

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' JOINT RESPONSE TO NUON CHEA AND KHIEU
SAMPHAN'S SUBMISSIONS CONCERNING COURT HEARING SCHEDULE AND
FITNESS REVIEW**

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RESPONSE

A. Introduction

1. On 24 December 2013, the Trial Chamber (“Chamber”) requested that Defence counsel “file short submissions in writing by 15 January 2014, indicating whether they consider that the medical condition of their clients has changed and whether it is necessary to reassess their fitness to stand trial and/or their physical ability to participate during all scheduled trial days”.¹
2. On 15 January 2014, the Defence for Nuon Chea and Khieu Samphan filed their responses. Neither claimed their client was unfit to stand trial in Case 02/02. However, each separately requested a reduction of the hearing schedule.² Furthermore, Nuon Chea’s counsel asked for the appointment of an expert to conduct a comprehensive medical examination for the purpose of assessing Nuon Chea’s fitness to stand trial.³

B. A slight reduction in sitting time is appropriate in the circumstances

3. The Co-Prosecutors do not object to the Defence request for a reduction of the per-day hearing time during the deliberations on Case 02/01 through the filing of Parties’ submissions on the appeal of Case 02/01. Such a reduction assists the Chamber and all parties to discharge their duties outside the hearings in Case 002/02.
4. As the Prosecution acknowledged at the Trial Management meeting on 11 and 12 December 2013, a reduction in the sitting time in Case 002/02 while the judgment is being finalised in Case 02/01 is a reasonable measure given the increased demand that performing these simultaneous tasks is likely to have on the Chamber’s resources. Once the Judgment is delivered, regardless of the outcome, appeals from various or even all parties are likely. If the Judgment is delivered by the end of June 2014 as predicted, immediately thereafter, the parties will likely be engaged in preparing notice of appeals and appeal submissions and responses. This is certain to require some reduction of the sitting time in Case 002/02 to accommodate the parties, particularly the Defence

¹ **E301/5** Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings, 24 December 2013.

² **E301/7** Response to Trial Chamber's request for submissions concerning Nuon Chea's fitness review, 15 January 2014; **E301/6** Informations de la Défense de M. Khieu Samphan concernant l'aptitude et les modalités d'organisation des audiences, 15 January 2014.

³ **E301/7** Response to Trial Chamber's request for submissions concerning Nuon Chea's fitness review, 15 January 2014, paras 11-12, 15.

workload in the appeal process. Any reduction should continue until all appeal pleadings in Case 002/01 are filed. At that point, the Co-Prosecutors submit that Case 002/02 should revert to a full-time hearing schedule unless a showing is made that a more limited schedule is necessary in the interests of the health of the Accused in accordance with their condition at that time. Since Appeal submissions are not likely to be finalized until late 2014, any evaluation or determination of the ability of the Accused to sit on a full time schedule following appeal submissions would be premature at this time as the health condition of the Accused can change over this significant period.

C. A comprehensive assessment of Nuon Chea's fitness to stand trial is currently unnecessary and unwarranted

5. ICTY Chambers have confirmed that an accused will be deemed unfit to stand trial if, due to impaired capacities, he or she cannot effectively exercise his/her rights to a fair trial. An assessment into an accused's fitness does not "require[e] that the Accused should have the capacity to *fully comprehend* the course of the proceedings in the trial".⁴ Rather it necessitates the attainment of a minimum standard that is satisfied when the accused can plead, testify, instruct counsel, and understand the nature of the charges and their consequences at such a level that it is possible for the accused to participate in the proceedings and sufficiently exercise those rights⁵.

6. An inquiry into an accused's fitness to stand trial is not initiated as of right. In order to commence such an inquiry, the ICTY has established that there must be an "adequate reason" to question the Accused's capacity to comprehend the proceedings against them.⁶ The Defence submission incorrectly asserts that the burden of proof with respect to the fitness of the accused does not rest on any particular party.⁷ The Defence has the burden of demonstrating that such an adequate reason exists to require the commencement of an inquiry into the Accused's fitness to stand trial.⁸

⁴ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, (ICTY Trial Chamber), 26 May 2004 ("Strugar Decision") at para. 48 (emphasis in original).

⁵ Strugar Decision, *supra* note 4 at para. 36.

⁶ *Prosecutor v. Stanišić*, Case No. IT-03-69, Decision on Stanišić Defence's Motion on the Fitness of the Accused to Stand Trial (ICTY Trial Chamber), 27 April 2006 ("Stanišić Decision"); Strugar Decision, *supra* note 4 at para. 25.

⁷ E301/7, *supra* note 2.

⁸ Stanišić Decision, *supra* note 4.

