
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.

II. LAW AND ARGUMENT

A. The Trial Chamber has the inherent authority to reconsider the Decision

13. The Trial Chamber has the inherent authority to reconsider its decisions. It has recognized this inherent authority by deciding past reconsideration requests on the merits.³³ Similarly, the Pre-Trial Chamber has held that "it has the inherent power to reconsider a decision it has previously rendered *because of a change of circumstances or when it finds that the previous decision was erroneous or that it has caused an injustice.*"³⁴ The Pre-Trial Chamber clarified that a change in circumstances *can* result where new facts or arguments are presented.³⁵ The Pre-Trial Chamber was guided by ICTY jurisprudence, noting: "[t]he Appeals Chamber of the ICTY has held that a Chamber may 'always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice.'"³⁶

14. It is submitted herein that the Decision *must* be reconsidered as the Trial Chamber did not have all the necessary information before reaching its Decision and did not hear all relevant arguments. The Decision, if not reconsidered, will result in manifest injustice.

B. Reconsideration is necessary because the Decision was rendered without fully hearing the arguments of the Defence on the need to call an additional expert or experts and Mr. IENG Sary's fitness to stand trial

15. A Trial Chamber has the discretion to issue decisions *proprio motu* but "the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party

³² *Id.*

³³ *See, e.g.*, Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7.

³⁴ Decision on Request to Reconsider the Decision for an Oral Hearing on the Appeals PTC 24 and PTC 25, 20 October 2009, D164/4/9, para. 12 (emphasis added).

³⁵ *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC/OCIJ(PTC 02), Decision on IENG Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File, 3 December 2008, D99/3/41, para. 6.

³⁶ Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25 (emphasis added), *citing Prosecutor v. Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13, and *Prosecutor v. Mucić et al.*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, para. 49.

whose rights can be affected by the decision to be made.”³⁷ The Defence did not present its full position on the need to call an additional expert or experts or on Mr. IENG Sary’s fitness to stand trial³⁸ because the Trial Chamber prematurely issued the Decision.³⁹

16. On 24 September 2012, the Trial Chamber provided Professor Campbell with Mr. IENG Sary’s recent medical reports following Mr. IENG Sary’s hospitalization “to advise as to what further medical expertise is required in relation to the Accused IENG Sary, should this be necessary.”⁴⁰ On 8 October 2012, the Trial Chamber ordered Professor Campbell to examine Mr. IENG Sary after Professor Campbell stated that he could not make a determination without re-examining him.⁴¹ The Trial Chamber’s appointment of Professor Campbell was *not* framed as the appointment of an expert for the purpose of determining fitness to stand trial. Additionally, the examination of Professor Campbell was *not* framed as a fitness hearing. The Defence was neither aware of the need nor afforded the opportunity to prepare full submissions on the issue of fitness. The Trial Chamber, therefore, acted unjustly by deciding Mr. IENG Sary’s fitness to stand trial without hearing full arguments on this issue by the Defence.

17. The Defence did not consider that it was necessary or ripe on 12 November 2012 to present arguments on Mr. IENG Sary’s fitness to stand trial, as Mr. IENG Sary had waived his right to be present during the testimony of the next several witnesses.⁴² As explained several times during the 12 November 2012 hearing, making submissions on competency was premature because “Mr. Ieng Sary has waived his presence [for] ... all the witnesses listed to appear for the remainder of this month and ... perhaps for the month of December as well ... [therefore his fitness] is not ripe for discussion because the proceedings can carry on without interruption.”⁴³ Proceeding with the witnesses for

³⁷ *Prosecutor v. Jelisić*, IT-95-10-A, Appeals Judgement, 5 July 2001, para. 27.

³⁸ This fact is acknowledged by the Trial Chamber in paragraph 21 of the Decision: “The IENG Sary Defence ... offers neither any basis upon which the Trial Chamber could reasonably reject the expertise provided [by Professor Campbell] nor cogent reasons for why the court-appointed experts should now be substituted.”

