

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:** 3 January 2013**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:****Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

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 ASSESS FITNESS

(REDACTED VERSION)

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 104 and 21 of the ECCC Internal Rules (“Rules”), hereby appeals the Trial Chamber’s Decision on IENG Sary’s Request for Reconsideration of the Trial Chamber Decision on the Accused’s Fitness to Stand Trial and Supplemental Request (“Impugned Decision”).¹ This Appeal is made necessary because the Trial Chamber erred in fact and abused its discretion occasioning a miscarriage of justice and resulting in prejudice to Mr. IENG Sary. The Defence submits two grounds of appeal. The Trial Chamber erred in fact in finding that Mr. IENG Sary is fit to stand trial. The Trial Chamber erred in fact and abused its discretion by finding additional expertise unnecessary and refusing to appoint an additional expert or experts to examine Mr. IENG Sary. The Impugned Decision is immediately appealable pursuant to Rule 104(4).

I. QUESTIONS PRESENTED

- A.** *The Cambodian Constitution, the ECCC’s legal framework and international law guarantee all Accused the rights to be physically and mentally present during the proceedings, to be able to communicate with counsel, to participate and to assist in their own defence. Mr. IENG Sary is unable to enjoy his rights to be mentally present during the proceedings, to be able to communicate with counsel and to assist in his own defence because he is frequently dizzy, nauseous, in pain or sleeping or is otherwise unable to concentrate during the proceedings. Did the Trial Chamber err in fact in finding Mr. IENG Sary fit to stand trial?*
- B.** *The Cambodian Constitution, the ECCC’s legal framework and international law guarantee all Accused the fundamental right to be tried only when considered fit to stand trial; i.e. when an Accused is physically and mentally present, able to communicate with counsel, to participate and to assist in his own defence. The Trial Chamber based its decision that Mr. IENG Sary was fit to stand trial and that no additional expertise was necessary on the report of a geriatrician and an obsolete report by this geriatrician and two other doctors, both of which conflict with the diagnosis of the doctors who treated Mr. IENG Sary while he was hospitalized at the Khmer-Soviet Friendship Hospital. Did the Trial Chamber err in fact in finding additional expertise unnecessary and abuse its discretion by refusing to appoint an additional expert or experts to examine Mr. IENG Sary?*

¹ Decision on IENG Sary’s Request for Reconsideration of the Trial Chamber Decision on the Accused’s Fitness to Stand Trial and Supplemental Request, 19 December 2012, E238/11/1.

II. SUMMARY OF ARGUMENTS

1. The Cambodian Constitution, the ECCC's legal framework and international law guarantee Mr. IENG Sary the rights to be physically and mentally present during the proceedings, to be able to communicate with counsel, to participate and to assist in his own defence. The enjoyment of these rights presupposes adequate physical and mental capacity. Mr. IENG Sary becomes fatigued with the slightest movement, frequently becomes dizzy and nauseous and vomits. He is often in pain and, when not in pain, often falls asleep during the proceedings due to fatigue. In these conditions, he cannot concentrate and cannot participate in the proceedings, communicate with his counsel or assist in his own defence. Nonetheless, the Trial Chamber erred in fact and found Mr. IENG Sary fit to stand trial, erroneously considering his mental and physical health in isolation and assuming that, because Mr. IENG Sary has no significant cognitive impairment, he is fit to stand trial.
2. The Cambodian Constitution, the ECCC's legal framework and international law guarantee Mr. IENG Sary the fundamental right to be tried only when considered fit to stand trial; i.e. when he is physically and mentally present, able to communicate with counsel, to participate and to assist in his own defence. The Trial Chamber did not have sufficient evidence before it to make a determination that Mr. IENG Sary is fit to stand trial. The evidence upon which it relied was of poor quality and was contradicted by other evidence. The Trial Chamber therefore erred in fact in finding that no additional expertise was required. The Trial Chamber selected the evidence most favorable to continuing with the proceedings and ignored conflicting evidence. It gave undue weight to poor quality evidence, failed to give sufficient weight to conflicting, better-quality evidence and shielded itself from being confronted with any additional evidence that might have demonstrated Mr. IENG Sary's lack of fitness to stand trial. The Trial Chamber therefore abused its discretion by refusing to appoint an additional expert or experts. The Supreme Court Chamber should grant this appeal, annul the Impugned Decision and order the Trial Chamber to appoint an additional expert or experts to assess Mr. IENG Sary's fitness to stand trial.

III. BACKGROUND

3. 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
4. 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
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 (“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 of urgency” in order to get a better understanding of Mr. IENG Sary’s health situation.⁸ The Defence agreed with this request.⁹
6. 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

² See, e.g., Decision on Accused IENG Sary’s Fitness to Stand Trial, 26 November 2012, E238/9, 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., E11/86.1); 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.

⁸ *Id.*, p. 74.

⁹ *Id.*, p. 83.

to what further medical expertise is required in relation to the Accused IENG Sary, should this be necessary.”¹⁰

7. 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

8. 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 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

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.

¹³ *Id.*, p. 3-5.

¹⁴ *Id.*, p. 2-6.

report with an expert medical consultant to assist the Defence in preparing for Professor Campbell's examination.¹⁵

9. 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 inquire whether 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 clinicians.²¹

10. On 8 November 2012, Professor Campbell testified in court.²² His testimony was consistent with his 6 November 2012 report, i.e. that Mr. IENG Sary, although physically frail, was fit to participate in the proceedings as long as minor recommendations, such as wearing a soft neck collar, were implemented. When asked by President Nil Nonn to

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. The Defence has never met Dr. Bursztajn and never had any association with him prior to this communication.

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.

²¹ *Id.*

²² Transcript, 8 November 2012, E1/142.1.

“tell the Court in brief about the health status of Mr. Ieng Sary,” Professor Campbell stated:

I shall enlighten you on part of my report. I will do it in two parts. First, his cognitive function, his mental state; his mental state is unchanged from what I and the other doctors saw and reported on in our September report. On testing his memory, there was no significant change. His physical state, though, is that he is more frail than he was before. He has spent the last two months in hospital. He has had very little physical activity during that time, and as a consequence his weakness is greater. If I could deal individually with his physical problems? First problem is his heart disease.... The second problem is his neck pain and lower-back pain.... His other physical problem is the dizziness that he complains of. And, as I've outlined in my report, I fell [sic] this comes from three causes.²³

Professor Campbell did not see a problem with Mr. IENG Sary sleeping during trial, explaining: “Now, I have dozed through a good few lectures, it doesn't mean I'm not capable of concentrating on them. And so, from my examination of Ieng Sary, I have not found any evidence that he is not capable of concentrating. That doesn't meant [sic] that he may not doze off at times, as I've said, many of us do, if there's not much that's actually maintaining our interest at the time.”²⁴ 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.²⁵ It was not 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.

