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E 238/9/cm-2

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Request for Correction

Case : 002/19-09-2007-ECCC/TC

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Reason for changes:
incorrect numbering of paragraph and paragraph reference.

Details:
renumbering paragraph from p. 10 to 15 and p.16-change reference to paras 32 and 33.

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22. Finally, the Chamber must balance the right of the Accused to be present with both his right, as well as that of any Co-Accused, to fair and expeditious proceedings.⁶⁴

5. FINDINGS

5.1. Introduction

20-23. The Accused's fitness to stand trial has been assessed by multiple psychiatrists and a geriatrician and has been the subject of expert reports on four separate occasions: in September 2009, June 2011 and most recently in September and November 2012. The reports resulting from these examinations show that the Accused has at no time during proceedings in Case 002 suffered from any cognitive or memory impairment beyond that expected of someone his age.⁶⁵ Most recently, on 6 November 2012, the Expert Geriatrician determined that there had been no change in the Accused's health warranting re-assessment of the court-appointed experts' conclusion of 3 September 2012 that the Accused is fit to stand trial.⁶⁶

20-24. The IENG Sary Defence does not as such challenge the recent reports of the court-appointed experts and the Expert Geriatrician and offers neither any basis upon which the Trial Chamber could reasonably reject the expertise provided nor cogent reasons for why the court-appointed experts should now be substituted.⁶⁷ For the above reasons and those which follow, the Trial Chamber has determined the Accused to be capable of effectively participating in his own defence and rejects the Defence request for the appointment of an additional expert to re-assess the Accused's fitness to stand trial.

5.2. Recent expert reports regarding the Accused's fitness to stand trial

21-25. On 3 September 2012, two court-appointed experts, Dr. FAZEL and Dr. Lina HUOT, concluded that the Accused does not suffer from any mental illness or cognitive impairment

⁶⁴ *Stanišić Appeals Decision*, para. 18.

⁶⁵ 3 September 2012 Report, pp. 8-9.

⁶⁶ November 2012 Expert Report, paras 10, 20; 3 September 2012 Report, para. 42 (conclusion of psychiatric experts Dr. Seena FAZEL and Dr. Lina HUOT that the Accused had the ability to plead, understand the nature of the charges, understand the course of the proceedings, understand the details of the evidence, instruct counsel, understand the consequences of the proceedings, and testify); see also T., 8 November 2012, pp. 35, 92-93, 96-97, 102, and 113-115 (indicating that Professor CAMPBELL discussed the Accused's fitness with the psychiatric experts before reaching the conclusions he did).

⁶⁷ Although an unsolicited letter of a consultant psychiatrist was submitted by the IENG Sary Defence to the Trial Chamber criticizing the Expert Geriatrician's methodology (Letter from Harold J. Bursztajn, MD to IENG Sary Defence Team, E238/6, 7 November 2012), the original psychiatric assessment of Drs. HUOT and FAZEL, which was the foundation of the psychiatric assessment of the Accused, was not provided to the medical consultant. The latter's conclusions are therefore entitled to little or no weight (T., 12 November 2012, p. 7).

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beyond that expected of someone his age.⁶⁸ They indicated that the Accused spoke clearly and coherently, was able to concentrate during a 60 minute interview, and remembered various details about his family, health, and the trial proceedings.⁶⁹ He scored 28 out of 30 on the Mini-Mental State Examination (“MMSE”) – well above the level indicative of cognitive impairment.⁷⁰

~~22-26.~~ After the Accused’s hospitalization on 5 and 6 November 2012, the Expert Geriatrician noted no change in the Accused’s mental state since the 3 September Report, finding that the Accused was able to remember and relate details concerning his health, family and defence counsel. Recently observed numbness in the Accused’s extremities impaired his ability to use a pen, resulting in a lower MMSE score, but did not affect, or indicate any impairment of, his mental capacity.⁷¹

~~23-27.~~ The Expert Geriatrician, following consultation with the Accused’s treating physicians and a professor of radiology, also addressed in his report and testimony the Accused’s long-standing and chronic cardiovascular condition, lower spine osteoarthritis, vertigo, sarcopenia (wasting of the muscles) in the leg and urological disorder. He also addressed the Accused’s most recent complaints, including shortness of breath, lower and cervical back pain, dizziness and unsteadiness.⁷²

~~24-28.~~ The Expert Geriatrician concluded these are most likely side-effects of the Accused’s chronic physical ailments, or of their treatment.⁷³ The Accused’s inactivity and muscle wastage contribute to his increased weakness and frailty. His cardiac condition and overall frailty result in on-going shortness of breath, while osteoarthritis of the lower spine results in back pain.⁷⁴ Cardiovascular conditions, vertigo, and medications may, individually or

⁶⁸ 3 September 2012 Report, para. 41.

