

ក្រុមមេធាវីការពារក្តី អៀង សារី
IENG SARY DEFENCE TEAM
EQUIPE DE DEFENSE DE IENG SARY

ANG Udom and Michael G. KARNAVAS

Co-Lawyers for IENG Sary

November 19, 2012

To: **Harold J. Bursztajn, MD**
 96 Larchwood Drive
 Cambridge, MA 02138

Re: Request for further review of public records and transcript related to Mr. IENG Sary
 &
 Request for additional information concerning potential appointment by the Trial Chamber as an expert consultant

Dear Dr. Bursztajn,

We wish to thank you again for your prompt and helpful assistance in reviewing the report prepared by Professor Campbell concerning Mr. IENG Sary's health and fitness to stand trial. We have made an oral request to the Trial Chamber, which we intend to supplement with written submissions, to appoint you, or a similarly qualified expert, to conduct an independent evaluation of Mr. IENG Sary's condition; hence, our contact with you. For your interest, and in the event you would be further willing to assist us, we are attaching the following documents:

1. The 8 November 2012 transcript of Professor Campbell's testimony (in which your letter to us was discussed and critiqued by Professor Campbell);
2. The 12 November 2012 transcript (in which submissions were made by the parties concerning Mr. IENG Sary's health and in which we requested the Trial Chamber to appoint you as an additional expert);
3. The 21 September 2012 transcript of Mr. IENG Sary's treating doctors regarding Mr. IENG Sary's recent hospitalization; and
4. Some relevant jurisprudence from the International Criminal Tribunal for the former Yugoslavia.

We stress that, under the Civil Law system employed by the ECCC, experts must be appointed by the Trial Chamber rather than retained by the parties. As we pointed out to the

Trial Chamber,¹ however, when an expert's opinion is called into question, it is common for another expert to be appointed to give a second opinion.

So that you are aware, the criteria for fitness to stand trial normally considered in international courts comes from the *Strugar* case at the International Criminal Tribunal for the former Yugoslavia. In *Strugar*, the Trial Chamber held (and the Appeals Chamber affirmed) that to determine fitness to stand trial, the following non-exhaustive list of the Accused's capacities should be evaluated:

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

That said, however, there is little guidance in international criminal jurisprudence regarding what constitutes the ability to meaningfully follow the proceedings and participate in one's defense – a right guaranteed by the International Covenant on Civil and Political Rights.

The *Strugar* Appeals Chamber was instructive in pointing out: "An accused's fitness to stand trial should ... 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.'"³ The focus on "commonsense" may assist when considering whether, in this instance, Mr. IENG Sary can actually and meaningfully participate in his trial.

In preparation for our submission to the Trial Chamber concerning the need to appoint an expert such as yourself to give a second opinion as to Mr. IENG Sary's fitness to stand trial, and should you be interested, it would be useful to have you review the attached material.

Assuming you are interested and available to be engaged in this matter, we would be grateful if you could provide us with the following information:

¹ See Transcript, 12 November 2012, p. 7-8.

² *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 36; *Prosecutor v. Strugar*, IT-01-42-A, Appeals Judgment, 17 July 2008 ("*Strugar* Appeals Judgement"), para. 55.

³ *Strugar* Appeals Judgement, para. 55. See also Transcript, 12 November 2012, p. 47.

1. Any 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;
2. Whether you have testified in court in the past, and if so, how often and for which party/side;
3. A ballpark figure for the number of hours you would need to examine Mr. IENG Sary, review all relevant medical records and prepare an expert report;
4. The rate you normally charge for such services; and
5. Whether you would be willing to be retained as an expert by the Trial Chamber, keeping in mind that the UN/ECCC payment scheme for experts is most likely considerably lower than your normal rate (since the parties are not involved in retaining experts, we do not have information as to the rate normally paid to experts at the ECCC).

This information will greatly assist us in preparing our written submissions to the Trial Chamber on this matter. Please let us know if you are able to assist us with this request or if you have any questions. We look forward to hearing from you.

Respectfully,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary