

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:** 18 January 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:**

IENG SARY'S SUBMISSIONS (RECOMMENDATIONS) CONCERNING THE SCOPE OF THE MARCH 2013 EXAMINATION BY PROFESSOR A. JOHN CAMPBELL AND DRS. SEENA FAZEL AND LINA HUOT

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to the Trial Chamber’s Memorandum titled “Re-appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea During the Week of 11 March 2013,”¹ submits the following recommendations. These submissions should *not* be viewed as either waiving or conceding any previous arguments made concerning the need for additional experts to examine Mr. IENG Sary. The Defence appealed the Trial Chamber’s Decision that Mr. IENG Sary is fit to stand trial and that additional expertise is unnecessary.² The Defence maintains that Professor Campbell is not competent and that an examination by these experts is insufficient to assist the Trial Chamber in determining Mr. IENG Sary’s fitness to stand trial.

RECOMMENDATIONS

1. In order to thoroughly evaluate Mr. IENG Sary’s health and fitness to stand trial, the experts should conduct their examination of Mr. IENG Sary over a minimum of five trial days. According to forensic neuropsychiatrist Dr. Harold Bursztajn, this minimum amount of time is necessary “[g]iven the complexity of the evaluation and potential issues such as fatigue and fluctuating mental status...”³
2. As part of their examination, the experts should, according to Dr. Bursztajn:
 - a. Familiarize themselves with the proceedings to assess whether Mr. IENG Sary is able to follow them well enough to assist counsel;
 - b. Observe Mr. IENG Sary in court or in his holding cell over time;
 - c. Observe attorney-client interactions;
 - d. Take a careful medical and mental-health history and consider the interaction between medical and neuropsychiatric impairments;
 - e. Take into account Mr. IENG Sary’s cultural background in relation to the cultural setting of the trial;

¹ Re-appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea During the Week of 11 March 2013, 18 December 2012, E256.

² See, e.g., IENG Sary’s Appeal against the Trial Chamber’s Decision that he is Fit to Stand Trial and its Refusal to Appoint an Additional Expert to Determine Fitness, 3 January 2013, E238/9/2/1.

³ Letter from Dr. Bursztajn to the Defence, 21 November 2012, E238/11.3.

- f. Conduct forensic neuropsychiatric interviews (to the extent any of the experts may possess the requisite expertise in this area);
 - g. Perform a systematic assessment of the limits of Mr. IENG Sary'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;
 - h. Perform a competency-specific mental status examination relative to capacity to assist counsel—which includes, for example, an assessment of his autobiographical memory. Competency must be assessed in a context-specific, task-specific (rather than generalized) manner;
 - i. Rule out faking, exaggerating or malingering;
 - j. Assess potential side effects of a range of medications, whether acute or emerging gradually in the form of subtle yet significant medication-related neurotoxicity;
 - k. Review and analyze all relevant medical records; and
 - l. Consider such collateral data as are relevant to the evaluation.⁴
3. A primary concern the Defence has with the previous report prepared jointly by Professor Campbell and Drs. Fazel and Huot⁵ is that the report completely separates the evaluation of Mr. IENG Sary's mental fitness from the evaluation of his physical fitness.⁶ To remedy this deficiency, the experts must consider, *inter alia*:
- a. The extent of Mr. IENG Sary's ability to concentrate on the proceedings when he is feeling fatigued, dizzy, nauseous, in pain or asleep;
 - b. Whether Mr. IENG Sary is able to recall witness testimony when (or after) he is feeling fatigued, dizzy, nauseous, in pain or asleep; and

⁴ Each of these recommendations was suggested by Dr. Bursztajn. *See id.*

⁵ Medical Report on Mr. IENG Sary, 3 September 2012, E222/1.

⁶ *See* IENG Sary's Appeal against the Trial Chamber's Decision that he is Fit to Stand Trial and its Refusal to Appoint an Additional Expert to Determine Fitness, 3 January 2013, E238/9/2/1, para. 43; 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, paras. 30-31.

- c. Whether Mr. IENG Sary is fully able to follow the proceedings when he is feeling fatigued, dizzy, nauseous, in pain or asleep.
4. In order to make these determinations and in keeping with the necessity of maintaining transparency, the experts should include in their report information such as:
 - a. Whether (and for how long) Mr. IENG Sary sleeps during the proceedings;
 - b. What causes Mr. IENG Sary to sleep during the proceedings;
 - c. How sleeping during the proceedings affects Mr. IENG Sary's ability to follow the proceedings;
 - d. How often Mr. IENG Sary gets dizzy and how long each dizzy spell lasts;
 - e. Whether and for how long Mr. IENG Sary feels nausea resulting from the dizzy spells or for other reasons;
 - f. How the dizzy spells or nausea affect Mr. IENG Sary's ability to follow the proceedings;
 - g. How long Mr. IENG Sary can lie still without needing to shift positions because of discomfort or pain;
 - h. How often Mr. IENG Sary must shift positions because of discomfort or pain;
 - i. How shifting positions affects Mr. IENG Sary's ability to follow the proceedings, particularly when the proceedings are viewed through a monitor;
 - j. How often Mr. IENG Sary is in a position to view the monitor each day; and
 - k. Whether and with how much detail Mr. IENG Sary can tell them what has been happening in court that day or on prior days.
5. To further ensure maximum transparency – especially if any future experts may be retained to examine Mr. IENG Sary – the report should include the following information:
 - a. A list of all medical documentation consulted;

- b. A list of any literature reviewed and / or relied upon;
- c. A list and explanation of any other doctors consulted;
- d. A comprehensive explanation of the examination(s) conducted;
- e. A list of any tests performed; and
- f. A list of tests not performed which might normally be performed during such assessments, as well as an explanation as to why these tests were not performed.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that the Trial Chamber:

- a. ACCEPT these recommendations concerning the scope of the medical assessment; and
- b. ORDER Professor Campbell and Drs. Fazel and Huot to carry them out without exception.

Respectfully submitted,



ANG Udom


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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 18th day of **January, 2013**