



**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
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Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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**DECISION ON IENG SARY'S REQUEST FOR RECONSIDERATION OF THE TRIAL CHAMBER
DECISION ON THE ACCUSED'S FITNESS TO STAND TRIAL AND SUPPLEMENTAL REQUEST**

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1. INTRODUCTION

1. On 6 and 8 November 2012, Professor A. John CAMPBELL (“the Expert Geriatrician”) reported to the Trial Chamber on the health of Accused IENG Sary (“Accused”).¹ On 26 November 2012, the Trial Chamber found that the Accused remained fit to stand trial.² The IENG Sary Defence (“Defence”) now requests the Chamber to reconsider this Decision.³ In a Supplemental Request, the Defence also moves the Chamber to appoint an expert to assess the Accused’s fitness daily, or alternatively, to order the ECCC physicians to make certain observations relating to the Accused’s fitness.⁴ For the reasons that follow, the Chamber rejects both requests.

2. PROCEDURAL BACKGROUND

2. Although the Expert Geriatrician was not expressly appointed to assess the Accused’s fitness to stand trial,⁵ the Defence was on notice as early as 2 November 2012 that the Accused’s fitness may be in issue.⁶ On 6 November 2012, the Expert Geriatrician concluded that there was no reason to disturb a previous finding that the Accused was fit to stand trial.⁷ On 7 November 2012, upon a Defence request, a consultant reviewed the Expert Geriatrician’s evaluation of the Accused’s “competency to stand trial” in order to assist the Defence in preparation for the upcoming hearing.⁸ During the hearing on 8 November 2012 in

¹ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), E238/4, 6 November 2012 (“November 2012 Report”); T., 8 November 2012.

² Decision on Accused IENG Sary’s Fitness to Stand Trial, E238/9, 26 November 2012 (“Decision”).

³ 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, E238/11, 7 December 2012 (“Request for Reconsideration”).

⁴ 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, E255, 12 December 2012 (“Supplemental Request”). *See also*, 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’, E255/1, 14 December 2012 (“Response”).

⁵ The Defence claims that it was not given any notice that the assessment would specifically address the Accused’s fitness to stand trial and was therefore not given sufficient opportunity to address the issue. Request for Reconsideration, paras 15-21.

⁶ Both the Civil Party Co-Lawyers and the Prosecution, prior to the filing of the expert report, raised the issue of the Accused’s fitness in their suggested questions for the Expert Geriatrician. Letter from Elisabeth SIMONNEAU-FORT, Subject: “Questions for the Experts Regarding IENG Sary’s Health”, E238/3, 2 November 2012; Memorandum, Subject: “Issues Relating to Fitness Hearing of IENG Sary on Thursday, 8 November 2012”, E238/1, 2 November 2012, p. 2.

⁷ November 2012 Report, para. 10.

⁸ Letter from Harold J. Bursztajn, MD to Ang Udom and Michael Karnavas, E238/6, 7 November 2012.

which the Expert Geriatrician presented his findings, the Chamber, Defence and Co-Prosecutors all questioned the Expert Geriatrician on his methods and conclusions concerning the Accused's fitness.⁹ At the close of the hearing, immediately prior to ordering submissions from the parties on 12 November 2012, the President declared that the Expert Geriatrician's "report and testimony will be used as the basis for our consideration and deliberation on the health status of Mr. IENG Sary to see whether he is fit to be present in the proceedings or not".¹⁰ On 12 November 2012, the Defence argued that any decision on the Accused's fitness was premature. Nonetheless, it maintained that the Accused was not fit to stand trial and requested further assessment of the Accused's fitness.¹¹ The Defence also informed the Chamber that if a decision on the Accused's fitness was issued, the Defence would seek immediate severance.¹² Having considered the submissions of the parties, the report and testimony of the Expert Geriatrician, the Chamber rendered its Decision on the Accused's fitness to stand trial on 26 November 2012.