³⁹ See *supra* paras. 5-6, 8, 10 which indicate that the Defence was not sufficiently informed of the need to present full oral arguments or allocated sufficient time to orally present such arguments and was in the process of preparing written submissions for the appointment of an additional expert.

⁴⁰ Directions to Parties Following Hearing of 21 September 2012, 24 September 2012, E233, para. 2.

⁴¹ Re-appointment of Professor A. John CAMPBELL (IENG Sary), 8 October 2012, E238, para. 1.

⁴² 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.

⁴³ Transcript, 12 November 2012, E1/143.1, p. 6. See also p. 12-14, 19.

whom Mr. IENG Sary had waived his right to be present would allow time for additional medical assessments and treatment to improve Mr. IENG Sary's condition.

18. The Defence did not make arguments concerning Mr. IENG Sary's fitness to stand trial until pressed to do so by Judge Cartwright.⁴⁴ Given the medical reports, the testimony of the doctors who treated and examined Mr. IENG Sary, and the manner and scope of Dr. Campbell's examination, the Defence considered that additional expertise was necessary before a determination could be made regarding Mr. IENG Sary's fitness to stand trial.⁴⁵
19. Professor Campbell's report contained highly technical material, some of which was nearly incomprehensible to those without medical backgrounds. Moreover, considering Mr. IENG Sary's treating doctors' diagnosis and the Defence's own observations of Mr. IENG Sary immediately prior to and since his hospitalization, Dr. Campbell's conclusions were surprising, if not incredible. Had the Defence been aware that the Trial Chamber intended the 12 November 2012 hearing to address the issue of Mr. IENG Sary's current fitness to stand trial, it most certainly would have requested additional time to consult with experts to properly prepare to make submissions.
20. The Defence made an oral request for the appointment of an additional medical expert on 12 November 2012.⁴⁶ The Defence then began immediate preparations to supplement this request with a written request for additional expertise, to be filed pursuant to Rule 32 of the ECCC Internal Rules ("Rules"). To this end, the Defence contacted Dr. Bursztajn to request his assistance in providing, *inter alia*, guidance regarding the appointment of an independent expert.
21. Prior to hearing the Defence's full arguments on the issue of Mr. IENG Sary's fitness to stand trial and on the need for an additional expert, the Trial Chamber issued its Decision. It is unconscionable that the Trial Chamber would: (1) appoint an expert for a stated purpose *other than* fitness; (2) only give the parties one full day to examine a report that was later used to determine fitness;⁴⁷ (3) not explicitly inform the parties that the real purpose of the hearing and oral submissions was to make arguments on fitness; and (4)

⁴⁴ *Id.*, p. 11: "Mr. Karnavas, the Chamber has a couple of questions arising out of your submission. We are left being unclear as to whether you assert that Ieng Sary is currently unfit or not or whether, for example, he can participate from the holding cells."

⁴⁵ *Id.*, p. 5-8.

⁴⁶ *Id.*, p. 7-11.

⁴⁷ *See supra* Background, paras. 6-8.

then decide the question of fitness without fully hearing from the parties. The Trial Chamber must reconsider the Decision since the Decision was made without providing the Defence sufficient opportunity to be heard.

C. Reconsideration is necessary because a decision as to Mr. IENG Sary's fitness to stand trial cannot be made without hearing from an additional expert or experts

1. There is a conflict between the diagnoses of Mr. IENG Sary's treating doctors and Professor Campbell

22. A board of treating doctors at the Khmer-Soviet Friendship Hospital, after consultation with numerous specialists,⁴⁸ after being responsible for Mr. IENG Sary's care for the past year⁴⁹ and after caring for him 24 hours a day while he was hospitalized, found that Mr. IENG Sary suffers from "insufficient blood drawing to his upper head" resulting in "limited motor movement"⁵⁰ and "dizziness."⁵¹ They found that "blood cannot be actually sent to the brain."⁵² They further found that Mr. IENG Sary "had fatigue once he had to respond to a question.... So we had to limit the time for the interview. I think, so far, the maximum time we spent interviewing him was about 15 minutes."⁵³