11. On 12 November 2012, the Defence orally submitted that the matter of Mr. IENG Sary's fitness to stand trial “is not ripe for discussion because the proceedings can carry on without interruption, irrespective of Mr. Ieng Sary's current state of health” since he had waived his right to be present during the testimony of many witnesses and Civil Parties.²⁶ The Defence submitted that it would therefore not devote time to arguing the shortcomings of Professor Campbell's testimony, although this should not be interpreted as an acceptance of his views and: “[q]uite the contrary, we take grave exception to the manner and scope of his latest examination of Mr. Ieng Sary, as well as, some of his rather -- how should I put it -- fanciful conclusions.... [T]he man that I see, when I meet [Mr. IENG Sary], is quite a different man than the one described by [Professor]

²³ *Id.*, p. 11-12.

²⁴ *Id.*, p. 56.

²⁵ *Id.*, p. 140.

²⁶ Transcript, 12 November 2012, E1/143.1, p. 6.

Campbell, but again, this is neither the time nor place to go into the merits of his particular testimony and findings.”²⁷ The Defence submitted: “it is both reasonable, and necessary for the Trial Chamber to engage an expert, who is not connected to, or associated with [Professor] Campbell’s examination of Mr. Ieng Sary, and to provide an independent evaluation.”²⁸ The Defence noted that Dr. Bursztajn’s letter had called Professor Campbell’s methodology and sources into question and suggested that he or a similarly qualified expert be appointed.²⁹ 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.³⁰ The OCP submitted that it was unnecessary to call additional experts.³¹ The Civil Parties supported the OCP.³²

12. 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.”³³

13. On 21 November 2012, Dr. Bursztajn responded.³⁴ In his opinion as an expert with extensive experience 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:

²⁷ *Id.*, p. 7.

²⁸ *Id.*

²⁹ *Id.*, p. 8-9.

³⁰ *Id.*, p. 25-30.

³¹ *Id.*, p. 36-37.

³² *Id.*, p. 39-42.

³³ Letter from the Defence to Dr. Bursztajn, 19 November 2012, E238/11.2.

³⁴ Letter from Dr. Bursztajn to the Defence, 21 November 2012, E238/11.3.

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.
 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).³⁵
14. On 26 November 2012, the Trial Chamber issued a written decision, finding Mr. IENG Sary fit to stand trial and rejecting the Defence's request to appoint an additional medical expert.³⁶ In this decision, the Trial Chamber considered whether it may order Mr. IENG Sary to participate in the proceedings from his holding cell and concluded that it may order Mr. IENG Sary's audiovisual participation "in the interests of justice."³⁷

³⁵ *Id.*

³⁶ Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9.

³⁷ *Id.*, para. 37.

15. On 4 December 2012, Mr. IENG Sary was not brought into the courtroom for the trial session as he had requested,³⁸ but was instead brought to his holding cell. A report prepared by the ECCC doctor that morning stated that, in the doctor's opinion, Mr. IENG Sary could not follow the proceedings in the courtroom and should remain in the holding cell due to extreme fatigue upon slight movement, chest pain, and the fact that he had not been able to sleep or eat and had vomited.³⁹ International Co-Lawyer Michael G. Karnavas requested that Mr. IENG Sary be brought into the courtroom, or at a minimum, video recorded in the holding cell by either the Audio Visual Unit or by his Defence team so that the Trial Chamber could observe his condition.⁴⁰ The Trial Chamber ruled that Mr. IENG Sary must remain in the holding cell and could not be video recorded.⁴¹ Judge Cartwright stated:

As to its ongoing obligation to monitor Ieng Sary's fitness, the Trial Chamber will rely on the treating doctor to alert it to any substantial change in Ieng Sary's physical condition, and it needs to be emphasized that it is medical monitoring that is required, not monitoring by the judges or defence counsel personally or by the public. For that reason, the Court declines to rule that Ieng Sary be videotaped while he is in the holding cells. It will rely on his treating doctor to bring any concerns about Ieng Sary's physical condition to its attention.⁴²

After the Trial Chamber's ruling, the Defence embedded its Case Manager, Mr. So Mosseny (who has been a member of the Bar Association of the Kingdom of Cambodia since December 2003 and has substantial legal experience),⁴³ in Mr. IENG Sary's holding cell. Mr. So Mosseny has remained in the holding cell every trial day, recording his observations of Mr. IENG Sary in daily logs and, when necessary, engaging with the medical doctors.

³⁸ IENG Sary's Withdrawal of Waivers of Right to be Present, 3 December 2012, E237/2; IENG Sary's Notice of Withdrawal of Waivers of Right to be Present During the Testimony of Certain Witnesses and Civil Parties, 6 December 2012, E249.

³⁹ E1/147.2. Note that this report is classified as strictly confidential despite Mr. IENG Sary's notice that his health issues could be addressed in public. See IENG Sary's Consent to Public Discussion of his Health, 8 November 2012, E1/142.2.

⁴⁰ Transcript, 4 December 2012, E1/147.1, p. 12-15.

⁴¹ *Id.*, p. 17-19.

⁴² *Id.*

⁴³ Prior to joining the ECCC, Mr. So Mosseny was the deputy manager of the Court Watch Project for the Center for Social Development. He is currently listed on the Defence Support Section's list of Cambodian lawyers who are qualified to appear as Co-Lawyers before the ECCC.

16. On 5 December 2012, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.⁴⁴ At the start of the trial proceedings, Mr. Karnavas notified the Trial Chamber that the Case Manager was in the holding cell with Mr. IENG Sary taking notes and that the Defence intended to file his daily observations of Mr. IENG Sary's condition.⁴⁵ Mr. Karnavas also pointed out that, although the ECCC doctor's 5 December 2012 medical report stated that Mr. IENG Sary would be more comfortable in the holding cell, comfort does not equate to ability to follow the proceedings.⁴⁶ Judge Cartwright informed the Defence that the Trial Chamber "in making any decision concerning Ieng Sary's ability to participate will take note primarily of medical information."⁴⁷ Senior Assistant Prosecutor Keith Raynor requested the Trial Chamber "to ensure that the medical report that comes to the Court each morning is sufficiently detailed in terms of information about the ability to follow the proceedings."⁴⁸ After the first morning break, National Co-Lawyer Ang Udom notified the Trial Chamber that Mr. IENG Sary had fallen asleep during the morning session.⁴⁹ The Judges deliberated and Judge Cartwright stated that the Trial Chamber:

reiterates that its starting point for any assessment of Ieng Sary's ability to participate in the Trial is the report supplied by the expert. It is interesting that you raise the topic of Ieng Sary being asleep this morning. There is a simple solution; your case manager could wake him up. It is not an indication of any mental health issue as the expert made very clear and Ieng Sary himself has never claimed any mental health inadequacies. Moreover falling asleep may simply indicate that Ieng Sary has no direct interest in the testimony of this civil party. The Trial Chamber is confident that the treating doctor will report to the Chamber if he observes any unusual and extreme fatigue on Ieng Sary's behalf.⁵⁰

17. On 6 December 2012, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.⁵¹ The observations indicated that Dr. Lim Sivutha stated 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, but he could take

⁴⁴ Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 4 December 2012, 5 December 2012, E248/2.1.