⁶⁹ 3 September 2012 Report, paras 27, 30.

⁷⁰ 3 September 2012 Report, para. 29 (indicating that an MMSE score of 23 and lower usually indicates cognitive impairment and the need for further assessment).

⁷¹ T., 8 November 2012, pp. 23-24, 87-88, 103-108 and 120. The Accused scored 26 out of 30 on the MMSE, well above a level indicating any cognitive impairment (T., 8 November 2012, pp. 24, 104-105).

⁷² November 2012 Expert Report, paras 4, 6-9; T., 8 November 2012, pp. 12-16, 83-84.

⁷³ T., 8 November 2012, pp. 121-122 (noting that although there is a risk of stroke and shortness of blood flow to the brain, there is no sign that his symptoms are caused by this and no indication that the Accused has suffered or is suffering from either condition).

⁷⁴ November 2012 Expert Report, paras 6-9; T., 8 November 2012, pp. 12-13, 16, 27, 121, 128-130.

collectively, cause dizziness and unsteadiness.⁷⁵ These side-effects may also be triggered by sitting for long periods, dehydration or over-heating.⁷⁶

~~25-29.~~ For the above reasons, the Trial Chamber does not consider the Accused to suffer from any cognitive incapacity rendering him unfit to participate in proceedings. The Accused suffers numerous physical ailments, and has done so since his initial arrest and detention in 2007. While the court-appointed experts acknowledge that the Accused's physical condition may reduce the Accused's ability to concentrate, the Chamber notes the consistent findings of the experts that the impact of these physical ailments is not such as to render the Accused IENG Sary incapable of participating effectively in his own defence.⁷⁷

5.3. Available measures to treat or reduce the impact of IENG Sary's physical condition

~~26-30.~~ In conjunction with recent assessments of the Accused's fitness to stand trial, the Chamber also requested the Expert Geriatrician to review the current medical care afforded to the Accused IENG Sary and to indicate whether further treatment options may be capable of treating the Accused's physical condition or mitigating its impact.⁷⁸

5.3.1. Review by the Expert Geriatrician of the Accused's current medical care

~~27-31.~~ The Expert Geriatrician described the Accused's cardio-vascular condition as stable but precarious.⁷⁹ The treatment currently provided for this condition is optimal, and no adjustment to it was considered necessary. The Accused's age and condition, however, is such that the risks of resuscitation, in the event of cardiac arrest, are considerable and it was the expert's view that the Accused is not a fit candidate for resuscitation.⁸⁰ Corrective treatment of the Accused's vertigo would similarly prove challenging.⁸¹ Although the Expert Geriatrician recommended some further tests in relation to the Accused's other medical conditions, Professor CAMPBELL clarified that he did not consider these tests to be essential

⁷⁵ November 2012 Expert Report, para. 9; T., 8 November 2012, pp. 13, 14 (noting that heart disease results in low blood pressure which may result in dizziness), 17, 30, 77, 79 and 83-84.

⁷⁶ November 2012 Expert Report, para. 9; T., 8 November 2012, pp. 14, 78.

⁷⁷ November 2012 Expert Report, paras 20-21; T., 8 November 2012, pp. 25, 78.

⁷⁸ Memorandum, Subject: "Re-appointment of Dr. A. John CAMPBELL (IENG Sary)", E238, 8 October 2012, para. 2.

⁷⁹ T. 8 November 2012, pp. 35, 123-124.

⁸⁰ November 2012 Expert Report, paras 7, 19; T., 8 November 2012, pp. 16, 35, 123-124.

⁸¹ November 2012 Expert Report, para. 9; T., 8 November 2012, pp. 13-14.

considering the Accused's age, his frail condition and the unlikelihood of positive outcomes.⁸² Further, and as in the event of an emergency, resuscitation is not recommended and the Accused's other medical conditions are not amenable to further treatment, the Expert Geriatrician considered continued hospitalisation to be unnecessary. As the Expert Geriatrician considered that measures addressing the symptoms of the Accused's medical condition may be implemented in the ECCC Detention Facility or holding cell while proceedings are on-going, the Chamber ordered on 8 November 2012 the Accused's return to the ECCC Detention Facility.⁸³