3. In the present Request for Reconsideration, the Defence repeats its objection to the qualifications of the Expert Geriatrician and requests further expert assessment of the Accused's fitness, alleging in particular that the diagnosis of the Accused's treating physicians is inconsistent with the Expert Geriatrician's conclusions.¹³ For the reasons that follow, these assertions are either unsupported by the relevant testimony or reports, or addressed by the Expert Geriatrician in his report.

4. Dr. LIM Sivutha and Dr. KY Bousuor also testified on 21 September 2012 as representatives of a board of treating physicians, including neurologist Prof. CHEA Lahoeun.¹⁴ Based primarily upon the opinion of neurologist Prof. CHEA Lahoeun, Dr. LIM Sivutha reported to the Chamber that the Accused's dizziness was most likely caused by restricted blood flow to the brain,¹⁵ although there could be other causes.¹⁶ Dr. LIM Sivutha testified that he was not qualified to advise the Chamber of the impact the neurologist's diagnosis may have on the Accused's ability to concentrate.¹⁷ In any event, based on his own

⁹ T., 8 November 2012, pp. 28-30, 93-125. The Civil Party Co-Lawyers declined to put any questions.

¹⁰ T., 8 November 2012, p. 140. Judge CARTWRIGHT also indicated twice that the Chamber may issue a decision on the Accused's "health status". T., 8 November 2012, pp. 138-139.

¹¹ Decision, para. 14.

¹² Decision, para. 17.

¹³ Request for Reconsideration, paras 24-37.

¹⁴ T., 21 September 2012, pp. 11, 46-47, 55.

¹⁵ T., 21 September 2012, pp. 16, 19, 29-31, 55.

¹⁶ T., 21 September 2012, p. 60.

¹⁷ T., 21 September 2012, p. 31-2.

observations while physically examining the Accused and in consultation with a neurologist and psychologist, Dr. LIM Sivutha did not have any concern regarding the Accused's mental health or ability to concentrate.¹⁸

5. The Expert Geriatrician reviewed Dr. LIM Sivutha's testimony¹⁹ and consulted with Dr. KY Bousuor (who had appeared before the Chamber with Dr. LIM Sivutha), neurologist Prof. CHEA Lahoeun, and three other treating physicians.²⁰ The Expert Geriatrician later reported that dizziness is not necessarily a symptom of restricted blood flow to the brain. Moreover, upon examination of the Accused, the Expert Geriatrician found no other symptoms or material from the various tests undertaken by the treating physicians to support this diagnosis.²¹ Neither did Dr. LIM Sivutha, nor the Accused's other treating physicians, indicate disagreement with the Expert Geriatrician's conclusions.

6. Finally, the Chamber emphasises that after his re-examination of the Accused on 5 and 6 November 2012, the Expert Geriatrician determined that there was no change in the Accused's health warranting any re-assessment of the psychiatric experts' (Dr. Seena FAZEL and Dr. Lina HUOT) September 2012 conclusions that the Accused is fit.²² The Defence has never challenged the qualifications of Dr. FAZEL or Dr. HUOT, nor the Accused's cognitive fitness.

3. FINDINGS

7. The Accused has rights of appeal pursuant to Internal Rule 104.²³ There is, however, no procedure provided in the Internal Rules for reconsideration of Trial Chamber decisions. Thus the Trial Chamber will not entertain applications concerning matters upon which it has

¹⁸ T., 21 September 2012, pp. 31-32, 52, 53. Indeed, the Accused's treating physicians did not limit their interviews to 10-15 minutes because they considered the Accused was *unable* to concentrate longer as the Defence suggests. T., 21 September 2012, p. 63. *See also*, T., 8 November 2012, pp. 61-62.

¹⁹ T., 8 November 2012, pp. 57-58.

²⁰ November 2012 Report, para. 4; T., 8 November 2012, pp. 6, 57-58, 86.

²¹ T., 8 November 2012, pp. 81-88.

²² November 2012 Report, para. 10; T., 8 November 2012, p. 19. A geriatrician is qualified to assess mental and physical health and determine whether further testing or specialised assessment is necessary. T., 8 November 2012, pp. 20-22, 103.

