

**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:** 12 December 2012**CLASSIFICATION****Classification of the document  
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**IENG SARY'S SUPPLEMENTAL REQUEST FOR A QUALIFIED EXPERT TO  
MAKE DAILY MEDICAL EXAMINATIONS RELATED TO MR. IENG SARY'S  
CAPACITY TO ASSIST IN HIS OWN DEFENCE  
OR, IN THE ALTERNATIVE,  
REQUEST FOR THE TRIAL CHAMBER TO ORDER THE ECCC DOCTORS TO  
MAKE SPECIFIC OBSERVATIONS RELEVANT TO MR. IENG SARY'S  
CAPACITY TO ASSIST IN HIS OWN DEFENCE**

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Judge NIL Nomm  
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 supplements the continuing oral requests made by his Co-Lawyers for the Trial Chamber to order experts to make daily medical examinations to assess his capacity to assist in his own defence. This Request is made necessary because the ECCC medical doctors have indicated that they do not possess the expertise necessary to assist the Trial Chamber in determining whether Mr. IENG Sary has the requisite capacity. At a minimum, the Defence requests the Trial Chamber to order the ECCC doctors to make specific daily inquiries and observations to assist the Trial Chamber in assessing Mr. IENG Sary’s day-to-day capacity to assist in his defence.

1. On 6 December 2012, Mr. Ang Udom, national Co-Lawyer for Mr. IENG Sary, requested that an expert be assigned on a daily basis to assess Mr. IENG Sary’s ability to participate in his defence.<sup>1</sup> This request for additional expertise is an ongoing request<sup>2</sup> because the Defence is concerned that Mr. IENG Sary’s physical ailments impair his ability to follow the proceedings in the same way as could an Accused in robust health. Mr. Ang Udom *did not* assert, and indeed the Defence has *never* asserted, that Mr. IENG Sary is suffering from any mental disease or defect that causes him to be unable to effectively participate in his defence.<sup>3</sup>
2. Since the Trial Chamber found that Mr. IENG Sary is mentally and physically fit to stand trial,<sup>4</sup> a matter the Defence disputes,<sup>5</sup> Mr. IENG Sary has been in the holding cell for the better part of each day. He is incapable of following – as opposed to unwilling to follow – the proceedings. The Defence strongly objects to the Trial Chamber’s collective notion that Mr. IENG Sary is sleeping through the proceedings because he is either bored or disinterested.<sup>6</sup> None of the judges are medical doctors and none of the judges have observed Mr. IENG Sary’s condition since his hospitalization. Despite this, the Trial Chamber has decided that Mr. IENG Sary must not be present in the courtroom (where he could be constantly monitored), but must

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<sup>1</sup> Draft Transcript, 6 December 2012, p. 3-4.

<sup>2</sup> *See, e.g.*, Transcript, 12 November 2012, E1/143.1, p. 7-11.

<sup>3</sup> *See* 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, 7 December 2012, E238/11, para. 32.

<sup>4</sup> Decision on Accused IENG Sary’s Fitness to Stand Trial, 26 November 2012, E238/9.

<sup>5</sup> *See* 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, 7 December 2012, E238/11.

<sup>6</sup> *See* Transcript, 5 December 2012, E1/148.1, p. 37-38.

instead remain in his holding cell (where the Trial Chamber has refused to permit him to be videotaped).