5.3.2. Measures that may mitigate the impact of the Accused's physical condition

28-32. Despite the absence of treatment options capable of reversing the Accused's medical condition, the Expert Geriatrician indicated a number of measures that may nevertheless alleviate or mitigate its effects. Following interviews of the Accused in the hospital, Detention Facility and in the holding cell, the Expert Geriatrician observed that lying down alleviated the Accused's back pain and shortness of breath.⁸⁴ On 5 and 6 November 2012, throughout three interview sessions lasting 60 to 90 minutes, the Accused was able to concentrate and hold a conversation. Two of these sessions took place on the same day, although the Accused was lying down during these sessions.⁸⁵ The Expert Geriatrician therefore considered that the Accused would be able to concentrate during court sessions of similar length and that the existing breaks between sessions were adequate. He suggested, however, that the Accused be brought to the holding cell sufficiently early to enable him to recover from any shortness of breath or dizziness caused by his transport from the Detention Facility. The holding cell also accommodates the Accused's need to urinate frequently, as it enables assisted access to a toilet and/or plastic urinal.⁸⁶

29-33. Other measures, which may also be undertaken in the holding cell or Detention Facility, may further alleviate the Accused's physical condition.⁸⁷ Concerning the Accused's

⁸² November 2012 Expert Report, para. 17; T., 8 November 2012, pp. 30-31, 34-36, 79-80 (noting that in any case, some of these tests may be unavailable or impracticable to conduct in Cambodia).

⁸³ November 2012 Expert Report, para. 19; T., 8 November 2012, pp. 16, 131-134. The Accused initially returned to the ECCC Detention Facility on 7 November 2012. Memorandum, Subject: "Transfer of IENG Sary to ECCC Detention Facility for 8 November 2012 Hearing", E239/2, 7 November 2012.

⁸⁴ November 2012 Expert Report, para. 7; T., 8 November 2012, pp. 16, 25-26, 53, 78, and 133; 3 September 2012 Report, para. 11.

⁸⁵ T., 8 November 2012, pp. 16, 25, 53, 58, 64, 67-68 and 108-109.

⁸⁶ T., 8 November 2012, pp. 18, 53, 58, 67-68, and 75-76.

⁸⁷ T., 8 November 2012, p. 135, 138.

lower back pain, the Expert Geriatrician recommended that the Accused use a brace.⁸⁸ In relation to his dizziness, the Expert Geriatrician recommended the use of a “soft collar” during the day and re-assessment of the Accused’s medication, particularly those with recognized side-effects of dizziness and weakness.⁸⁹ Monitoring would also enable the ECCC medical staff to immediately treat or address any dizziness or unsteadiness resulting from a drop in blood pressure upon standing or moving.⁹⁰ Concerning the Accused’s overall frailty and weakness, a simple exercise program may gradually increase lower limb strength and balance, and dietary supplements may also prove beneficial.⁹¹ Vision testing and appropriate adjustment to the Accused’s glasses should also remedy recent complaints concerning the Accused’s eyesight.⁹²

~~30-34.~~ Overall, and while the Expert Geriatrician considered the Accused to require greater personal care in the light of his increasing frailty and decreased mobility, this does not prevent him from participating effectively in proceedings.⁹³ Where certain accommodations are made to mitigate his condition, the Trial Chamber therefore concludes that the Accused is capable of participating effectively in his own defence.

5.4. Should the Accused IENG Sary, in the interests of justice, be ordered to participate in proceedings from the holding cell?

~~31-35.~~ The Chamber notes that the Accused’s physical frailty has to date created a number of trial management challenges, as well as the prospect of a substantial prolongation of proceedings. To date, the Accused’s ill-health has directly resulted in the partial or total adjournment of twelve scheduled trial days.⁹⁴ Further, the Chamber’s ability to continue trial proceedings since the Accused’s hospitalisation on 7 September 2012 has largely rested upon the issuance of a waiver by the Accused IENG Sary of his right to be present during the testimony of 40 witnesses and Civil Parties, many of whom have already been heard over the

⁸⁸ November 2012 Expert Report, para. 8; T., 8 November 2012, pp. 13.

⁸⁹ November 2012 Expert Report, paras 9, 16; T., 8 November 2012, pp. 13, 17, 28, 35-36, 80 and 84.

⁹⁰ November 2012 Expert Report, para. 11; T., 8 November 2012, pp. 17, 74-75.

⁹¹ November 2012 Expert Report, para. 15; T., 8 November 2012, pp. 32-33, 130-133.

⁹² November 2012 Expert Report, paras 10, 18; T., 8 November 2012, p. 17.