23. This assessment is consistent with the Defence's observations of Mr. IENG Sary. The Defence has regularly interacted with Mr. IENG Sary for over four years and has observed the sharp decline in his health. Mr. IENG Sary currently experiences shortness of breath and becomes dizzy when he moves.⁵⁴ Mr. IENG Sary cannot concentrate when he feels dizzy.⁵⁵ Mr. IENG Sary must urinate several times an hour, particularly in the mornings.⁵⁶ The need to urinate frequently causes frequent movement, which therefore causes frequent dizziness, which results in a lack of concentration. It is *commonsense* that a person in such a state cannot meaningfully participate in his own defence.⁵⁷

⁴⁸ Transcript, 21 September 2012, E1/125.1, p. 20.

⁴⁹ *Id.*, p. 11.

⁵⁰ *Id.*, p. 12.

⁵¹ *Id.*, p. 14.

⁵² *Id.*, p. 19.

⁵³ *Id.*, p. 62-63.

⁵⁴ This was acknowledged by Professor Campbell. *See* Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, p. 1; Transcript, 21 September 2012, E1/125.1, p. 14, 26-27.

⁵⁵ Professor Campbell indicates that Mr. IENG Sary can concentrate when he is physically comfortable and is not out of breath. *See* Transcript, 8 November 2012, E1/142.1, p. 25, 53.

⁵⁶ *See, e.g.*, Medical Report on Mr. IENG Sary, 3 September 2012, E222/1, para. 13.

⁵⁷ The Trial Chamber has previously recognized that a commonsense approach is required in determining fitness to stand trial: "An accused's fitness to stand trial should ... turn on whether his capacities 'viewed overall and in

24. In stark contrast to the conclusions reached by Mr. IENG Sary's treating doctors and the observations of the Defence, Professor Campbell – after having observed Mr. IENG Sary for a comparatively miniscule amount of time – concluded that Mr. IENG Sary is fit to stand trial as long as certain minor recommendations (such as wearing a soft neck collar) are implemented.⁵⁸ Curiously, Professor Campbell reached this conclusion without making any effort to speak to Dr. Lim Sivutha,⁵⁹ Mr. IENG Sary's treating physician at the Khmer-Soviet Friendship Hospital who personally examined Mr. IENG Sary daily during his hospitalization.⁶⁰ Professor Campbell appeared eager to paint a rosy picture of Mr. IENG Sary's health. For example, his report makes it appear that Mr. IENG Sary could stand on his own,⁶¹ although when questioned Professor Campbell admitted that Mr. IENG Sary could not even get up out of bed or sit unaided, let alone stand.⁶²
25. Hearing from multiple experts when there are conflicting diagnoses is standard practice. The ICTR Appeals Chamber has noted that “[i]n practice, Trial Chambers generally consider various professional opinions before taking an important procedural decision arising from an accused's medical condition which may impact the course of a trial.”⁶³ In deciding on the Accused Kovačević's fitness to stand trial at the ICTY, the Trial Chamber considered and compared multiple reports prepared by experts called by the Prosecution, Defence and the Trial Chamber itself before reaching a decision.⁶⁴ Mr. IENG Sary's treating physicians repeatedly emphasized that to determine the proper treatment for Mr.

a reasonable and commonsense manner, [are] at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights.” Decision on NUON Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 16; Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, E138, para. 27, quoting *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 55.

⁵⁸ See Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4.

⁵⁹ *Id.*, para. 4. See also Transcript, 8 November 2012, E1/142.1, p. 85-86.

⁶⁰ Transcript, 21 September 2012, E1/125.1, p. 37.

⁶¹ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, p. 2, 4.

⁶² Transcript, 8 November 2012, E1/142.1, p. 74-75.

⁶³ *Prosecutor v. Karamera et al.*, ICTR-98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ndirumpatse, 19 June 2009, para. 19, citing, *inter alia*, the ICTY *Prosecutor v. Stanišić and Simatović* case in which the Trial Chamber considered at least 11 medical reports from numerous experts in determining fitness to stand trial. In the *Karamera* case, the Trial Chamber considered that since the expert reports signed by multiple doctors were in agreement, there was no need to appoint a further expert. *Prosecutor v. Karamera et al.*, ICTR-98-44-T, Decision on Remand Regarding Continuation of Trial, 10 September 2009, para. 17.

