

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**REPLY TO CO-PROSECUTOR'S RESPONSE TO NUON CHEA'S
URGENT APPLICATION FOR APPOINTMENT OF A FITNESS EXPERT**

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I. INTRODUCTION

1. Pursuant to Rule 32 of the ECCC Internal Rules (the ‘Rules’) and Article 8.4 of the Practice Direction on ‘Filing of Documents Before the ECCC’,¹ counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits this reply to the ‘Co-Prosecutors’ Response to Nuon Chea’s Urgent Application for Appointment of a Fitness Expert’ (the ‘Response’),² which was notified to the parties on 9 January 2011. In accordance with this Chamber’s decision on the Defence request for an extension of time in which to submit its reply,³ this document has been timely filed.

II. SUBMISSIONS IN REPLY

A. The Defence Reserves its Rights to Make Further Submissions and Requests Clarification as to When the Chamber Intends to Issue a Decision

2. The Trial Chamber has advised the parties that ‘*modalities* for the assessment of the fitness to stand trial of all Accused will also be a subject for discussion during the forthcoming Trial Management Meeting’.⁴ Accordingly, as an initial matter, the Defence hereby reserves its right to make further submissions at that stage of the proceedings. Additionally, the Defence hereby requests the Chamber to clarify—as soon as possible—whether it intends to make a substantive decision on the instant application in advance of the Trial Management Meeting.

B. The Application is, by Definition, an Urgent One

3. The Office of the Co-Prosecutors (the ‘OCP’) has taken issue with the fact that the Defence filed its ‘Urgent Application for Appointment of Fitness Expert’ (the ‘Application’)⁵ as an *urgent* one: ‘There is [...] no legitimate basis for the Defence to

¹ *Practice Direction ECCC/01/2007/Rev5*. According to Article 8.4: ‘A reply to a response shall only be permitted where there is to be no oral argument on the request, and such reply shall be filed within 5 calendar days of notification, in the ECCC official language which the party has elected under Article 2.2, of the response to which the participant is replying.’

² Document No E-30/1, ‘Co-Prosecutor’s Response to Nuon Chea’s Urgent Application for Appointment of a Fitness Expert’ (the ‘Response’), 8 February 2011, ERN 00642927–00642933.

³ See Document No E-30/2/1, Memorandum from Susan Lamb to the Defence, re: ‘Trial Chamber’s response to “Urgent Request for Additional Time to File Reply to Co-Prosecutors’ Response to Nuon Chea’s Urgent Application for Appointment of a Fitness Expert” (E30/2)’, 15 February 2011, ERN 00644954 (the ‘Extension Memo’).

⁴ Extension Memo, p 1 (emphasis added).

⁵ Document No E-30, ‘Urgent Application for Appointment of Fitness Expert’ (the ‘Application’), 2 February 2011, ERN 00641421–00641436.

now seek to have the Trial Chamber treat this matter as an urgent application.’⁶ The suggestion that: ‘[t]he Defence has been effectively participating in these court proceedings for over three years, and refused to cooperate in late 2009 when the Co-Investigating Judges (the ‘CIJs’) appointed two psychiatric experts to evaluate whether the Accused was fit to stand trial’,⁷ is factually misleading and, ultimately, unhelpful. As noted in the Application, the Defence did not *refuse to cooperate* with the CIJs; rather, it attempted to obtain from the OCIJ necessary and reasonable assurances that the proposed experts would be instructed to operate in accordance with the applicable law and the Accused’s fundamental rights.⁸ Only when such assurances were not forthcoming did the Defence advise Nuon Chea that it was against his interests to participate in such a potentially damaging exercise.⁹ In any event, given the procedural posture of Case 002, there is every reason to treat the fitness issue with the urgency it deserves.¹⁰