⁹³ T., 8 November 2012, pp. 31-32 (considering that the detention centre is able to provide such care), 135.

⁹⁴ 21 May 2012; 22 May 2012; 23 May 2012; 24 May 2012; 13 August 2012; 12 September 2012; 13 September 2012; 17 September 2012; 18 September 2012; 19 September 2012; 26 September 2012; 27 September 2012. This list does not include those days re-scheduled in advance for hearings concerning the Accused’s health.

past weeks.⁹⁵ Although the Chamber has previously expressed appreciation for the Accused's cooperation in this manner, which assisted greatly in facilitating the smooth conduct of proceedings, the Chamber notes that the Defence now indicates an intention to revoke any outstanding waivers should the Trial Chamber decide on the basis of the court-appointed medical expertise that the Accused is fit to stand trial.⁹⁶

~~32.36.~~ The Chamber further notes the determination of the Expert Geriatrician that the Accused is best able to concentrate when lying down and that in view of his increased frailty, the Accused's medical needs are most appropriately provided for in the holding cell.⁹⁷ The Expert Geriatrician did not, however, include the provision of a hospital bed in the courtroom among the list of recommendations considered either to enhance the Accused's welfare or to be medically appropriate. As the holding cell is accessible at all times by members of his Defence team and the ECCC Medical Unit, the Chamber does not consider video-recording of the holding cell to be necessary to ensure that the Accused is appropriately monitored. The Trial Chamber considers that the holding cell provides adequate and appropriate means to meaningfully participate in the proceedings.

~~33.37.~~ The Chamber therefore considers that the Accused's participation by audio-visual means from the holding cell may be ordered in the interests of justice and provides early notice to the parties that the Chamber may do so where no medical basis exists to justify the Accused's absence from proceedings, but where the Accused's presence in the courtroom would be contrary to his medical interests and/or to the expeditious conduct of the trial. This finding is without prejudice to the Accused's right to otherwise elect to be present in the courtroom during trial proceedings at all times, to expressly waive his right to be present altogether, or to receive medical treatment outside the ECCC premises where determined by the Chamber to be medically necessary.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

⁹⁵ See e.g. IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, E229, 18 September 2012; IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, E237, 1 October 2012; IENG Sary's Limited Waiver of Right to be Present During Court Proceedings, E237/1, 13 August 2012. Previously, the Accused did not waive his right to be present for witness testimony concerning "him either directly or indirectly or go into acts and conduct which are alleged against him" (T., 23 May 2012, p. 3); see also *Zigiranyirazo* Appeal Decision, para. 21 (noting that an accused has a stronger interest in being present when witnesses testify as to his acts and conduct).

⁹⁶ T., 12 November 2012, pp. 44-45, 52.

⁹⁷ November 2012 Expert Report, paras 20-21; T., 8 November 2012, pp. 16-17, 25-26, 78, 133.

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AFFIRMS its earlier finding that the Accused IENG Sary is capable of meaningful participation in his own defence and is therefore fit to stand trial;

DENIES the Defence request to appoint a new expert to reassess the Accused's trial fitness;

DIRECTS the Medical Unit and Detention Facility, as appropriate, to implement the recommendations of the Expert Geriatrician set out in paragraphs 3229 and 3330 of this decision;

REJECTS the Defence request that the Accused be video-taped in the holding cell or that a hospital bed be provided in the courtroom;

DETERMINES that a stay of proceedings, adjournment or severance of the Accused's case to enable further medical testing or treatment is currently unwarranted and would unreasonably infringe upon the right of all Accused in Case 002 to a fair and expeditious trial;

FURTHER ADVISES the parties that upon implementation of measures set out in paragraphs 3229 and 3330 of this decision, the Chamber shall resume proceedings in relation to all witnesses, Civil Parties and experts scheduled to appear in Case 002/01, including those for whom IENG Sary has not waived his right to be present;

INDICATES that the Chamber may henceforth order the Accused's participation in proceedings from the holding cell pursuant to Internal Rule 81(5) where it considers that the interests of justice so require, except where

- a) the Accused opts to be physically present in the courtroom, and where the exercise of this right is not inconsistent with measures necessary to ensure the Accused's physical well-being or to ensure the smooth conduct of the trial;
- b) the Accused waives his right to be present during proceedings; or
- c) the Accused's absence from the courtroom or holding cell is occasioned by a change in his medical condition or is otherwise justified.

NOTES that in accordance with Internal Rule 104(4), immediate appeal of the present decision does not stay proceedings before the Trial Chamber.

Phnom Penh, 26 November 2012
President of the Trial Chamber