

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

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URGENT APPLICATION FOR APPOINTMENT OF FITNESS EXPERT

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I. INTRODUCTION

1. Pursuant to Rules 32 of the ECCC Internal Rules (the 'Rules'), counsel for the Accused Nuon Chea (the 'Defence') submit this application to the Trial Chamber for an order appointing a qualified expert to determine whether Nuon Chea is physically and mentally fit to stand trial.
2. For the reasons stated below, the Defence submits that: (i) the application is admissible; (ii) because Nuon Chea's competency to stand trial is objectively uncertain, this Chamber should order the necessary expert assessment; (iii) in so doing, any assigned expert/s (the 'Proposed Expert/s') should be specifically instructed to conduct a fitness test that adequately reflects the complexity of the ECCC proceedings and the realities of the Accused's physical and mental condition; and (iv) any expert report should be utilized *strictly* for the purpose of determining Nuon Chea's fitness to stand trial. While Nuon Chea will cooperate in any such undertaking to the degree it does not undermine his privilege against self-incrimination, he will not—in principle—waive his right to be physically present at any stage of his upcoming trial.
3. Given the personal and private nature of the facts supporting the instant application, the Defence requests that it be classified as strictly confidential. However, in light of the important legal issues raised herein and the more general interest in transparent trial proceedings, a public redacted version of these submissions should be made available.

II. PROCEDURAL HISTORY

4. On 21 December 2007, the Defence requested the Office of the Co-Investigating Judges (the 'OCIJ') to appoint 'an expert to determine [Nuon Chea's] fitness to stand trial' arguing that 'the issue [was] of ongoing concern and [had] not [...] be assessed in a comprehensive and definitive manner'.¹ This application was summarily rejected by the OCIJ.² On appeal, the Pre-Trial Chamber (the 'PTC') held that, while 'charged persons are in principle entitled to [...] [a fitness determination] during the investigation and pre-trial phase',³ the Defence request was not factually justified.⁴

¹ Document No D-54, 'Application to Appoint Expert', 21 December 2007, ERN 00156972–00156988, para 1.

² Document No D-54/IV, OCIJ Letter to Son Arun, 3 March 2008, ERN 00171400.

³ Document No D-54-V-5, PTC 'Decision on Nuon Chea's Appeal Regarding Appointment of an Expert', 22 October 2008, ERN 00233587–00233598 (the 'Nuon Chea Fitness Decision'), para 27 ('In this respect, the [PTC] finds that the issue of fitness does arise at this stage, contrary to the assertion by the Co-Investigating Judges.')

⁴ Nuon Chea Fitness Decision, paras 28–43.

5. Nearly two years after the Defence filed its original application, the OCIJ assigned two psychiatrists (the 'Previous Experts') to evaluate whether Nuon Chea was fit to stand trial.⁵ The Defence advised the Accused not to cooperate in the proposed examinations because, among other things, the Previous Experts' mandate was impermissibly vague and raised concerns that the results of the examination would be put to improper use.⁶ The OCIJ continued to instruct the Previous Experts,⁷ yet their attempts to meet with Nuon Chea were unsuccessful and they were ultimately unable to complete their assignment.⁸ While the Previous Experts noted that '[a] review of [Nuon Chea's] medical files reveals no past history of mental disorder',⁹ they concluded that '[a]ny opinion as to mental disorder or fitness to stand trial would nevertheless at this stage be an "interim" view and *would need to be reassessed at the time any trial proceedings were convened*'.¹⁰
6. This Chamber was seised of the case file on 14 January 2011.¹¹

III. RELEVANT FACTS

7. [REDACTED]
8. [REDACTED]
 - a. [REDACTED]