7. The Special Panels for Serious Crime (Timor-Leste) have held that if the Court forms a “*significant concern* about the competence of [the accused] to stand trial” and such a concern has its foundations in a significant evidentiary base it will be appropriate to conduct an inquiry into the capacity of an accused person to stand trial.⁹ However, in the absence of any significant concern, an additional inquiry into an Accused person’s fitness to stand trial is unwarranted and unnecessary.
8. In situations where fitness to stand trial is an issue and there are significant material variations between expert opinions and medical evidence it may be necessary to appoint additional experts or to conduct further examinations.¹⁰ However, in Nuon Chea’s present case no such material variations exist, the views of medical experts have been largely consistent, and the current prognosis for Accused Nuon Chea is good.¹¹
9. The Defence’s assertions as to Accused Nuon Chea’s state of health do not disclose an adequate reason to hold an inquiry into his fitness to stand trial. These assertions are mere reproductions of evidence adduced from the March 2013 expert examination at which Nuon Chea was deemed to be fit to stand trial. No new medical evidence attesting to deterioration in Nuon Chea’s condition was provided in the Defence submission. Furthermore medical tests conducted since the March 2013 examination have not indicated a significant deterioration in Nuon Chea’s physical condition.
10. ICTY Chambers have held that considerations of expeditiousness will militate against further assessments of an accused’s fitness to stand trial in situations where there is no significant concern about his competence as well as the absence of any adequate reason that could lead to such a concern:

The Chamber has...the obligation...to ensure that the trial is fair and expeditious. Over the past months, it has spent considerable efforts to

⁹ *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, Case No. 01A/2004, Findings and Order on Defendant Nahak’s Competence to Stand Trial (Special Panels for Serious Crimes (Timor-Leste)), 1 March 2005 at para. 49.

¹⁰ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial (ICTY Trial Chamber), 12 April 2006 at para. 17.

¹¹ See e.g. **E10/166** Rapport médical hebdomadaire de Nuon Chea en date du 16-01-2014, 16 January 2014, noting that Nuon Chea is in overall “good haemodynamic condition”.

provide for facilities to accommodate the Accused's health concerns. This includes amongst others the possibility of reduce court sessions...and the possibility for the Accused to make use of a video-conference link...[T]here has been a constant discrepancy between [the Accused's] claims and the medical examinations. The Chamber has to find a fair balance between monitoring the Accused's health developments and focusing on hearing the case.¹²

11. In determining whether an adequate reason exists to question the Accused's capacity to fully comprehend the course of the proceedings, the Chamber may have regard not only to available medical records and expert opinions but also to its own observations of the Accused both during and after the proceedings. ICTY Chambers have held that factors relevant to this assessment include whether or not the accused: (1) was able to address the bench directly with statements that "appeared to the Trial Chamber to be quite collected, relevant, well structured and comprehensive";¹³ (2) appeared to be able to understand and follow the evidence, this includes potentially taking notes and paying attention";¹⁴ (3) appeared to demonstrate they were following the proceedings by, for example, raising "a concern that he could not follow proceedings because of some problem with his sound equipment or video display;"¹⁵ (4) actively instructed their counsel;¹⁶ (5) and was generally "appropriately and well behaved."¹⁷ The Chamber had occasion to observe Nuon Chea's conduct as recently as during closing statements in Case 002/01 in October 2013, during which Nuon Chea addressed the court for about 90 minutes in a clear and articulate way from the courtroom itself.¹⁸ In the Co-Prosecutors' submission, nothing about his behaviour during those hearings provides any objective reason to inquire further into Nuon Chea's fitness to stand trial.
12. It is important to note that the Nuon Chea Defence do not assert that he is unfit to stand trial. Rather, they only assert that his ability to fully concentrate and assist the Defence is limited to 90 minute sessions and a certain number of court sittings per week. The Prosecution proposes that the Trial Chamber adopt the limited trial schedule sought by the Defence teams, with the exact schedule determined by the Trial Chamber, through

¹² *Prosecutor v Jovica Stanišić*, Case No. IT-03-69-T, Decision on Urgent Defence Request for Further Submission of Psychiatric Medical Expert and Decision on Defence Motion to Redact Medical Records (ICTY Trial Chamber), 6 August 2009 at para. 11.

¹³ Strugar Decision, *supra* note 4 at para. 51.

¹⁴ Strugar Decision, *supra* at para. 51; see also *Prosecutor v. Florencio Tacaqui*, Case No. 20/2001, Judgement (SPSC), 9 December 2004 at p. 9.

¹⁵ Strugar Decision, *supra* note 4 at para. 51.

¹⁶ Strugar Decision, *supra* note 4 at para. 51.

¹⁷ Strugar Decision, *supra* note 4 at para. 51.


¹⁸ **E1/237.1**, TC Transcript, 31 October 2013 (Nuon Chea), 09.03.56 - 09.57.28 and 10.18.00 - 10.52.47.

the filing of the appeals, likely to be near the end of 2014. Thus, the remedy sought by each Accused will be fully met for at least the next nine months. Once the parties have filed all appeal submissions, if the Trial Chamber is presented with significant evidence questioning the ability of the Accused to resume a full-time sitting schedule, the issue can be re-evaluated at that time.

D. Requested Relief

13. For these reasons, the Co-Prosecutors respectfully request the Trial Chamber to:
- a. Deny Nuon Chea's request for a comprehensive medical examination;
 - b. Accept the request of the Defence to reduce the sitting time for the Case 002/02 trial through the period of drafting of the Case 002/01 judgment, and until the conclusion of pleadings on any potential appeals in Case 002/01; and
 - c. Consider whether any reductions are necessary thereafter on the evidence of the condition of Nuon Chea and Khieu Samphan presented to the Trial Chamber at that time.

Respectfully submitted,

Date	Name	Place	Signature
21 January 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
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