⁶⁴ *Prosecutor v. Kovačević*, IT-01-42/2-I, Public Version of Decision on the Accused's Fitness to Enter a Plea and to Stand Trial, 12 April 2006. Although at the ICTY the parties may call their own experts, whereas at the ECCC, the Trial Chamber selects and appoints experts, the principle is the same: the Trial Chamber should consider various expert opinions before making a decision as crucial as an accused's fitness to stand trial.

IENG Sary, consultation with additional specialists, including neurologists, radiologists and heart specialists is necessary.⁶⁵ Professor Campbell himself noted that in general in the medical field, providing second and even third opinions is quite common.⁶⁶

26. The Trial Chamber has previously found that “[a] decision on fitness to stand trial may be based on the conclusions of a single expert assessment where the Trial Chamber, having assessed all pertinent material before it and all relevant factors, is in possession of sufficient information to ground its decision.”⁶⁷ Such is not the case here, where Mr. IENG Sary’s treating doctors and Professor Campbell have reached such starkly different diagnoses.
27. Given the conflicting diagnoses as to Mr. IENG Sary’s medical conditions, it would be improper for the Trial Chamber to choose to accept Professor Campbell’s report wholeheartedly and to reject the conclusions of Mr. IENG Sary’s treating physicians, without any medical basis for choosing one over the other. Doing so would give the appearance that the Trial Chamber improperly selected the report most likely to be favorable to the public. It would also give the appearance of siding with the Western doctor over the Khmer treating doctors (who should have, at the very least, been afforded the opportunity to respond to Professor Campbell’s conclusion that they had erred in their diagnosis and to provide their own analysis of Professor Campbell’s report).
28. To determine which diagnosis is correct and whether Mr. IENG Sary is currently fit to stand trial, the Trial Chamber must appoint an additional expert or experts. This expert should, *inter alia*, provide a systematic assessment of the limits of: (i) Mr. IENG Sary’s attention; (ii) his concentration; (iii) his understanding and communication of relevant language; and (iv) his executive functioning relative to his endurance when he is fatigued and in pain, as the trial progresses and the complexity of the information presented to him increases.⁶⁸ The expert must also have specialized knowledge concerning the issue of

⁶⁵ Transcript, 21 September 2012, E1/125.1, p. 20-23, 27-28, 36-42, 57, 64.

⁶⁶ Transcript, 8 November 2012, E1/142.1, p. 89-90.

⁶⁷ Decision on NUON Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 18.

⁶⁸ See *supra* para. 11 for a list of tests Dr. Bursztajn recommends should be performed.

competency to stand trial and must be experienced in performing such assessments. Professor Campbell, while a qualified geriatrician, does not possess this competence.⁶⁹

2. Professor Campbell erred in his analysis of Mr. IENG Sary's fitness to stand trial

29. Professor Campbell erred in considering Mr. IENG Sary's physical condition and his mental condition in isolation, rather than considering the impact that Mr. IENG Sary's poor physical condition has on his mental state.⁷⁰ This is apparent from Professor Campbell's reliance on the 3 September 2012 report he prepared along with Drs. Huot Lina and Seena Fazel – a report which was prepared *prior to* Mr. IENG Sary's two month hospitalization and is, therefore, no longer the benchmark by which to measure Mr. IENG Sary's fitness.
30. The 3 September 2012 report is neatly divided into separate sections for "evaluation of physical health" and "evaluation of mental health, cognitive impairment, and fitness to plead and stand trial."⁷¹ To prepare this report, Mr. IENG Sary was, in fact, evaluated on two separate days (for approximately one hour each day), with one day reserved to examine physical health, and one day reserved to examine mental health.⁷² Like Professor Campbell, Drs. Huot Lina and Seena Fazel erroneously considered mental and physical health in isolation. What is required in Mr. IENG Sary's situation, given his poor physical health, is a more nuanced assessment of fitness that takes into account the effect physical health has on mental fitness and his *post-hospitalization* status.
31. The artificial separation between the consideration of Mr. IENG Sary's physical health and mental health allowed Professor Campbell to conclude that, because Mr. IENG Sary performed adequately on the Mini Mental State Exam, his mental health must not have

⁶⁹ Professor Campbell's qualifications indicate that, prior to being appointed as an expert at the ECCC, he only performed one assessment during his long career to assist a court in determining fitness to stand trial. *See* E62.1.