**C. The Fitness of the Accused, and Not His
Lawyers, is the Primary Focus of the Inquiry**

4. Whether or not the Defence—that is, the *lawyers* representing Nuon Chea—have been participating in the proceedings, ‘effectively’¹¹ or otherwise, is of limited moment. While the assistance of counsel is one of many factors to consider in making a fitness determination, the crux of any proper evaluation is Nuon Chea’s personal ability to participate in the proceedings. The fact that the Defence has taken a vigorous and comprehensive approach to the protection of Nuon Chea’s rights and interests¹² is not dispositive (or even particularly demonstrative) of the issue of the Accused’s fitness to stand trial. Had the Defence filed 150,000 (instead of merely 150¹³) documents during the judicial investigation, Nuon Chea’s competence would be as uncertain as it remains today.

⁶ Response, para 2.

⁷ Response, para 2.

⁸ See Application, para 5.

⁹ *Ibid.*

¹⁰ *N.B.* The Defence took a similar stance during the judicial investigation, filing a request for a fitness evaluation at the first instance. See Document No **D-54**, ‘Application for Appointment of Expert’, 21 December 2007, ERN 00156972–00156988.

¹¹ Response, para 2; see also *ibid.*, para 7 (‘[F]or over three years, the Defence has effectively participated in the complex judicial investigation conducted by the [CIJs] and numerous appeals before the [PTC].’) and para 8 (‘In this case, there can be no question that the Defence has actively and effectively participated in the judicial investigation and other pre-trial proceedings.’)

¹² See Response, para 8 (where the OCP recounts the numerous filings made by the Defence on behalf of Nuon Chea).

¹³ *Ibid.*

D. The Defence Has Satisfied the Appropriate Standard

5. Substantively, the Response raises more questions than it answers. As a general matter, the OCP has failed to address the Defence position that a proper fitness assessment in the instant case must—while starting with *Strugar*¹⁴—take due account of the Accused’s current physical state and the complexity of the instant proceedings.¹⁵ More specifically, the Response is unpersuasive on the following points:
- a. Citing *Strugar*, the OCP notes: ‘[t]he burden of proving that an Accused is *not fit to stand trial* is on the defence, and the standard of proof is the balance of probabilities.’¹⁶ Yet, as noted in the Application,¹⁷ the Defence is not suggesting (at this point) that Nuon Chea is unfit to stand trial. Rather, it has simply moved the Chamber for the appointment of a qualified expert to evaluate the issue. Accordingly, a lower threshold than the one articulated in *Strugar* is appropriate.¹⁸
 - b. Contrary to the OCP’s suggestion,¹⁹ there is no rule against reliance on the subjective complaints of an accused person in determining whether or not to appoint an expert. Nor are the observations of counsel without probative value in this regard. The Chamber can and should consider such submissions (and assign them any appropriate weight), in conjunction with objective factors set out in the Application.²⁰
 - c. Nuon Chea’s previous *medical* assessments have been made exclusively by physicians that lack the necessary expertise to assess fitness to stand trial, as that concept is defined in law. Accordingly, the OCP’s suggestion that these reports²¹ lend support to its position that no “adequate reason” [exists] to doubt the Accused’s competence to stand trial²² is misplaced.

¹⁴ IT-01-42-T, *Prosecutor v Strugar*, ‘Decision re the Defence Motion to Terminate Proceedings’, 26 May 2004 (the ‘Strugar Decision’).

¹⁵ See Application, paras 25–29.

¹⁶ Response, para 38, n 3 (emphasis added).

¹⁷ See Application, para 22.

¹⁸ *Ibid.*

¹⁹ See Response, para 4 (The Defence ‘relies solely on subjective complaints by the Accused regarding his condition and arguments or observations of his counsel’.)

²⁰ *N.B.* While counsel may have never ‘advised the Court that they were unable to obtain his informed consent to any necessary action’, the Defence has indeed informed this Chamber that Nuon Chea may be ‘[un]able to competently and effectively participate in these legal proceedings’. Response, para 10.

²¹ See Response, paras 5(a)–(e).

²² Response, para 5.