⁵ Document No B-35, 'Expertise Order', 17 September 2009, ERN 00379010-00379013.
⁶ Document No B-35/2, Defence Letter to OCIJ, 14 October 2009, ERN 00389599-00389603. *N.B.* The Defence made clear that its letter 'should in no way be construed so as to preclude a later claim by the Defence that [Nuon Chea] is not fit to stand trial, or to preclude a later request for a psychiatric evaluation'. *Ibid.*
⁷ See Document No B-35/4, OCIJ Letter to the Experts, 19 October 2009, ERN 00391846.
⁸ See Document No B-35/6.2, Experts' Letter to the OCIJ, 26 October 2009, ERN 00392356; Document No B-35/7, 'Deposition of Psychologic Expertise', 2 December 2009, ERN 00407300-00407305 (the 'Previous Expert Report'), p 5.
⁹ Previous Expert Report, p 6; see also Document No D-427, 'Closing Order', 16 September 2010, ERN 00604508-00605246, para 1584 (where the Co-Investigating Judges take note of this point).
¹⁰ Previous Expert Report, p 6 (emphasis added).
¹¹ See Document No E-9, 'Order to File Material in Preparation for Trial', 17 January 2011, ERN 00635754-00635759, para 2 ('[...] 14 January 2011 [was] the date upon which the Trial Chamber greffiers were formally forwarded the Case File from the Pre-Trial Chamber.')

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

- b. [Redacted]
- c. [Redacted]
- d. [Redacted]
- e. [Redacted]
- f. [Redacted]

15 [Redacted]

16 [Redacted]

17 [Redacted]

18 [Redacted]

19 [Redacted]

20 [Redacted]

- k. At a public hearing before this Chamber on 31 January 2011, the Accused was similarly excused for the same reasons.



IV. RELEVANT LAW

A. Fitness to Stand Trial

1. *Appointment of an Expert*

9. The Rules explicitly contemplate an expert determination of an Accused's fitness to stand trial. Specifically, Rule 32 provides as follows:

The [...] Chambers may, for the purpose of determining whether a Charged Person or Accused is physically and mentally fit to stand trial, or for any other reasons, or at the request of a party, order that they undergo a medical, psychiatric, or psychological examination by an expert. The reasons for such order, and the report of the expert, shall be recorded in the case file.

A fitness examination may be ordered at various stages of the proceedings irrespective of whether previous evaluations have been undertaken.²⁶ The Rules clearly contemplate an early assessment of the issue prior to trial: pursuant to Rule 79(7), one of the distinct purposes of the trial management meeting is to allow 'the Accused to raise issues in relation [to] his or her mental and physical condition'.

2. *The Pre-Trial Chamber Approach*

10. During the judicial investigation, the PTC had occasion to adopt certain positions in response to applications for fitness evaluations by Nuon Chea and Ieng Sary. These are summarized as follows:
- a. The scope of Rule 32 'is sufficiently broad to encompass' comprehensive and detailed requests for fitness evaluations.²⁷

²⁶ See Rule 31(10) ('[T]he [...] Accused [...] or [his] lawyers [...] may request [...] the Chambers, as appropriate, to appoint additional experts to conduct new examinations or to re-examine a matter already the subject of an expert report. The request must be in writing and give reasons. The request shall be ruled upon by [...] the Chambers as soon as possible and in any event before the end of the [...] proceedings.')

²⁷ See Document No A-189-I-8, PTC 'Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert', 21 October 2008, ERN 00233433-00233443 (the 'Ieng Sary Fitness Decision'), para 27; Nuon Chea Fitness Decision, para 19.

- b. A request for a fitness evaluation, ‘*by its nature, [...] requires timely attention*’.²⁸
- c. Because ‘the ECCC constitutive documents, the Internal Rules, and Cambodian law do not define the precise meaning of “fitness to stand trial”,’ guidance should be sought ‘in procedural rules established at the international level’.²⁹
- d. The general test—adopted primarily from *Strugar*,³⁰ and *Stanisic*,³¹ and, to a lesser extent, *Nahak*³²—is: ‘whether there is an adequate reason to question the Charged Person’s capacity to participate, with the assistance of his Co-Lawyers, in the proceedings and sufficiently exercise his rights during the investigation’.³³

²⁸ Ieng Sary Fitness Decision, para 22 (emphasis added).

²⁹ Ieng Sary Fitness Decision, para 28; Nuon Chea Fitness Decision, para 20 (citing Article 12 of the ECCC Agreement).