⁷⁰ The Trial Chamber itself appears to make this error, finding in the Decision that Mr. IENG Sary does not suffer from cognitive or mental impairment which would render him unfit to participate in the proceedings. *See* Decision, paras. 20, 26.

⁷¹ *See* Medical Report on Mr. IENG Sary, 3 September 2012, E222/1.

⁷² *Id.*, paras. 6, 27. This report indicates that Dr. Huot Lina also met with Mr. IENG Sary briefly on 27 August 2012, when he offered to assist the doctors in interviewing his wife. *See also* Email from Trial Chamber Legal Officer Roger Phillips to the Defence, "Examination of IENG Sary", 27 August 2012, noting that the interviews would start at 1:00pm and would require Mr. IENG Sary to be absent during a portion of the trial testimony scheduled to start at 1:30pm and enquiring whether Mr. IENG Sary would waive his right to be present.

changed and he must be fit to stand trial.⁷³ This determination ignores the consequences of Mr. IENG Sary's physical ill health on his ability to concentrate and to instruct his Defence team.⁷⁴ If Mr. IENG Sary does not lie perfectly still during the entirety of each trial session, but instead turns his head slightly, shifts his position, or even must get up (with assistance) to urinate, he will not be able to concentrate, follow the proceedings or assist in his own defence.⁷⁵

32. Instead of focusing on Mr. IENG Sary's ability to concentrate and follow the proceedings in order to assist in his own defence, Professor Campbell appeared to consider that mental fitness equates to the absence of any mental illness, such as dementia. There has never been any allegation that Mr. IENG Sary is mentally ill. This simply is not the issue.

33. Professor Campbell similarly did not appropriately consider the context in which Mr. IENG Sary is required to assist his defence team. He likened the inability to concentrate and assist in one's defence during a trial in which Mr. IENG Sary faces possible conviction for crimes against humanity and a sentence of life in prison with sleeping through lectures.⁷⁶ Professor Campbell simply does not appreciate the complexities at issue or the importance of the case to Mr. IENG Sary. It would be erroneous and unjust for the Trial Chamber to accept Professor Campbell's report without seeking an independent evaluation.

3. Additional expertise is needed

34. The Defence recommends that the Trial Chamber seek the medical opinion of someone, such as Dr. Bursztajn, experienced in the degree of competency necessary to assist in one's own defence in a case as voluminous and complex as Case 002. Dr. Bursztajn is

⁷³ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, para. 10.

⁷⁴ In *Strugar*, the Trial Chamber held (and the Appeals Chamber affirmed) that to determine fitness to stand trial, the following non-exhaustive list of the Accused's capacities should be evaluated:

1. The capacity to plead;
2. The capacity to understand the nature of the charges;
3. The capacity to understand the course of the proceedings;
4. The capacity to understand the details of the evidence;
5. The capacity to instruct counsel;
6. The capacity to understand the consequences of the proceedings; and
7. The capacity to testify.

Prosecutor v. Strugar, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004 ("Strugar Decision"), para. 36; *Prosecutor v. Strugar*, IT-01-42-A, Appeals Judgment, 17 July 2008, para. 55.

⁷⁵ As Mr. IENG Sary's treating doctors have recognized, even the slightest movement makes Mr. IENG Sary feel exhausted. See Transcript, 21 September 2012, E1/125.1, p. 27.

⁷⁶ Transcript, 8 November 2012, E1/142.1, p. 56.

highly qualified⁷⁷ and has directly relevant medical expertise and experience.⁷⁸ Dr. Bursztajn has indicated that a number of tests are necessary to determine Mr. IENG Sary's fitness to stand trial and that these tests must be performed by an expert with specific expertise.⁷⁹ Professor Campbell does not have such expertise and has not performed the requisite tests.