⁴⁵ Transcript, 5 December 2012, E1/148.1, p. 2.

⁴⁶ *Id.*

⁴⁷ *Id.*, p. 4.

⁴⁸ *Id.*, p. 6.

⁴⁹ *Id.*, p. 36-37.

⁵⁰ *Id.*, p. 37-38.

⁵¹ Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 5 December 2012, 7 December 2012, E248.1.

note of Mr. Ieng Sary's physical health.⁵² At the start of the trial proceedings, Mr. Ang Udom informed the Trial Chamber that Mr. IENG Sary had not slept well the night before and preferred to remain in the holding cell.⁵³ He additionally notified the Trial Chamber that the 6 December 2012 medical report did not indicate whether Mr. IENG Sary was able to participate in the proceedings.⁵⁴ He requested that an expert be assigned on a daily basis to assess Mr. IENG Sary's ability to participate in his defence.⁵⁵

18. On 7 December 2012, the Defence filed a request for the Trial Chamber to reconsider its decision that Mr. IENG Sary is fit to stand trial and its decision not to appoint an additional expert.⁵⁶ The Defence submitted that reconsideration was necessary because the Trial Chamber had issued its decision without being fully briefed by the Defence on the issue and because additional expertise was necessary due to Professor Campbell's lack of qualifications and experience, flaws in his analysis and his disagreement with the treating doctors. The Defence recommended that the Trial Chamber seek the medical opinion of someone, such as Dr. Bursztajn, who is experienced in the degree of competency necessary to assist in one's own defence in a case as voluminous and complex as Case 002. That same date, the Defence circulated a courtesy copy of its Case Manager's observations of Mr. IENG Sary on the previous day.⁵⁷ The observations indicated that Dr. Kim Samsan stated that he was not able to make an assessment concerning Mr. Ieng Sary's mental ability.⁵⁸ The Defence then received an email from a Trial Chamber Legal Officer stating that the Trial Chamber ordered the Defence to stop audio recording Mr. IENG Sary and his ECCC doctor and to stop filing daily observation logs. The email stated that the Defence was required to seek leave specifying how such practices are permissible under the ECCC legal framework.⁵⁹

⁵² *Id.*, at 8:55a-9:10a.

⁵³ Transcript, 6 December 2012, E1/149.1, p. 3.

⁵⁴ *Id.*, p. 3-4.

⁵⁵ *Id.*

⁵⁶ 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.

⁵⁷ Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 6 December 2012, 7 December 2012, E248/1.1.

⁵⁸ *Id.*, at 10:36a-10:39a.

⁵⁹ Email from Trial Chamber Legal Officer, "Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility", 7 December 2012. This email was reproduced in a Trial Chamber memorandum. *See* Order for Submissions, 12 December 2012, E254. On 8 December 2012, the Defence responded to the Trial Chamber Legal Officer's email, requesting an oral hearing on the issue and requesting the Trial Chamber to

19. On 12 December 2012, the Defence filed a request supplementing its oral requests for the Trial Chamber to order experts to make daily medical examinations to assess Mr. IENG Sary's capacity to assist in his own defence. The Defence argued that the daily medical reports submitted by the ECCC doctors did not provide the detailed information necessary for the Trial Chamber to properly assess Mr. IENG Sary's capacity to follow the proceedings throughout the day. Given the ECCC doctors' admitted inability to make such an assessment themselves, the Defence requested that the Trial Chamber appoint qualified doctors to examine Mr. IENG Sary each day and provide their assessments as to, *inter alia*:

- 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.⁶⁰

Until a decision on the supplemental request was made, or in the alternative, the Defence requested, at a minimum, that the Trial Chamber order the treating doctors to 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;
- 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.⁶¹

provide reasoning for its decision not to allow audio recording. Email from Defence to Trial Chamber Legal Officer, "Re: Letter from Ieng Sary Defence in response to the report from the Detention Facility", 8 December 2012. On 11 December 2012, Judge Cartwright informed the Defence that its request for an oral hearing was denied. Transcript, 11 December 2012, E1/151.1, p. 2. Mr. Karnavas requested to continue audio taping Mr. IENG Sary while deliberations were made as to whether audio recording was permissible, explaining that the recordings would not be made public, could be provided to the Trial Chamber each day and could be deleted if necessary. He explained that if recordings were never made, there would be no record. *Id.*, p. 3-4. The Trial Chamber denied this request. *Id.*, p. 5.

⁶⁰ 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, 12 December 2012, E255, paras. 4, 6.

⁶¹ *Id.*, para. 7.

The Defence submitted that such information would 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).⁶²

20. On 14 December 2012, the OCP responded to the Defence's supplemental request. The OCP argued that, given the recent finding on Mr. IENG Sary's fitness, the purpose of the daily medical reports should be to monitor his health and indicate any "significant changes which may affect his *capacity* to participate in his defence (not his participation on an hourly basis, as the Defence has claimed)."⁶³ According to the OCP, the treating doctors' daily medical reports on Mr. IENG Sary's medical condition "should include sufficient information to enable the Trial Chamber to monitor his overall condition and identify any issues that may require a response from the Court."⁶⁴
21. On 18 December 2012, the Trial Chamber issued a memorandum reappointing Professor Campbell and Drs. Seena Fazel and Lina Huot to return to Cambodia the week of 11 March 2013 to "review the health of [Mr. IENG Sary], as well as [his] treatment and care."⁶⁵ On the same date, the Trial Chamber issued a different memorandum directing the ECCC doctors to report daily to the Trial Chamber each morning and to include in their reports *only* significant changes in Mr. IENG Sary's health status which deviate from the conclusions reached by Professor Campbell in his report, as well as observations on how the facilities in the holding cell that might enhance Mr. IENG Sary's physical ability to participate.⁶⁶
22. On 19 December 2012, the Trial Chamber issued the Impugned Decision. The Trial Chamber rejected the Defence's request that it reconsider the issue of Mr. IENG Sary's fitness and refused to appoint additional experts. The Trial Chamber stated that it would not entertain applications upon which it had already ruled and stated that the Defence had

⁶² *Id.*

⁶³ Co-Prosecutors' Response to "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", 14 December 2012, E255/1, para. 5 (emphasis in original).

⁶⁴ *Id.*, para. 12.

⁶⁵ Re-Appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea during week of 11 March 2013, 18 December 2012, E256, para. 2.