³⁰ See *Prosecutor v Strugar*, Case No IT-01-42-T, ‘Decision re the Defence Motion to Terminate Proceedings’, 26 May 2004 (the ‘Strugar Decision’) (in which Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’) acknowledged the concept of fitness to stand trial as encompassing an accused person’s fitness to plead, to testify, to instruct counsel, and to understand the nature of the charges, the details of the evidence, and the course and consequences of the proceedings). In *Strugar*, the following salient principles were identified and relied upon: (i) the enjoyment of an accused person’s fundamental rights presupposes a minimum level of mental and physical capacity to comprehend them; (ii) where such capacity is adversely affected by any mental or physical disorder the effective exercise of those rights may be hindered or precluded; (iii) the right to the assistance of counsel may compensate for any deficiency in capacity *but only where the accused person is able to sufficiently instruct counsel in the preparation of his defence*; (iv) in case of temporary unfitness, the proceedings should be adjourned until the impairment or incapacity is appropriately remedied; (v) the standard of proof is the balance of probabilities; (vi) the determination should be based on relevant expert opinion informed and guided by the applicable legal standards. *Ibid*, paras 21–24, 38–39, 46–49 (emphasis added).

³¹ *Prosecutor v Stanisic and Simatovic*, Case No IT-03-69, ‘Decision on Stanisic Defence’s Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes’, 27 April 2006 (the ‘Stanisic Decision’).

³² See *Prosecutor v Josep Nahak*, Case No 01A/2004, ‘Findings and Order on Defendant Nahak’s Competence to Stand Trial’, Judge Philip Rapoza, 1 March 2005 (the ‘Nahak Decision’), para 24 (in which the Special Panels for Serious Crimes in East Timor (Dili District Court) determined that ‘internationally recognized principles and norms’ require a fitness evaluation (as well as a subsequent hearing and judicial determination) ‘when the issue of a defendant’s competence to stand trial has been adequately raised’). In *Nahak*, the court found that the rationale for such fitness evaluation is three-fold: (i) *respect for the accused person’s fundamental rights to counsel, to be informed of the charges against him, and to adequate time and facilities to prepare a defence*: ‘Without [the capacity to understand and exercise these rights] on the part of a defendant, the rights themselves become meaningless.’; (ii) *the ban against trials in absentia*: ‘[T]hrough physically present in the courtroom, [an unfit accused person] is in reality afforded no opportunity to defend himself.’; and (iii) *the integrity of the judicial process*: ‘In circumstances where a defendant cannot comprehend the nature of the proceedings against him, cannot rationally consult with his attorney or cannot assist in the preparation of his defense, the results of the trial are unlikely to be either fair or accurate. Society has an interest in ensuring that the conviction of a defendant is not the result of his helplessness at trial.’ Nahak Decision, paras 38, 46, 48. For such evaluation ‘to be ordered there must be some degree of doubt as to the defendant’s competence to stand trial’ and ‘the level of concern on the part of the court relative to the defendant’s competence must be significant’. *Ibid*, paras 49, 50. An accused person is fit to stand trial if he has: ‘(1) A rational as well as a factual understanding of the charges against him; (2) A rational as well as a factual understanding of the nature and object of the proceedings against him; and (3) A present ability to consult with his lawyer and to assist in the preparation of his defence with a reasonable degree of rational understanding’. *Ibid*, para 54. ‘A defendant who is unable to do more than agree with his attorney because he does not have the capacity to do otherwise cannot be described as competent, even though represented by counsel.’ *Ibid*, para 132.

³³ Ieng Sary Fitness Decision, para 41; Nuon Chea Fitness Decision, para 35.

- e. The burden is on the Defence to justify the appointment of a fitness expert.³⁴
11. In terms of the particular meaning of ‘fitness to stand trial, the PTC explicitly adopted the formulation established by *Strugar* (the ‘Strugar Test’):

The Trial Chamber of the ICTY also found in *Strugar* that an individual’s fitness to stand trial encompasses his/her capacity ‘to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify’.³⁵

Less clear, however, is the extent to which the PTC considered other relevant jurisprudence and/or scholarship in arriving at this position. Yet such a survey would undoubtedly assist the Trial Chamber in formulating a fitness test that will do justice to the sort of proceedings that are expected in Case 002 at the ECCC.