- d. While Nuon Chea's memory *may* very well be 'appropriate for his age and condition'²³ or 'in a normal state in accordance with his age',²⁴ these statements beg the question: are such age and condition at an acceptable level for these complex, protracted, and physically/mentally taxing proceedings. Moreover, assuming these assessments were ever valid and/or relevant in the first place, do they continue to hold today—many months after they were initially made.²⁵ The 'weekly medical examinations and reports'²⁶ are limited to physical health and not useful in this regard. Nor is the paper review of Nuon Chea's previous history conducted by Drs Philip Brinded and Ka Sunbaunat.²⁷ The simple fact remains: a forensic fitness evaluation by qualified experts has not been accomplished to date.
- e. While perhaps 'lucid', the Accused's statements at his Initial Appearance and Adversarial Hearing were hardly 'lengthy'.²⁸ In any event, neither Nuon Chea's performance at two extremely short hearings in September 2007 nor the invocation of his right to remain silent before the OCIJ²⁹ are indicative of his appreciation of, and ability to participate in, the byzantine scenario about to unfold before the Trial Chamber.
6. In short, contrary to the OCP's assertion, the Defence has indeed satisfied the 'legal requirement for the appointment of a fitness expert to examine the Accused'.³⁰

E. The Defence Has Reservations Concerning the Previous Experts

7. The OCP has submitted that it 'would not oppose the appointment by the Trial Chamber of the two psychiatric experts previously appointed by the [CIJs] (Professors Philip Brinded and Ka Sunbaunat) to conduct an examination of the Accused to evaluate his

²³ Response, para 5(a) (citing Document No **D24/II**, Medical Report of Dr Nopparat Panthongwiriyaikul, 14 October 2007, ERN 00148831-00148833). *N.B.* The Defence does not subscribe to this position.

²⁴ Response, para 5(b) (citing Document No **D24/IV**, Medical Report of Dr Liv Chhinh, 19 October 2007, ERN 00149992). *N.B.* The Defence does not subscribe to this position.

²⁵ *N.B.* As noted, the proposed experts suggested that a new evaluation should be undertaken at the trial stage. See Application, para 5 (citing Document No **B-35/7**, 'Nuon Chea Deposition of Psychologic Expertise' (the 'Expert Report'), 2 December 2009, ERN 00407300-00407305).

²⁶ Response, para 6.

²⁷ See Response, para 5(f) (citing Document No **B-35/7**, Expert Report: 'Cognitive impairment such as difficulty with short term memory *has been noted* as consistent with chronological age.') (emphasis added). *N.B.* At no time have these doctors undertaken an actual, physical assessment of Nuon Chea.

²⁸ Response, para 9.

²⁹ See Response, para 9 (citing Nuon Chea's appearance before the OCIJ on 14 December 2009).

³⁰ Response, para 11.

fitness to stand trial, pursuant to the criteria set forth in the *Strugar* decision'.³¹ The Defence, however, would likely oppose such appointment on the following grounds.

8. The Defence's primary concern lies with the qualifications of the proposed experts. Given the complicated nature of the evaluation requested, the Defence seeks the appointment of skilled forensic professionals with demonstrated experience in undertaking fitness evaluations of elderly and infirm individuals facing complex (preferably international-criminal-law related) judicial proceedings. In this regard, should the Chamber find the Defence's further objections (paras 9–11, *infra*) unpersuasive, the Defence requests the immediate disclosure of the official (certified) CVs of the recommended doctors, as well as the opportunity to make additional submissions with respect to such documentation. In the event the Chamber has other qualified professionals in mind, the Defence hereby seeks similar information (and time to respond thereto) with respect to those individuals.
9. As to the issue of professionalism, it *appears*—from a review of the Case File—that officials of Calmette Hospital (and possibly Dr Ka Sunbaunat) *may be* withholding relevant information regarding the preparation of Ieng Thirith's psychiatric expert report from the ECCC.³² The disclosure of such material was requested by the OCIJ, as well as the ECCC Office of Administration, in 2010; yet counsel for Ieng Thirith apparently has not received the information to date. In assessing Dr Ka Sunbaunat's qualifications, the Defence urges the Trial Chamber to take this information into consideration. It goes without saying that any appointed fitness expert to these proceedings must be willing and able to cooperate with the judges and parties on this very important issue.
10. While the OCP has suggested that consistency in the application of the appropriate fitness standard may be important,³³ there is simply no reason to believe that *any* qualified individual (properly instructed by the Trial Chamber) would be incapable of consistently applying the correct test. Moreover, the Defence has previously argued that the proposed experts were insufficiently instructed by the OCIJ, thus applying an inadequate standard