⁶⁶ Memorandum to the Doctor Treating IENG Sary at the Detention Centre, 18 December 2012, E238/12.

not presented any new circumstances.⁶⁷ The Trial Chamber then noted that it had already on its own motion requested Professor Campbell and Drs. Seena Fazel and Lina Huot to return to examine Mr. IENG Sary in March 2013.⁶⁸

IV. PRELIMINARY MATTERS

A. Admissibility of the Appeal

1. The Appeal is admissible under Rule 104(4)(b)

23. Rule 104(4)(b) allows immediate appeals of “decisions on detention and bail under Rule 82.” The decision that Mr. IENG Sary is fit to stand trial is a decision on detention because it has the effect of keeping Mr. IENG Sary in detention.⁶⁹ The decision that additional experts will not be appointed is also a decision on detention since it forms part of the modalities of Mr. IENG Sary’s detention. Were Mr. IENG Sary not in detention, he would be free to be examined by any doctor he may choose. The Pre-Trial Chamber has previously held that “[a]ny aspect of the modalities of pre-trial detention ... shall be under the effective control of the competent ECCC judicial authorities and strictly limited to the needs of the proceedings.”⁷⁰ In accordance with Rule 21(2), the same holds true at the trial stage.⁷¹ The Supreme Court Chamber found an appeal against the Trial Chamber’s decision on the reassessment of Ms. IENG Thirith’s fitness to stand trial admissible under Rule 104(4)(b) as a decision on detention even though the decision was not strictly formulated as a decision on detention and the Trial Chamber had only “consequently order[ed]” the release of Ms. IENG Thirith after it found she was not fit to stand trial.⁷² The present Appeal should be similarly admitted under Rule 104(4)(b).

2. The Appeal is admissible under Rule 104(4)(d)

⁶⁷ Impugned Decision, paras. 7-8.

⁶⁸ *Id.*, para. 9.

⁶⁹ See *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings Before this Court, 2 November 2012, para. 43 (emphasis added): “the concept of fitness to stand trial must be viewed as an aspect of the broader notion of fair trial. It is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, *the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist*. In this sense, fitness to stand trial can be defined as absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights.”

⁷⁰ 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. 11.

⁷¹ Rule 21(2) states: that “[a]ny coercive measures to which [an Accused] may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. *Such measures shall be strictly limited to the needs of the proceedings...*” (emphasis added).

⁷² Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, 13 September 2012, E138/1/10, p. 19.

24. Rule 104(4)(d) allows immediate appeals of “decisions on interference with the administration of justice under Rule 35(6).” The Supreme Court Chamber has held that “neither an error of fact or law nor an abuse of discretion on the part of the Trial Chamber can, *by itself*, constitute a knowing and willful interference with the administration of justice within the meaning of Rule 35.”⁷³ The Trial Chamber has not merely erred or abused its discretion. Through a series of interrelated decisions (including the Impugned Decision), the Trial Chamber has knowingly, willfully and continuously interfered with the administration of justice by violating Mr. IENG Sary’s fundamental fair trial rights to be mentally (as well as physically) present at trial, to participate in the proceedings, to communicate with counsel and to assist in his own defence.

First, the Trial Chamber scheduled Professor Campbell’s examination and testimony in such a way as to leave the parties with only two days to review Professor Campbell’s report and prepare to question him. The Trial Chamber did not inform the parties sufficiently in advance that Professor Campbell’s testimony and the brief remarks solicited by the Trial Chamber on the morning of 12 November 2012 were in fact intended as a fitness hearing.

Second, the Trial Chamber decided that Mr. IENG Sary was fit to stand trial, without fully hearing from the Defence on the matter. The Trial Chamber based its decision largely on the opinion of one doctor who did not have the expertise to make such an assessment and whose medical opinion starkly differed from that of Mr. IENG Sary’s board of treating doctors.⁷⁴ The Trial Chamber refused to appoint any other expert to examine Mr. IENG Sary.

Third, the Trial Chamber ordered Mr. IENG Sary to attend trial from his holding cell and denied his right to be physically present in the courtroom where his condition could be observed by the Trial Chamber and parties.

Fourth, the Trial Chamber prohibited the videotaping of Mr. IENG Sary in his holding cell by the Audio-Visual Unit or his Defence team.

⁷³ Decision on IENG Sary’s Appeal Against Trial Chamber’s Order Requiring his Presence in Court, 13 January 2012, E130/4/3, p. 1 (emphasis added).

⁷⁴ 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.

Fifth, the Trial Chamber prohibited the Defence from audiotaping Mr. IENG Sary in the holding cell and from filing its own observations of Mr. IENG Sary's condition.

Sixth, the Trial Chamber instructed the ECCC doctors to *only* inform it of significant changes in Mr. IENG Sary's health (and the ECCC doctors have claimed they are only competent to assess physical health).

Finally, the Trial Chamber, through the Impugned Decision, refused to reconsider its decision that Mr. IENG Sary is fit and additional experts are unnecessary, despite the fact that the Defence had presented it with the shortcomings in Professor Campbell's qualifications, methodology and analysis and reasons why an earlier report by Professor Campbell and two other doctors could not be relied upon.

The Trial Chamber has attempted in *every* way possible to shield itself from *any* information that would transparently and objectively dispel the myth that Mr. IENG Sary is actually able at all times to fully and meaningfully participate in the trial proceedings. It has further done everything possible to ensure that there is little or no record of Mr. IENG Sary's actual condition. Such a record would demonstrate that Mr. IENG Sary is not fit to stand trial, or at a minimum, that additional expertise is necessary. The Trial Chamber's actions constitute an interference with the administration of justice.

3. A broad interpretation of Rule 104(4) is required by Rule 21 and is in the interest of justice

25. The Supreme Court Chamber has held that according to Rule 21,⁷⁵ "the interpretation of the Internal Rules must not lead to [the] infringement of any interests of the Accused that emanate from fundamental rights guaranteed under statutes and applicable international legal instruments, such as ... the right to fair trial ... the right to defence."⁷⁶ A broad interpretation of admissibility under Rule 104(4) is required to protect Mr. IENG Sary's

⁷⁵ Rule 21(1) provides: "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement."

⁷⁶ Decision on Immediate Appeals by NUON Chea and IENG Thirith on Urgent Applications for Immediate Release, 3 June 2011, E50/2/1/4, para. 39. The Pre-Trial Chamber has similarly recognized that Rule 21 requires a broad interpretation of the right to appeal: "[c]onsidering the fair trial rights of the Appellant ... the Pre-Trial Chamber finds that Rule 21 *requires* it to interpret the Internal Rules in such a way that the Appeal is also admissible on the basis of Rule 21." 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. 18 (emphasis added).

fundamental fair trial rights to be present at trial, to participate in the proceedings, to communicate with counsel and to assist in his own defence – rights guaranteed by the Cambodian Constitution,⁷⁷ the Agreement,⁷⁸ the Establishment Law⁷⁹ and applicable international legal instruments.⁸⁰

26. Strictly limiting interlocutory appeals “is inconsistent with the jurisprudence of the ECCC, the practice of all international criminal tribunals, the needs of a fair and expeditious trial and the rights of the accused.”⁸¹ If there is any doubt as to this Appeal’s admissibility under Rule 104(4), the interpretation that safeguards Mr. IENG Sary’s interests must prevail.⁸² If the Appeal is not admitted at this stage, Mr. IENG Sary will be forced to go through a trial in which he cannot participate, communicate with his counsel or assist in his own defence.