3. Other Approaches

12. Refinements to the broad criteria articulated in *Strugar* are contained in a number of other approaches to the issue of fitness to stand trial, for example: the Fitness Interview Test–Revised Edition (the ‘Fitness Interview Test’),³⁶ the MacArthur Competence Assessment Tool–Criminal Adjudication (the ‘MacArthur Test’),³⁷ and a test advanced by the Australian High Court (the ‘Australian Test’).³⁸ In particular, these tests address the following factors in greater detail:

- a. *The accused’s rational and factual understanding of the proceedings*

This includes an appreciation of: the accused’s fundamental rights (e.g. to offer evidence of innocence and challenge allegations, to remain silent, protection against self-incrimination, possibility of appeal); the fairness of his treatment by the court; the roles of the judges, prosecuting attorneys, and defence counsel; the nature and quality of his assistance by counsel; the expectation that the accused should fully instruct his defence team; the elements of the crimes charged; any available pleas; any applicable burdens/standards of proof/persuasion; the

³⁴ Ieng Sary Fitness Decision, para 46 (the PTC concluded there was ‘no reason justifying the appointment of a psychiatric expert’); Nuon Chea Fitness Decision, para 41 (‘the request for the appointment of an expert to assess the Charged Person’s fitness to stand trial and capacity to participate effectively in his defence is not justified’). *N.B.* The PTC affirmed, on factual grounds, the denial of both applications.

³⁵ Nuon Chea Fitness Decision, para 22 (citing *Strugar* Decision, para 36).

³⁶ See R Roesch, PA Zapf, SL Golding & JL Skeem, *Defining and Assessing Competency to Stand Trial*, in IB Weiner & A K Hess (Eds), *Handbook of Forensic Psychology, 2nd Ed.* (Wiley 1999) pp 11–12; D Nussbaum, M Hancock, I Turner, J Arrowood, S Melodick, *Fitness/Competency to Stand Trial: A Conceptual Overview, Review of Existing Instruments, and Cross-Validation of the Nussbaum Fitness Questionnaire* (Oxford 2007), pp 51–53.

³⁷ See Roesch *et al.*, n 37 *supra*, pp 12–13; Nussbaum *et al.*, n 37 *supra*, pp 53–58.

³⁸ See *Subramaniam v The Queen* [2004] HCA 21, 211 ALR 1, at 40–41.

implications of testimony (the accused's own and others); applicable sentencing principles, including the likelihood and severity of any potential sentence.³⁹

b. *The accused's capacity to testify*

This includes his ability to apply himself to the proceedings in an informed and constructive way;⁴⁰ as well as his capacity to think, concentrate, and speak rationally, calmly, and logically in court.⁴¹

c. *The accused's capacity to instruct defence counsel*

As clarified in *Strugar*, this capacity can be assessed according to criteria such as: the accused's apprehension of the bases for his defence and his ability to: learn new information; recall pertinent information; focus his attention for extended periods of time; and appreciate the likely consequences of his posture in court.⁴² Further elaboration includes the accused's ability to: relate to counsel; communicate facts to counsel; plan his legal strategy; and otherwise engage in his own defence.⁴³ In particular, this includes the mental capacity to instruct counsel on the manner in which adverse evidence should be properly tested.⁴⁴

13. This is not necessarily an exhaustive list of criteria. A truly comprehensive fitness evaluation should include the identification and assessment of psychopathological items such as: disturbance of thought, consciousness, communication, and/or memory; delusional processes; hallucinations; unmanageable or disturbing behaviour; mental retardation; and/or general impairment of judgement and insight,⁴⁵ as well as whether any medication or other treatment is necessary to maintain competency and any attendant effect of such measures on demeanor, affect, and ability.⁴⁶
14. In the final analysis, the proper fitness test to be applied is one that consolidates *all* relevant criteria and reflects the particular character of the accused as well as the idiosyncrasies of the proceedings. Because the meaning of fitness to stand trial is so highly contextualized, its evaluation depends upon the seriousness and complexity of the

³⁹ See McArthur Test.

⁴⁰ See Australian Test.

⁴¹ See Strugar Decision.

⁴² Strugar Decision, para 49.

⁴³ See Fitness Interview Test, Australian Test.

⁴⁴ See Fitness Interview Test, Australian Test.

⁴⁵ See, generally, SL Golding, *Training Manual: Interdisciplinary Fitness Interview-Revised*, University of Utah, Department of Psychology (1993), pp 31–43.