3. To monitor Mr. IENG Sary, the Defence has embedded its Case Manager, Mr. So Mosseny (who is a member of the Cambodian Bar and has substantial legal experience), in the holding cell to make and record his observations by preparing daily reports, and, when necessary, to engage with the medical doctors. Specifically, Mr. So Mosseny has recorded that Dr. Lim Sivutha has said that he could not make an assessment as to Mr. IENG Sary's mental ability to follow the proceedings since he is not a psychiatrist.<sup>7</sup> On the following day, Dr. Kim Samsan also told Mr. So Mosseny that he was not able to make an assessment of Mr. IENG Sary's ability to follow the proceedings.<sup>8</sup>
4. The ECCC medical doctors are qualified to take Mr. IENG Sary's pulse and blood pressure and to monitor his general health. However, by their own recorded admissions, they are unqualified to make a determination as to whether Mr. IENG Sary is actually able to follow the proceedings on each day that they have monitored him.
5. For these reasons, the Defence supplements its oral submissions that the doctors currently assigned to monitor Mr. IENG Sary have not provided the detailed information necessary for the Trial Chamber to make a proper assessment of Mr. IENG Sary's capacity to follow the proceedings throughout the day, and cannot, by their own admission, make this assessment themselves. The Defence requests daily medical examinations by doctors with sufficient expertise to assist the Trial Chamber in assessing Mr. IENG Sary's ability to follow the proceedings. This is a matter which Senior Prosecutor Keith Raynor indicated was necessary and reasonable to: **a.** ensure Mr. IENG Sary's rights, and **b.** minimize any disruptions to the proceedings.<sup>9</sup>
6. The Trial Chamber should appoint qualified doctors to examine Mr. IENG Sary each day and provide their assessments as to, *inter alia*:

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<sup>7</sup> See Defence Team's Observations of Mr. IENG Sary, 5 December 2012, entry at 8:55a-9:10a, E248.1.

<sup>8</sup> See Defence Team's Observations of Mr. IENG Sary, 6 December 2012, entry at 10:36a-10:39a, E248/1.1.

<sup>9</sup> Transcript, 5 December 2012, E1/148.1, p. 6.

- a. The extent of Mr. IENG Sary's ability to concentrate when he is feeling fatigued or dizzy or when he is in pain;
  - b. Whether Mr. IENG Sary is able to recall witness testimony when he is feeling fatigued or dizzy or when he is in pain; and
  - c. Whether Mr. IENG Sary is fully able to follow the proceedings when he is feeling fatigued or dizzy or when he is in pain.
7. Until a decision on this Request is made – or, at a minimum, in the alternative – the Defence requests that the Trial Chamber order the ECCC medical doctors to make specific inquiries and examinations each day, throughout the day, to assist the Trial Chamber in assessing Mr. IENG Sary's capacity to assist in his defence. The doctors must not be allowed to simply present vague generalizations or, worse yet, make assumptions based on Mr. IENG Sary's failure to raise specific issues,<sup>10</sup> such as whether he is fatigued or has concerns about following the proceedings. The doctors must be proactive. They must be ordered not just to note Mr. IENG Sary's vital statistics, but also to regularly and continuously report other relevant information they observe, including complaints by Mr. IENG Sary, observations of Mr. IENG Sary's Defence team (who will be monitoring him) and observations of the nurse and caretaker. In order to assist the Trial Chamber in determining whether Mr. IENG Sary is fully able to follow the proceedings (by providing the information necessary to demonstrate Mr. IENG Sary's ability to concentrate and recall what he has heard when he is fatigued, dizzy or in pain), the doctors should include in their reports information such as:
- a. Whether Mr. IENG Sary is awake when the doctor enters his holding cell and whether (and for how long) he takes naps during the day;
  - b. How often Mr. IENG Sary gets dizzy and for how long each dizzy spell lasts;
  - c. How long Mr. IENG Sary can lie still without needing to shift positions because of discomfort;

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<sup>10</sup> See Defence Team's Observations of Mr. IENG Sary, 6 December 2012, E248/1.1, entry at 9:02a-9:07a, 9:30a.

- d. How often Mr. IENG Sary was in a position to view the monitor each day; and
- e. Whether Mr. IENG Sary can tell them what has been happening in court that day or the prior day.

This list is not exhaustive and is intended only to provide examples of the types of information the ECCC doctors should be including in their reports.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully renews its oral requests for the Trial Chamber to ORDER a qualified expert to make daily assessments, on a continuing basis, of Mr. IENG Sary's capacity to assist in his own defence. In the alternative, the Defence respectfully requests the Trial Chamber to ORDER the ECCC doctors to make specific inquiries and observations each day, throughout the day, to assess Mr. IENG Sary's capacity to assist in his defence.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 12<sup>th</sup> day of **December, 2012**