27. Fitness to stand trial is an issue the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Appeals Chamber considers admissible on an interlocutory basis.⁸³ Similarly, the High Court of Australia has stated: “There is simply no point in embarking on a lengthy trial with all the expense and inconvenience to jurors that it may entail if it is to be interrupted by reason of some manifestation or exacerbation of a debilitating

⁷⁷ Article 38 of the Cambodian Constitution provides that “[e]very citizen shall enjoy the right to defense through judicial recourse.” Article 31 of the Cambodian 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 rights to be present at trial, to participate in the proceedings, to communicate with counsel and to assist in his own defence are human rights recognized by Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”).

⁷⁸ Agreement, Art. 13(1).

⁷⁹ Establishment Law, Art. 35 new (b), (d).

⁸⁰ ICCPR, Art. 14.

⁸¹ Decision on IENG Sary’s Appeal Against Trial Chamber’s Decision on IENG Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe, 20 March 2012, E51/15/1/2.1, para. 1. This opinion was recently cited approvingly by the OCP. 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, n. 28.

⁸² This is required by Rule 21 and would also be in accordance with the principle of *in dubio pro reo*, a fundamental principle of criminal law that is recognized by Article 38 of the Cambodian Constitution. At issue in this Appeal are Mr. IENG Sary’s fundamental fair trial rights to be present at trial, to participate in the proceedings, to communicate with counsel and to assist in his own defence. An interpretation of Rule 104(4) that results in the inadmissibility of such issues would constitute a “collision of norms”: on the one hand, a strict interpretation of Rule 104(4) (which would disable Mr. IENG Sary’s fundamental fair trial rights) and, on the other hand, the Supreme Court Chamber’s obligation to ensure that Mr. IENG Sary’s rights to be present at trial, to participate in the proceedings, to communicate with counsel and to assist in his own defence are not infringed. See Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, paras. 30-32.

⁸³ *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008 (“*Strugar Appeals Judgement*”), paras. 33-34.

condition which can affect the accused's fitness to be tried."⁸⁴ The High Court of Muar in Malaysia has explained: "the inquiry by the court as to the fitness of the accused person ought to be determined forthwith when it comes to the knowledge of the court, and ought not to be postponed.... It is the duty of the court either at the commencement of the trial, or at any stage during the course of the trial, when the question of fitness to stand trial is raised, to determine that issue immediately."⁸⁵ Rule 104(4) should be interpreted in such a way as to protect Mr. IENG Sary's fair trial rights by resolving this appeal related to fitness to stand trial immediately.

B. Request for a public, oral hearing

28. This Appeal addresses a violation of Mr. IENG Sary's fundamental fair trial rights. This violation must be addressed in an open and transparent manner. Rule 109(1) indicates that appeal hearings should generally be conducted in public.⁸⁶ Issues of such importance *must* be transparently debated to ensure benefit to the public at large, especially when these issues are likely to impact the legitimacy and credibility of the ECCC. None of the issues raised are confidential.⁸⁷

V. LAW AND ARGUMENT

A. The Trial Chamber erred in fact in finding Mr. IENG Sary fit to stand trial

29. Mr. IENG Sary has the fundamental right to be tried only when he is fit to stand trial; i.e. when he is physically and mentally present, able to communicate with counsel, able to participate and assist in his own defence. This right is guaranteed to him by the Cambodian Constitution,⁸⁸ the Agreement,⁸⁹ the Establishment Law,⁹⁰ the Rules⁹¹ and the International Covenant on Civil and Political Rights.⁹² The enjoyment of Mr. IENG Sary's rights presupposes an adequate level of mental and physical capacity.⁹³ Mr. IENG

⁸⁴ *Id.*, n. 90, citing *Kesavarajah v. R* [1994], 181 CLR 230, High Court of Australia, p. 246-48.

⁸⁵ *Id.*, n. 90, citing *Public Prosecutor v. Misbah Bin Saat* [1997] 3 MLJ 495, p. 504.

⁸⁶ Rule 109(1) states: "Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only."

⁸⁷ IENG Sary's Consent to Public Discussion of his Health, 8 November 2012, E1/142.2.

⁸⁸ Cambodian Constitution, Art. 31.

⁸⁹ Article 13(1) of the Agreement states: "The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."

⁹⁰ Establishment Law, Art. 35 new.

⁹¹ Rule 81(1).

⁹² ICCPR, Art. 14(3)(d).

⁹³ *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 21.

Sary's rights are not lessened because he is elderly and in poor health. The right to equal treatment before the law is enshrined in the Cambodian Constitution,⁹⁴ a number of international⁹⁵ and regional instruments,⁹⁶ and in the Constitutions of many States.⁹⁷

30. To be considered fit to stand trial, Mr. IENG Sary must possess the following capacities: **a.** to plead; **b.** to understand the nature of the charges; **c.** to understand the course of the proceedings; **d.** to understand the details of the evidence; **e.** to instruct counsel; **f.** to understand the consequences of the proceedings; and **g.** to testify.⁹⁸ The Trial Chamber, quoting the ICTY *Strugar* Appeals Chamber, has held: "The applicable standard in determining fitness to stand trial is that of '*meaningful participation* which allows the accused to exercise his fair trial rights to such a degree that he is *able to participate effectively* in his trial and has an understanding of the essentials of the proceedings.'"⁹⁹ Mr. IENG Sary's fitness to stand trial should therefore "turn on whether his capacities 'viewed overall and in 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.'"¹⁰⁰ If, on the preponderance of the evidence, Mr. IENG Sary is not fit for trial, the proceedings against him must be terminated or stayed until such time as he regains fitness.¹⁰¹

⁹⁴ Article 31 of the Cambodian Constitution provides that "[e]very Khmer citizen shall be equal before the law...."

⁹⁵ Article 7 of the Universal Declaration of Human Rights provides that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Article 14(1) of the ICCPR provides that "[a]ll persons shall be equal before the courts and tribunals." Article 26 of the ICCPR provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

⁹⁶ See Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Convention on Human Rights, Art. 24.

⁹⁷ See, e.g., United States Constitution, 14th amendment; French Constitution, adopted 1958, Art. 1; Constitution of the Federal Republic of Austria, Art. 7; New Zealand Bill of Rights Act of 1990, Part 2, para. 27; Constitution of the Republic of Poland, 2 April 1997, Art. 32; Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 12; First Draft Constitution of the Republic of Zambia, 30 April 2012, Art. 45.

⁹⁸ Decision on NUON Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 15; Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, E138, para. 26, citing *Prosecutor v. Strugar*, IT-01-42-T, Decision re Defence Motion to Terminate Proceedings, 26 May 2004, para. 36.

⁹⁹ 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 *Strugar* Appeals Judgement, para. 55.

¹⁰⁰ 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 *Strugar* Appeals Judgement, para. 55.