⁴⁶ See, e.g., Utah Code Annotated §77-15-5 (1994).

charges, the challenges facing the accused in the given case, and the relationship between him and his counsel.⁴⁷ In making the assessment, the court should take due account of the accused's age, intellectual capacity, and medical condition, with the ultimate goal of promoting optimum understanding of, and participation in, the complex trial process.

4. Burden and Standard of Proof

15. The PTC approach suggests that the burden of proof rests on the Defence.⁴⁸ However, in *Nahak*, the trial court regarded such an allocation as unreflective of general and customary international practice.⁴⁹ Rather than placing the burden on either party, Judge Riposa concluded that—given the lack of clarity on the issue—it was in the interests of justice for the court to decide the matter without reference to any particular onus that might otherwise be imposed on the Defendant.⁵⁰ The generally accepted standard of proof is the balance of probabilities.⁵¹ In other words, in order to proceed, it must be more likely than not that an accused is fit to stand trial.

5. Consequences of Unfitness

16. As noted in *Strugar*, 'the consequences of finding an accused unfit to stand trial are likely to vary according to the circumstances'.⁵² Depending on the severity of any incapacity, the appropriate remedy could take the form of an outright discontinuance;⁵³ a stay of the proceedings pending treatment and improvement;⁵⁴ or the imposition of truncated/modified proceedings designed to suit the accused's limited capabilities.⁵⁵ In any event, there is no basis for a trial 'to continue while an accused is unfit'.⁵⁶ In other words, any degree of

⁴⁷ See I Freckelton, *Rationality and Flexibility in Assessment of Fitness to Stand Trial*, 19 International Journal of Law and Psychiatry (1996), p 48.

⁴⁸ See *Strugar* Decision, para 38.

⁴⁹ See *Nahak* Decision, para 66.

⁵⁰ See *Nahak* Decision, para 67.

⁵¹ See *Strugar* Decision, para 38.

⁵² *Strugar* Decision, para 39 ('[T]here appears no statutory or other basis for a trial before [the ICTY] to continue while an accused is unfit to stand trial. Moreover, in a case where the unfitness to stand trial is a temporary condition, it may prove appropriate to merely adjourn the trial and to continue the trial when the accused has sufficiently recovered. Other cases may require that a trial be abandoned. It may also be the case that an impairment of capacity is of such a nature and effect that measures can be taken to sufficiently alleviate the impairment, or its effect, so that the trial can continue.')

⁵³ In cases where there is no chance of an improvement in condition, the proceedings should be terminated. See *Strugar* Decision, paras 19, 39 (Although not explicitly mentioned in the ICTY's statute, rules, or jurisprudence, both parties agreed that if the accused were found to be unfit, the trial should be terminated.); see also *R v Secretary of State for Home Department ex parte The Kingdom of Belgium and R v Secretary of State for Home Department ex parte Amnesty International Ltd and five other applicants*, 15 February 2000.

⁵⁴ See *Strugar* Decision, para 39.

⁵⁵ See *Strugar* Decision, para 39.

⁵⁶ *Strugar* Decision, para 39.

unfitness must be sufficiently ameliorated in order to proceed. International criminal tribunals have been particularly mindful of the health constraints of elderly and infirm defendants and have altered the schedule of proceedings accordingly where the stress of the trial threatened to exacerbate existing medical conditions.⁵⁷

B. The Right to Be Tried in One's Presence

17. The right to be tried in one's presence finds universal recognition as one of the most basic precepts of a fair criminal trial.⁵⁸ This right is reflected in the Rules, which provide that the 'Accused shall be tried in his or her presence, except as provided in this Rule'.⁵⁹ According to the relevant jurisprudence, 'presence' means *physical attendance at the trial*.⁶⁰
18. The right to be tried in one's presence is not absolute; it can be waived or forfeited in cases where a defendant's behavior results in substantial disruption of the trial.⁶¹ However, any disruption that is not reasonably attributable to the accused person—such as illness or other physical/mental incapacity⁶²—cannot be used to justify interference with the right to be tried in one's presence.⁶³ At this tribunal, exception to the general rule is provided *only* in cases where an accused: (i) 'refuses or fails to attend the proceedings';⁶⁴ (ii) 'is expelled from them in accordance with the [Rules]';⁶⁵ or (iii) 'due to health reasons or other serious concerns, [...] cannot be present before the Chamber' *and* consents to 'continue the proceedings in his or her absence'.⁶⁶
19. Notably, the ICTR Appeals Chamber has held that, in a joint trial, the right to be tried in one's presence applies equally to the presentation of testimony likely to concern the

⁵⁷ See, e.g., *Prosecutor v Milosevic*, Case No. IT-02-54-T, 'Reasons for Decision on Assignment of Defence Counsel', 22 September 2004, para 53; *ibid.*, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision of the Assignment of Defense Counsel', 1 November 2004, para 6.