35. The Defence has never met Dr. Bursztajn. The Defence has never had any prior association with Dr. Bursztajn. The Defence communicated with Dr. Bursztajn for the first time on 7 November 2012, for the purpose of seeking his assistance in reviewing Professor Campbell's report. The Defence submits that any similarly qualified expert would be acceptable; however, this expert should have had no prior involvement in assessing Mr. IENG Sary's health.⁸⁰ This will alleviate any concern that the expert's conclusions may be influenced by a desire to validate the expert's previous reports or the reports of colleagues. Such additional medical expertise is necessary for the Trial Chamber to ultimately determine Mr. IENG Sary's fitness to stand trial; i.e., his ability to fully participate in the proceedings.

D. Reconsideration is necessary because the Decision will result in manifest injustice

36. The Decision is no mere administrative or trial management decision. It is a decision which directly impacts upon Mr. IENG Sary's fundamental fair trial rights. Mr. IENG Sary has the right to be present at trial, which is guaranteed to him by the Cambodian Constitution,⁸¹ the Establishment Law,⁸² the Rules,⁸³ and the International Covenant on

⁷⁷ See Curriculum Vitae of Dr. Harold Bursztajn, E115.2.2.

⁷⁸ For example, Dr. Bursztajn's *curriculum vitae* lists forensic neuropsychiatric evaluation of disability and diminished capacity as a major research interest and he has authored articles with topics such as "Clinicians' Guidelines for Assessing and Presenting Subtle Forms of Patient Incompetence in Legal Settings." *Id.*, p. 5, 7.

⁷⁹ See *supra* para. 11.

⁸⁰ At the ICTR, the *Karamera* Trial Chamber "consider[ed] that a report from the Chief Medical Officer, as well as from an independent medical expert *with no prior involvement in the case*, [was] necessary to gain a full appreciation of the state of [an accused's] health." *Prosecutor v. Karamera et al.*, ICTR-98-44-T, Order Concerning Medical Examination of Matthieu Ngirumpatse, 23 June 2009, para. 7.

⁸¹ 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." The right to be present at trial is a human right recognized by Article 14(3)(d) of the ICCPR, to which Cambodia is a party.

⁸² 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...*"

⁸³ Rule 81(1) states: "The Accused shall be tried in his or her presence, except as provided in this Rule." Rule 81(5) states in pertinent part: "Where, due to health reasons or other serious concerns, the Accused cannot attend

Civil and Political Rights.⁸⁴ The ICTY has held that the right to be present “appears to be to ensure the presence of an accused person *who is capable of assisting the Tribunal by the presentation of his or her defence.*”⁸⁵ It is manifestly unjust to try an Accused who is not fit to assist in his own defence. As former ICTY/ICTR Appeals Chamber Judge Schomburg has explained, “[t]he international community has come to accept that an accused must never become the mere object of criminal proceedings.”⁸⁶

37. The Defence submits that Mr. IENG Sary is currently unfit to participate in the proceedings because he is unable concentrate for more than 10-15 minutes at a time, due to dizziness and fatigue. A proper and thorough examination by an additional expert or experts will assist in making a balanced and correct evaluation. The Decision that Mr. IENG Sary is fit to follow the proceedings, when evidence available to the Defence demonstrates the contrary, results in a manifest injustice. The Decision was issued prematurely, without hearing full arguments from the Defence, and it will force Mr. IENG Sary to go through with a trial in which he cannot meaningfully participate, in violation of his fair trial rights.

III. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to: a. RECONSIDER the Decision and b. APPOINT an additional expert or experts to assist it in determining Mr. IENG Sary’s fitness to stand trial.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 7th day of **December, 2012**

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.”

⁸⁴ Article 14(3)(d) 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...”

⁸⁵ *Strugar* Decision, para. 32 (emphasis added).

⁸⁶ Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation, para. 3, in *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, 11 May 2007.