¹⁰¹ *Strugar* Appeals Judgement, para. 56. See also *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the

31. Mr. IENG Sary is not currently fit to stand trial. He experiences extreme fatigue with the slightest movement.¹⁰² Mr. IENG Sary must move frequently because he suffers from a urological condition that requires him to urinate frequently.¹⁰³ He experiences dizziness upon turning his head or moving.¹⁰⁴ This dizziness frequently leads to nausea,¹⁰⁵ which occasionally leads to vomiting episodes.¹⁰⁶ Mr. IENG Sary frequently experiences discomfort or pain, even when lying still.¹⁰⁷ He experiences numbness in his extremities, which makes it impossible for him to do simple tasks such as take a drink or speak on the telephone to his lawyer without assistance.¹⁰⁸ When not nauseous or in pain, Mr. IENG Sary frequently falls asleep throughout the day, due to his extreme fatigue.¹⁰⁹ It is commonsense that when Mr. IENG Sary is dizzy, nauseous, in pain, extremely fatigued or asleep, he is not capable of concentrating on the trial proceedings. Accordingly, Mr. IENG Sary cannot effectively participate: he cannot understand the details of the evidence, instruct counsel or otherwise assist in his own defence. This is even more so the case when Mr. IENG Sary is removed from the actual proceedings and forced to view them through a video monitor.¹¹⁰

32. Notwithstanding the obvious physical disabilities contributing to Mr. IENG Sary's inability to meaningfully follow the proceedings and assist in his defence, the Trial

Fitness of Laurent Gbagbo to Take Part in the Proceedings Before this Court, 2 November 2012, para. 43.

¹⁰² See, e.g., Transcript, 21 September 2012, E1/125.1, p. 14: "In relation to his fatigue, it is at a third level, and the main cause is due to his weakening heart."

¹⁰³ See, e.g., Medical Report on Mr. IENG Sary, 3 September 2012, E222/1, para. 13.

¹⁰⁴ See, e.g., Transcript, 21 September 2012, E1/125.1, p. 14; Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4.

¹⁰⁵ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, para. 9

¹⁰⁶ See, e.g., Letter from Defence to Trial Chamber Greffier, "An Incident Concerning Mr. Ieng Sary's Health and Treatment on 16 October 2012", 22 October 2012. See also E1/147.2. Note that this report is classified as strictly confidential despite Mr. IENG Sary's notice that his health issues could be addressed in public. See IENG Sary's Consent to Public Discussion of his Health, 8 November 2012, E1/142.2.

¹⁰⁷ See Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, para. 8

¹⁰⁸ See also Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 4 December 2012, 5 December 2012, E248/2.1; Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 5 December 2012, 7 December 2012, E248.1; Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 6 December 2012, 7 December 2012, E248/1.1.

¹⁰⁸ See, e.g., Transcript, 21 September 2012, E1/125.1, p. 15-16.

¹⁰⁹ See, e.g., Transcript, 5 December 2012, E1/148.1, p. 36-37; Observation Log concerning Mr. Ieng Sary's ability to follow the proceedings and participate in his Defence 4 December 2012, 5 December 2012, E248/2.1.

¹¹⁰ The fact that Mr. IENG Sary has in the past voluntarily waived his right to directly participate in the proceedings does not in any way diminish his right to directly participate in the proceedings as he has insisted on doing since his most recent return from the Khmer-Soviet Friendship Hospital.

Chamber found Mr. IENG Sary fit to stand trial. It did so by artificially and erroneously separating consideration of his physical condition from his mental fitness. The Trial Chamber misguidedly determined that because Mr. IENG Sary did not suffer from any cognitive or memory impairment, he was fit to stand trial.¹¹¹ Simply put, the Trial Chamber 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 upon his mental state.

B. The Trial Chamber erred in fact and abused its discretion by finding additional expertise unnecessary and refusing to appoint an additional expert or experts to examine Mr. IENG Sary to assess his fitness to stand trial

33. In finding an Accused fit to stand trial, Chambers are required to be certain on a preponderance of the evidence.¹¹² It is standard practice to hear from multiple experts in order to make such a determination. The International Criminal Tribunal for Rwanda 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.”¹¹³ 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, the Defence and the Trial Chamber itself before reaching a decision.¹¹⁴ In deciding on the Accused Gbagbo’s fitness to stand trial at the International Criminal Court, the Trial Chamber appointed three experts to examine Gbagbo and considered each of their reports.¹¹⁵ Mr. IENG Sary’s treating physicians repeatedly emphasized that to determine the proper treatment for Mr. IENG Sary, consultation with additional specialists, including

¹¹¹ Decision on Accused IENG Sary’s Fitness to Stand Trial, 26 November 2012, E238/9, paras. 20, 21, 26.

¹¹² *Strugar Appeals Judgement*, para. 56.

¹¹³ *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.

¹¹⁴ *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.

¹¹⁵ See *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings Before this Court, 2 November 2012.

neurologists, radiologists and heart specialists, is necessary.¹¹⁶ Professor Campbell himself noted that in general in the medical field, providing second and even third opinions is quite common.¹¹⁷ The Trial Chamber has determined that it may also rely on its own observations of an Accused during the proceedings to determine fitness.¹¹⁸ The Trial Chamber has not observed Mr. IENG Sary since his hospitalization.

34. The Trial Chamber abused its discretion (as well as interfered with the administration of justice) by selectively choosing the evidence most favorable to continuing with the proceedings and ignoring conflicting evidence that did not assist it in reaching its desired result. According to the Pre-Trial Chamber and ICTY Appeals Chamber, an abuse of discretion occurs, *inter alia*, when a Chamber gives weight to extraneous or irrelevant considerations or fails to give weight or sufficient weight to relevant considerations.¹¹⁹ The Trial Chamber did not have sufficient evidence before it to determine on a preponderance of the evidence that Mr. IENG Sary is fit to stand trial. The evidence it relied upon was of poor quality and was contradicted by other, higher-caliber evidence. The Trial Chamber erred in fact in finding additional expertise unnecessary in such a situation.

1. The Trial Chamber gave undue weight to poor-quality evidence

35. The Trial Chamber relied primarily upon Professor Campbell's 6 November 2012 report and his 8 November 2012 testimony.¹²⁰ Professor Campbell's evidence should not have been accorded such weight. Professor Campbell is not a neurologist. He is a geriatrician, with generalized knowledge about issues affecting the health of the elderly.¹²¹ Professor Campbell has no significant experience assessing competency in the context of fitness to stand trial. Apart from his examination of Ms. IENG Thirith, Professor Campbell's *curriculum vitae* indicates that in his entire professional career, he has performed only

¹¹⁶ Transcript, 21 September 2012, E1/125.1, p. 20-23, 27-28, 36-42, 57, 64.

¹¹⁷ Transcript, 8 November 2012, E1/142.1, p. 89-90.

¹¹⁸ Decision on NUON Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 18.

¹¹⁹ See Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 25, *quoting Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004.

¹²⁰ See Decision on Accused IENG Sary's Fitness to Stand Trial, 26 November 2012, E238/9, section 5.2.