⁵⁸ See, e.g., *Prosecutor v Zigiranyirazo*, Case No ICTR-2001-73-AR73, 'Decision on Interlocutory Appeal', 30 October 2006 (the 'Zigiranyirazo Decision'), para 11.

⁵⁹ Rule 81(1).

⁶⁰ See *Zigiranyirazo Decision*, para 11; *Prosecutor v Karemera et al.*, Case No ICTR-98-44-AR73.10, 'Decision on Nzirorera's Interlocutory Appeal Concerning His Right to Be Present at Trial', 5 October 2007 (the 'Karemera Decision'), para 11.

⁶¹ See, e.g., *Zigiranyirazo Decision*, para 14; *Karemera Decision*, para 11.

⁶² *N.B.* Physical incapacity due to illness cannot be construed as a waiver and, as in the case of Nzirorera, is not attributable to an accused person. See *Karemera Decision*, paras 2, 15.

⁶³ See *Karemera Decision*, para 15; *Zigiranyirazo Decision*, para 20.

⁶⁴ Rule 81(4).

⁶⁵ *Ibid.*

⁶⁶ Rule 81(5). *N.B.* In such cases—that is, where the Accused consents not to be present—he or she 'may also request to follow the proceedings by appropriate audiovisual means'. *Ibid.*

alleged acts and conduct of a co-accused only.⁶⁷ In other words, an accused at a joint trial is entitled to be present *throughout the proceedings*.

V. ARGUMENT

A. The Application is Admissible

20. This Chamber has been seised of the case file since 14 January 2011. As Rule 32 specifically permits parties to the proceedings to move for the appointment of a qualified expert in order to determine whether the ‘Accused is physically and mentally fit to stand trial’, the instant request is admissible.

B. Because Nuon Chea’s Fitness to Stand Trial is Objectively Uncertain, this Chamber Should Order an Expert Assessment

21. Nuon Chea has yet to undergo a comprehensive fitness evaluation. Apart from periodic checkups by assigned cardiologists and staff physicians of the ECCC detention facility, an examination of the type envisaged by Rule 32 and the relevant jurisprudence has not been conducted. As noted above, the factual record is replete with objective indications that Accused’s capacity to participate effectively in the proceedings may be significantly compromised.⁶⁸ In any event, as the Previous Experts have concluded, the issue of Nuon Chea’s fitness to stand trial ‘would need to be reassessed at the time any trial proceedings were convened’.⁶⁹
22. It must be emphasized that the Defene is not presently attempting to demonstrate that Nuon Chea is unfit to stand trial or that the proceedings should be terminated on that basis. Rather, the instant application concerns the need—at this very early stage of the trial proceedings—to appoint a qualified expert to *assess* the Accused’s capacity to proceed. The distinction is a crucial one. In *Strugar*, defence counsel were able to directly engage qualified fitness experts and subsequently submit their reports in support of a motion to terminate the proceedings. This is contrary to the procedure applicable at the ECCC, pursuant to which the Defence is fully dependent on the judges to make the necessary expert appointment. Accordingly, the threshold for an application such as the instant one should be considerably lower than the one articulated by *Strugar* and adopted by the PTC.
23. In the case of Nuon Chea—an elderly and infirm defendant facing trial in a judge-driven (as opposed to party-driven) civil-law process—any presumption of fitness (to the extent

⁶⁷ Karemera Decision, para 15.

⁶⁸ See paras 7(a)–(k), *supra*.