³¹ Response, para 11.

³² See Document No **B-37/9/19.1**, 'Note re Request for Assistance in Obtaining Disclosure of Documents', 22 June 2010, ERN 00539796–00539798.

³³ See Response, para 11 ('Given that these particular experts are already familiar with the Accused's prior medical records and conditions, and that they have also conducted evaluations of Ieng Thirith and Ieng Sary, their appointment to complete an evaluation of the Accused would be both efficient and most likely result in consistent standards amongst the competency evaluations of the Accused.')

themselves.³⁴ In any event, undoubtedly of paramount significance are competency (as addressed above in paragraph eight) and effectiveness. As to the latter, the Defence has identified three factors which *could* lead Nuon Chea to be reluctant to participate fully—as the Defence will advise him to do, subject to adequate protection of his right against self-incrimination³⁵—in any examination conducted by the proposed experts:

- a. the proposed experts' *apparent* association with the OCIJ: the Defence has previously questioned the CIJs' commitment to respecting Nuon Chea's rights, both as a general matter,³⁶ and in specific connection to the fitness issue;³⁷
- b. Dr Ka Sunbaunat's *apparent* attitude toward his responsibilities vis-à-vis the court and the parties: as discussed above;³⁸ and his *apparent* associations with Calmette Hospital, an RGC institution (the Defence has consistently complained of government interference in the work of the tribunal);³⁹ and
- c. the proposed experts' *apparent* associations with three individuals who have taken positions adverse to the Accused: both proposed experts have prepared reports on Ieng Sary and Ieng Thirith,⁴⁰ and Dr Ka Sunbaunat has prepared a report on Kaing Guek Eav (alias 'Duch').⁴¹

11. Experts who appear before the Trial Chamber must, by definition, be independent and impartial in the performance of their court-appointed duties. Moreover, they must approach their work with a spirit of integrity and professionalism. Given the factors outlined in the previous paragraph, Nuon Chea may perceive the proposed experts to be lacking in these crucial qualities and, accordingly, receive them with less than the full measure of trust and cooperation necessary for a proper fitness evaluation.

³⁴ See Application, n 80.

³⁵ See Application, paras 30–32.

³⁶ See 'Preliminary Objection Concerning an Issue Requiring the Termination of Prosecution – Lack of a Fair Investigation', 14 February 2011 (the 'Fair Trial Objection'), paras 13–17. *N.B.* This document has not yet been placed on the Case File.

³⁷ See Application, para 5.

³⁸ See para 9, *supra*.

³⁹ See Fair Trial Objection, paras 3–12.

⁴⁰ See, e.g., Document No **B-37/9/8**, 'Deposition of Psychologic Expertise', 2 December 2009, ERN 00407278–00407286.

⁴¹ See Document No **D-288/6.155**, 'Experts Summons of Ka Sunbaunat', 21 August 2009, ERN 00367759–00367760.

III. CONCLUSION

12. For the reasons stated herein, as well as those set out in the Application, the Defence submits that: (i) there is undoubtedly “adequate reason” to question the Accused’s capacity, with the assistance of his counsel, to participate effectively in trial proceedings;⁴² and (ii) the Trial Chamber should—in consultation with the Defence—appoint an appropriate expert or experts to adequately and effectively evaluate such capacity.

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⁴² Response, para 3.