¹²¹ Transcript, 8 November 2012, E1/142.1, p. 19, 21.

one fitness to stand trial assessment of an accused who suffered from both physical and cognitive impairments.¹²²

36. Professor Campbell did not spend sufficient time examining Mr. IENG Sary, nor did he perform all the necessary tests. Professor Campbell only examined Mr. IENG Sary for one hour to one hour and a half during his 6 November 2012 examination.¹²³ During his previous 28 August 2012 visit, he spent only approximately one hour with Mr. IENG Sary.¹²⁴ In contrast, during a typical trial day, Mr. IENG Sary is required to be physically and mentally fit for several hours, with only brief breaks.
37. There is no indication that Professor Campbell sufficiently familiarized himself with the trial proceedings to enable an assessment of the degree of attention and concentration they require Mr. IENG Sary to exert. Professor Campbell has never observed Mr. IENG Sary in the courtroom or in his holding cell during trial proceedings, let alone for any extended period of time (which would allow an assessment of Mr. IENG Sary's endurance). Professor Campbell has never observed Mr. IENG Sary's interactions with his defence team. According to Dr. Bursztajn, these are, *inter alia*, the steps required of an expert who assesses competency to stand trial.¹²⁵
38. An example of Professor Campbell's lack of appreciation for the importance and rigors of trial – as well as his effort to downplay Mr. IENG Sary's serious physical ailments – is his assertion that sleeping during a trial in which Mr. IENG Sary faces possible conviction for crimes against humanity and a sentence of life in prison indicates nothing more than boredom. Professor Campbell equates this with sleeping through lectures.¹²⁶ Professor Campbell's report also makes it appear that Mr. IENG Sary could stand on his

¹²² See Professor Campbell's qualifications, E62.1.

¹²³ Transcript, 8 November 2012, E1/142.1, p. 16, 21, 24, 25, 58.

¹²⁴ Medical Report on Mr. IENG Sary, 3 September 2012, E222/1, para. 6. This report does not state how much time Professor Campbell spent with Mr. IENG Sary on the date he examined him. However, *see also* Email from Trial Chamber Legal Officer Roger Phillips to the Defence, "Examination of IENG Sary", 27 August 2012, which notes that the examinations of Mr. IENG Sary 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. Mr. IENG Sary did not agree to waive his right to be present, and the proceedings were accordingly resumed at 2:00pm, after Mr. IENG Sary's examination had concluded. *See* Transcript, 28 August 2012, E1/116.1, p. 54, 56.

¹²⁵ See Letter from Dr. Bursztajn to the Defence, 21 November 2012, E238/11.3.

¹²⁶ Transcript, 8 November 2012, E1/142.1, p. 56.

own,¹²⁷ although when questioned Professor Campbell admitted that Mr. IENG Sary could not even get up out of bed or sit unaided, let alone stand.¹²⁸

39. Yet another example is Professor Campbell's assertion that dizziness is normal in the elderly and can presumably therefore be ignored. His report states: "Dizziness' is a common complaint amongst older people. In an epidemiological study of people 65 years and over 30% reported dizziness, 27% of these had symptoms more than once a month and 37% had symptoms lasting more than a minute. Dizziness was most often provoked by postural change and head and neck movement."¹²⁹ What Professor Campbell obscures with these statistics is that Mr. IENG Sary's frequent dizziness, which occurs more than once a month, is only found in 8.1% of those of 65 years of age or older (27% of 30%); thus, it is *not common*, as Professor Campbell would have the Trial Chamber believe.
40. Perhaps the single largest flaw in Professor Campbell's assessment of Mr. IENG Sary's fitness to stand trial is the way in which he artificially separates physical fitness from mental fitness. 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 is defined by 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.¹³⁰
41. This separation between physical health and mental fitness allowed Professor Campbell to conclude that, because Mr. IENG Sary performed adequately on the Mini Mental State Exam, he is mentally fit and must be fit to stand trial.¹³¹ This determination ignores the consequences of Mr. IENG Sary's physical ill health on his ability to participate in the proceedings and to instruct his Defence team. 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

¹²⁷ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, p. 2, 4.

¹²⁸ Transcript, 8 November 2012, E1/142.1, p. 74-75.

¹²⁹ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, p. 2-3.

¹³⁰ See Impugned Decision, para. 6, noting that the Defence had not challenged Mr. IENG Sary's cognitive fitness.

¹³¹ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), 6 November 2012, E238/4, para. 10.

concentrate, follow the proceedings, communicate with counsel or assist in his own defence.¹³²

42. The sole additional evidence¹³³ relied upon by the Trial Chamber apart from the November 2012 report and testimony by Professor Campbell is a 3 September 2012 report prepared jointly by Professor Campbell and Drs. Seena Fazel and Lina Huot *prior to* Mr. IENG Sary's two-month hospitalization.¹³⁴ The Trial Chamber appears to consider that it may rely on this report simply because the Defence did not previously challenge the qualifications of Drs. Seena Fazel and Lina Huot.¹³⁵ The Defence did not consider that it needed to contest these doctors' qualifications since Mr. IENG Sary's health at the time they examined him was not nearly as poor as it is today. Furthermore, while these doctors may be qualified in their fields, they still failed to take into account the effect that physical health has on mental fitness in the trial context.

43. The 3 September 2012 report prepared by Professor Campbell and Drs. Seena Fazel and Lina Huot 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."¹³⁶ 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.¹³⁷ Like Professor Campbell, Drs. Lina Huot 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,

¹³² 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.

¹³³ The Trial Chamber mentions in passing some much older reports in the Background section of its Decision on Accused IENG Sary's Fitness to Stand Trial, but does not appear to rely upon them in reaching its decision.

¹³⁴ Medical Report on Mr. IENG Sary, 3 September 2012, E222/1.

¹³⁵ Impugned Decision, para. 6.

¹³⁶ *See* Medical Report on Mr. IENG Sary, 3 September 2012, E222/1.

¹³⁷ *Id.*, paras. 6, 27. This report indicates that Dr. Lina Huot 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. Mr. IENG Sary did not agree to waive his right to be present, and the proceedings on 28 August 2012 were accordingly resumed at 2:00pm, after Mr. IENG Sary's examination had concluded. *See* Transcript, 28 August 2012, E1/116.1, p. 54, 56; Transcript, 29 August 2012, E1/117.1, p. 53.

is a more nuanced assessment of fitness that takes into account both the effect that physical health has on mental fitness and his *post-hospitalization* status.¹³⁸

2. The Trial Chamber failed to give sufficient weight to conflicting evidence

44. In stark contrast to the conclusions reached by Professor Campbell after a one hour to one hour and a half examination, a board of treating doctors at the Khmer-Soviet Friendship Hospital (after consultation with numerous specialists,¹³⁹ after being responsible for Mr. IENG Sary's care for the past year¹⁴⁰ 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"¹⁴¹ and "dizziness."¹⁴² They found that "blood cannot be actually sent to the brain."¹⁴³ This assessment is consistent with the Defence's observations of Mr. IENG Sary. The Defence has regularly interacted with Mr. IENG Sary for approximately five years and has observed the sharp decline in his health.¹⁴⁴

45. The treating doctors recognized that Mr. IENG Sary was incapable of concentrating for more than 15 minutes at a time and accordingly limited the time spent questioning him to short periods. The Trial Chamber refuses to accept this, asserting that "Dr. LIM Sivutha did not have any concern regarding the Accused's mental health or ability to concentrate."¹⁴⁵ While it is correct that Dr. Lim Sivutha asserted he was not competent to speak about Mr. IENG Sary's mental health,¹⁴⁶ he did acknowledge:

¹³⁸ See Letter from Dr. Bursztajn to the Defence, 21 November 2012, E238/11.3.