⁶⁹ Previous Expert Report, p 6.

one exists under international criminal law) is rebutted by the objective evidence set out above, which calls into question the Accused's capacity to effectively assist his counsel and follow the proceedings. The 'adequacy' of this reasoning should be assessed in light of this Chamber's central role in ensuring the fairness of the trial. In this regard, any burden as such should not lie with the Defence; rather, this Chamber must satisfy itself—as a matter of principle—that anyone brought before it to stand trial is, in fact, fit to do so.⁷⁰

24. Assuming the Trial Chamber would seek to apply a somewhat higher threshold of adequacy (as did the PTC), such test is undoubtedly met at this stage of the proceedings. While the PTC did not find adequate reason to justify the appointment of a Rule 32 expert on 22 October 2008,⁷¹ the OCIJ's subsequent attempt to order a fitness evaluation strongly suggests that adequate reason to do so existed as of September 2009.⁷² By force of logic, if such rationale existed then, it most certainly continues to exist, *a fortiori*, more than one year later. Moreover, in attempting to make their assessment, the Previous Experts emphasized the need to *reassess* any conclusions they might have drawn once any trial proceedings were convened.⁷³ Now that such juncture has been reached, it would be inappropriate not to follow the Previous Experts' advice on this point.

C. This Chamber Should Instruct the Proposed Expert/s to Conduct a Fitness Test That Adequately Reflects the Complexity of the Proceedings and the Realities of the Accused's Condition

25. The complexity and seriousness of the charges and challenges facing Nuon Chea at the ECCC are likely to require greater capacities on his part than would be expected of a defendant in a typical case. Therefore, what is needed—at the outset of any fitness determination—is the identification of the specific capabilities required by the Accused to function adequately within the ECCC system and which, if absent, may result in an unfair trial. As the decision on Nuon Chea's fitness to stand trial will be influenced significantly by expert evidence, it is important to reduce subjectivity and arbitrariness in the assessment process (as far as possible) by providing clear guidelines to the Proposed Expert/s as to what, precisely, constitutes 'fitness to stand trial' under the prevailing circumstances.

⁷⁰ See para 15, *supra*.

⁷¹ See para 4, *supra*.

⁷² See para 5, *supra*.

⁷³ *Ibid.* N.B. According to the opinion of the Previous Experts, such additional examination appears necessary irrespective of the outcome of any previous examination, had one been completed.

26. In framing the instructions, the Defence urges the Trial Chamber to refine the Strugar Test in relation to the anticipated length and organization of the current proceedings. It is self-evident, as mentioned, that an individual's fitness to stand trial depends to a large degree on the sort of trial that is to be expected—in this case, one of extreme duration and complexity. Accordingly, the test must be sufficiently contextualized and designed to avoid a determination based on simply on a 'fit/unfit' dichotomy; such unnuanced approach would fail to account for both the intricacies of international criminal proceedings and the realities of Nuon Chea's physical and mental condition.
27. On this basis, and with a view to ensuring the protection of the Accused's fair-trial rights as well as efficient trial proceedings, the instructions to the Proposed Expert/s should not only adequately define the notion of 'fitness', but also the meaning of 'trial' as that term is specifically understood at the ECCC. In order to carry out their mission effectively, the Proposed Expert/s must have a minimum level of understanding as to the size and significance of the undertaking about to unfold before this Chamber. Importantly in this regard, it will be advisable to obtain the Proposed Expert/s' views on the appropriate length of hearings, required intervals of rest and recuperation, and other related matters.
28. Rather than expecting the Proposed Expert/s to conduct close-analysis of international criminal jurisprudence,⁷⁴ the Chamber should clearly and pro-actively set out the applicable standards and elucidate the most effective approach. Not only should all of the various, relevant capacities be mentioned in the instructions, but the Trial Chamber should also guide the Proposed Expert/s on how to determine whether the Accused can be said to sufficiently possess each of these capacities. In no way an encroachment upon the Proposed Expert/s' domain, such approach would merely amount to prudent briefing.
29. With the Strugar Test as a starting point,⁷⁵ instructions to the Proposed Expert/s should be elaborated with more detailed and precise assessment criteria adopted from the various approaches discussed above.⁷⁶ It is worth stressing that—due, in part, to the differences between the legal and medical disciplines—misunderstandings as to the nature and scope of the Proposed Expert/s' mandate could quite easily occur. An example of such misunderstanding can be found in *Strugar*, where one of the experts had based his

⁷⁴ See Document No B-35, 'Expertise Order', 17 September 2009, ERN 00379010–00379013, p 2 (ERN 00379011).