²³ *Prosecutor v. Mucić et al.*, ICTY Appeals Chamber (IT-96-21-Abis), Judgment on Sentence Appeal, 8 April 2003, para. 50 ("the prevention of injustice arising from error is, in most systems, provided by rights of appeal"); *Prosecutor v. Žigić*, ICTY Appeals Chamber (IT-98-30/1-A), Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9 (rejecting reconsideration where express avenues of appeal and review are provided). The limited rights of interlocutory review provided in Internal Rule 104(4) accord with international standards (Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications (SCC), E154/1/1/4, 25 April 2012, para. 15).

already ruled.²⁴ Doing so would encourage the endless re-litigation of the same issues.²⁵ This does not, however, prevent parties from appealing a decision at the appropriate time, or filing a fresh application before this Chamber when justified by new circumstances.

8. Even if considered a fresh application, the Defence Request for Reconsideration lacks any reference to new circumstances arising since the Decision was issued. The Request for Reconsideration is therefore rejected as inadmissible.

9. The Supplemental Request for appointment of a qualified expert to assess the Accused's fitness daily is also, in effect, a request for the Chamber to reconsider its decision that further assessment of the Accused's fitness to stand trial is unwarranted. It similarly fails to present any new circumstances. Thus this *de facto* request for reconsideration is also rejected as inadmissible. In any event, the Chamber notes that, on its own motion, it has re-appointed the Expert Geriatrician and psychiatric experts Dr. Seena FAZEL and Dr. Lina HUOT to re-assess the Accused's health, treatment and care in March 2013.²⁶

10. Alternatively, the Defence moves the Chamber to order the ECCC physicians to make specific inquiries each day to assist the Chamber in assessing the Accused's fitness.²⁷ The Trial Chamber on its own motion has directed the Accused's treating physician to report daily on certain aspects of the Accused's health status that it deems appropriate. Insofar as the Defence seeks additional relief, it is denied. On 14 December 2012, the Co-Prosecutors requested access to the daily medical reports made by the Accused's treating physician.²⁸ The Defence does not object to the Co-Prosecutors' or Civil Party Co-Lawyers' access to these reports. Accordingly, the Chamber grants the Co-Prosecutors' request for access. It is also in the interests of justice that the Civil Party Co-Lawyers be granted access.

²⁴ Memorandum, Subject: "Trial Chamber's disposition of Lead Co-Lawyers' 'Submission for purpose of reconsideration and Correction of Memorandum E62/3/10/4' (E62/3/10/4/1) and Motion E117'", E117/2, 23 September 2011, pp. 2-3, p. 3; Case 001/18-07-2007/ECCC/TC, Decision on Request to Reconsider Decision on Proof of Identity for Civil Party Application, (E2/36) 10 August 2009, para. 5. The Defence refers to the reconsideration standard adopted in the Pre-Trial Chamber (Request for Reconsideration, para. 13). In adopting this standard, the Pre-Trial Chamber considered that reconsideration "is particularly important for a judicial body of last resort like the Pre-Trial Chamber." Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person (PTC), C22/I/68, para. 25. Indeed, no other avenue of review of Pre-Trial Chamber decisions exists. Before this Chamber, however, the parties have the right of appeal.

²⁵ *Prosecutor v. Kajelijeli*, ICTR Appeals Chamber (ICTR-98-44A), Judgment, 23 May 2005, para. 202.

²⁶ Thus the Chamber dismisses the Co-Prosecutors' submissions concerning periodic expert reviews. Response, para. 14.

²⁷ Supplemental Request, para. 7. *See also*, Response, para. 12.

²⁸ Response, para. 13.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**REJECTS** the Request for Reconsideration as inadmissible;**REJECTS** the Supplemental Request;**GRANTS** the Co-Prosecutors' and the Civil Party Co-Lawyers' access to the daily medical reports made by the Accused's treating physicians.Phnom Penh, 19 December 2012
President of the Trial Chamber

Nil Nonn