¹³⁹ Transcript, 21 September 2012, E1/125.1, p. 20.

¹⁴⁰ *Id.*, p. 11.

¹⁴¹ *Id.*, p. 12.

¹⁴² *Id.*, p. 14.

¹⁴³ *Id.*, p. 19.

¹⁴⁴ See, e.g., Letter from Defence to Trial Chamber Senior Legal Officer, "Request for Measures to Improve Mr. Ieng Sary's Health and Physical Condition", 4 September 2012; Email from Defence to Trial Chamber Senior Legal Officer, "Mr. Ieng Sary's Health", 7 September 2012; Email from Defence to Trial Chamber Senior Legal Officer, "Mr. IENG Sary's Health", 10 September 2012; Email from Defence to Trial Chamber Senior Legal Officer, "Request for Additional Medical Attention and Monitoring for Mr. IENG Sary", 17 September 2012; Letter from Defence to Trial Chamber Greffier, "An Incident Concerning Mr. Ieng Sary's Health and Treatment on 16 October 2012", 22 October 2012; Letter from Defence to Trial Chamber Greffier, "Upcoming Medical Examination of Mr. Ieng Sary and Testimony from Doctors", 24 October 2012; Letter from Defence to Trial Chamber Senior Legal Officer, "The Need for Specialists to Examine Mr. Ieng Sary, Prepare a Report and Give Testimony and for the Experts' Medical Reports to be Provided Sufficiently in Advance of the Next Hearing on Mr. Ieng Sary's Health", 26 October 2012.

¹⁴⁵ Impugned Decision, para. 4.

¹⁴⁶ Transcript, 21 September 2012, E1/125.1, p. 32.

A. Generally, when we ask him, we did not observe any problems in his response to our questions; he responded appropriately to our questions. And normally each interview lasted for a few minutes, but as for the neurologist, when they conducted interview or so with him, it would last approximately 10 to 15 minutes, but generally his response was appropriate to the questions; there was no issue in - in relation to that. *But sometimes he did not pay attention to the questions; we had to repeat our questions as well.* But he also asked us for clarification in relation to the questions we ask, as well, from time to time.

BY MR. PICH ANG:

Q. In your assessment, the interview would last for approximately 15 minutes, as you mentioned in your answer earlier on. But do you think that he could maintain his concentration span during the 15-minute interview?

MR. LIM SIVUTHA:

A. *I noticed that he had fatigue once he had to respond to a question. So, fatigue was the main problem facing him. And if we raised our voice, for example, then he attempted to respond in a louder voice as well, then he was rather exhausted. 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. The idea was not to disturb him that much, so we had to do everything to ensure that it was favourable for his condition.*¹⁴⁷

46. These treating doctors recognized that Mr. IENG Sary's extreme fatigue and other physical ailments affect his ability to concentrate. They spent a considerable amount of time with Mr. IENG Sary on a daily basis during his hospitalization, unlike Professor Campbell. The Trial Chamber avers that "[n]either ... Dr. LIM Sivutha, nor the Accused's other treating physicians, indicate[d] disagreement with the Expert Geriatrician's conclusions,"¹⁴⁸ but, in fact, these doctors were *never* questioned by the Trial Chamber as to whether they agreed with Professor Campbell. The Khmer-Soviet Friendship Hospital Governing Board for the Examination of the Health of the Accused at the ECCC Detention Facility was provided no opportunity to voice any agreement or disagreement. Dr. Bursztajn, a highly qualified, Harvard-educated forensic neuropsychiatrist, criticized Professor Campbell's methodology and recommended specific tests (which should be performed by an expert with specific expertise). These tests were not performed.
47. The Trial Chamber, without any explanation, discounted the evidence of the treating doctors and found additional expertise unnecessary. It did this despite the fact that even Professor Campbell admitted that in making medical diagnoses, second and even third

¹⁴⁷ *Id.*, 62-63 (emphasis added).

¹⁴⁸ Impugned Decision, para. 5.

opinions are commonplace.¹⁴⁹ The Trial Chamber abused its discretion by selecting the evidence it preferred and finding no other expertise necessary, without explaining why the conflicting evidence was not reliable.

3. The Trial Chamber shielded itself from relevant information that would have demonstrated Mr. IENG Sary's lack of fitness

48. The Trial Chamber did not permit the Defence to fully brief it on the issue of Mr. IENG Sary's fitness before it decided that he was fit and that no additional expertise was necessary. 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."¹⁵⁰ 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.¹⁵¹ 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.

49. 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.¹⁵² 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."¹⁵³ Proceeding with the witnesses for

¹⁴⁹ Transcript, 8 November 2012, E1/142.1, p. 89-90.

¹⁵⁰ Directions to Parties Following Hearing of 21 September 2012, 24 September 2012, E233, para. 2.

¹⁵¹ Re-appointment of Professor A. John CAMPBELL (IENG Sary), 8 October 2012, E238, para. 1.

¹⁵² 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.

¹⁵³ 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.

50. The Defence did not make arguments concerning Mr. IENG Sary's fitness to stand trial until pressed to do so by Judge Cartwright.¹⁵⁴ 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.¹⁵⁵
51. 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.
52. The Defence made an oral request for the appointment of an additional medical expert on 12 November 2012.¹⁵⁶ The Defence then began immediate preparations to supplement this request with a written request for additional expertise, to be filed pursuant to Rule 32. To this end, the Defence contacted Dr. Bursztajn to request his assistance in providing, *inter alia*, guidance regarding the appointment of an independent expert.
53. 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 decided Mr. IENG Sary was fit to stand trial and no additional expertise was necessary. The Trial Chamber abused its discretion by: (1) appointing an expert for a stated purpose *other than* fitness; (2) only giving the parties one full day to examine a report that was later used to determine fitness; (3) not explicitly informing the parties that the real purpose of the

¹⁵⁴ *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."

¹⁵⁵ *Id.*, p. 5-8.

¹⁵⁶ *Id.*, p. 7-11.

hearing and oral submissions was to make arguments on fitness; and (4) then deciding the question of fitness without fully hearing from the parties.

54. As discussed in the admissibility section *supra*, the Trial Chamber has done everything in its power (by ensuring that there is no record of his condition) to ensure that it has no evidence before it that might contradict Professor Campbell's assessment that Mr. IENG Sary is fit to stand trial. This is an abuse of discretion as well as an interference with the administration of justice.

VI. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to ANNUL the Impugned Decision and to ORDER the Trial Chamber to appoint an additional expert or experts to assess 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 3rd day of **January, 2013**