⁷⁵ The capacities identified include the capacity to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify. *Strugar*, para 36.

⁷⁶ See paras 12–14, *supra*.

assessment of fitness on the accused's capacity to *fully* comprehend the proceedings.⁷⁷ The Trial Chamber, however, ruled that this set too high a standard of comprehension.⁷⁸ Likewise, in *Nahak*, one of the experts was also criticized for not having applied the competency standard enunciated by the court.⁷⁹ In order to avoid any similar problems, the instructions to the Proposed Expert/s and the scope of their mission must be crystal-clear.⁸⁰

D. The Proposed Expert Report Should Be Utilized *Strictly* for the Purpose of Determining Nuon Chea's Fitness to Stand Trial

30. The Defence accepts that its position vis-à-vis the OCIJ⁸¹ may give this Chamber pause as to whether the Defence would adopt a similar attitude towards any further order of examination. Cooperation with the previous order was inadvisable as a result of its impermissibly vague nature as well as the risks of improper use of the results of the examination.⁸² Assuming the object and purpose of any order by the Trial Chamber is exclusively concerned with determining the degree of Nuon Chea's fitness to stand trial, the Defence will advise him to fully cooperate with the Proposed Experts.
31. In order to protect Nuon Chea's privilege against self-incrimination, the Trial Chamber should hold that any report/s submitted by the Proposed Expert/s will be used only for the specific purpose for which they have been requested, namely: to assess the Accused's fitness to stand trial—as envisaged by Rule 32. The Defence's concern arises from the potential interplay between the final sentence of that Rule, stipulating that expert reports on fitness 'shall be recorded in the case file', and the first sentence of Rule 87(3), which states that this Chamber is to base 'its decision on evidence from the case file'. When read in conjunction, these Rules raise the question of whether any Rule 32 reports on the case file could ultimately be used as 'evidence' in the determination of Nuon Chea's culpability for the crimes of which he has been accused. The Defence submits that the answer to this question must be a negative one. In this

⁷⁷ See *Strugar*, para 48.

⁷⁸ See *Strugar*, para 48.

⁷⁹ See *Nahak*, paras 124–134.

⁸⁰ *N.B.* In its order of 17 September 2009, the OCIJ failed to specify the appropriate standards in sufficient detail, thereby increasing the risk of an insufficient evaluation. In point three of the expertise, with only a broad reference to *Strugar*, it was left to the Previous Experts to distill and apply the precise fitness criteria. Given the dangers discussed above, it would have been prudent (and ultimately more effective) for the OCIJ to have specified the appropriate standard in much greater detail. A result of these vague instructions is found in the Previous Expert Report, where it is indicated that their understanding of the applicable standards does not exceed the broad notion of 'meaningful participation'. While that may seem to capture the essence of the fitness standard, it overlooks the many nuances of the actual concept.

⁸¹ See para 5, *supra*.

⁸² *Ibid.*

regard, the Chamber should explicitly instruct the Proposed Expert/s not to discuss with Nuon Chea any of the underlying factual allegations contained in the Indictment:

32. In light of Rule 32's special purpose, the results of any examination conducted pursuant to its terms should serve the *exclusive* purpose of determining the Accused's fitness to stand trial, unless Nuon Chea himself consents to any additional use. Only in the absence of any risk of adverse consequences could the Accused be expected to cooperate fully and effectively in a fitness evaluation.

**E. Nuon Chea Does Not Waive His Right to
Be Present Throughout the Trial Proceedings**

33. As a matter of principle, Nuon Chea does not waive his right to be physically present at any stage of the upcoming trial proceedings, including those portions of the substantive hearing likely to concern only the alleged acts and conduct of his co-accused.

VI. CONCLUSION

34. For the reasons stated above, the Defence requests the Trial Chamber to:
- a. appoint a qualified expert/s in order to determine whether Nuon Chea is physically and mentally fit to stand trial;
 - b. instruct such expert/s according to the various positions argued and expressed herein;
 - c. order that any report produced by the expert/s will be utilized solely by the Trial Chamber for the determination of Nuon Chea's fitness to stand trial, unless the Accused himself consents to any additional use.

Given the nature of the instant application, the Defence requests the Chamber to treat it as a matter of urgency.

CO-LAWYERS FOR NUON CHEA



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