



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007-ECCC/TC

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Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON ACCUSED'S FITNESS TO STAND TRIAL AND
ORDER ASSIGNING EXPERTS

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1. INTRODUCTION

1. Following the Case 002/02 Trial Management Meeting of 11 to 13 December 2013, the Chamber set forth the next steps in Case 002/02 and invited Defence counsel to file brief submissions indicating whether it was necessary to reassess the fitness of the Accused to stand trial and/or their physical ability to participate during all scheduled trial days.¹ On 15 January 2014, both Defence teams filed submissions regarding the fitness of the Accused and the schedule for the next hearings in Case 002/02.² The Co-Prosecutors filed a response on 22 January 2014.³

2. SUBMISSIONS

2. The NUON Chea Defence seeks a comprehensive assessment of NUON Chea's health condition and his ability to participate in trial proceedings.⁴ It submits that NUON Chea's current medical ailments cause him pain and discomfort, the aggregate effect of which is to impact his ability to concentrate on complex issues of fact.⁵ It further submits that the length and timing of proceedings affect whether he can meaningfully participate.⁶ In the event the Chamber were to find NUON Chea fit to stand trial, the NUON Chea Defence requests the Chamber to schedule trial hearings in the morning hours only starting at 7:30AM when he is best able to concentrate.⁷

3. The KHIEU Samphan Defence submits that KHIEU Samphan is no longer capable of participating for four consecutive trial days each week as he tires quickly and his attention span is diminished.⁸ It suggests a reduced trial schedule of four mornings per week from 9:00AM until 1:00PM or three full trial days, 9:00AM to 11:30AM and 1:30PM to 4:00PM.⁹

¹ Trial Chamber Workplan for Case 002/02 and Schedule for upcoming Filings, E301/5, 24 December 2013, para. 6.

² *Informations de la Défense de M. KHIEU Samphân concernant l'aptitude et les modalités d'organisation des audiences* ("KHIEU Samphan Request"), E301/6, 15 January 2014; Response to Trial Chamber's Request for Submissions Concerning NUON Chea's Fitness Review ("NUON Chea Request"), E301/7, 15 January 2014.

³ Co-Prosecutors' Joint Response to NUON Chea and KHIEU Samphan's Submissions Concerning Court Hearing Schedule and Fitness Review ("Co-Prosecutors' Joint Response"), E301/8, 21 January 2014.

⁴ NUON Chea Request, paras 11, 15(a).

⁵ NUON Chea Request, para. 7.

⁶ NUON Chea Request, para. 9.

⁷ NUON Chea Request, para. 10, 13.

⁸ KHIEU Samphan Request, paras 2-3.

⁹ KHIEU Samphan Request, para. 5.

It notes that KHIEU Samphan is available for any medical examination considered necessary by the Trial Chamber.¹⁰

4. The Co-Prosecutors submit that a comprehensive assessment of NUON Chea's fitness to stand trial is unnecessary and unwarranted. They submit that the Defence must demonstrate a significant concern regarding the competence of the Accused to stand trial before a fitness examination is merited and that the Defence fail to cite any new medical evidence that NUON Chea's condition is deteriorating.¹¹ The Co-Prosecutors also submit that NUON Chea's ability to clearly and articulately address the court during the October 2013 Closing Statements gives no reason to inquire further into his fitness.¹² They nonetheless concede that a limited trial schedule as sought by the Accused is appropriate until the parties have filed submissions on any appeal of Case 002/01. After this time, the Chamber may then revisit the capacity of each Accused to resume a full-time sitting schedule.¹³

3. FINDINGS

5. The Chamber, upon its own motion or that of the parties, has discretion to appoint experts to perform physical or mental assessments of the Accused to determine their fitness.¹⁴ This Chamber has previously held that adequate reasons must exist to justify an enquiry and where reassessment is sought following the submission of an expert report, the onus rests on the moving party to demonstrate its necessity.¹⁵

6. NUON Chea was last assessed by Professor A. John CAMPBELL, geriatrician and Dr. Seena FAZEL, psychiatrist about one year ago on 18, 19 and 20 March 2013.¹⁶ Physically, they found the Accused to be frail.¹⁷ He was found to have longstanding degenerative back

¹⁰ KHIEU Samphan Request, para. 4.

¹¹ Co-Prosecutors' Joint Response, paras 6-7, 9.

¹² Co-Prosecutors' Joint Response, para. 11.

¹³ Co-Prosecutors' Joint Response, para. 12.

¹⁴ Internal Rules 31, 32; *See also*, Decision on IENG Sary's Request for Reconsideration of the Trial Chamber Decision on the Accused's Fitness to Stand Trial and Supplemental Request, E238/11/11, 19 December 2012, para. 9 (noting the re-appointment of medical experts to reassess the Accused's fitness on its own motion); Second Decision on Accused NUON Chea's Fitness to Stand Trial, E256/5, 2 April 2013, para. 13.

¹⁵ Decision on NUON Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise ("First Decision on NUON Chea's Fitness"), E115/3, 15 November 2011, para. 20; *See also*, *Prosecutor v. Vladimir Kovačević*, ICTY Trial Chamber, IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006, para. 17.

¹⁶ Expert Medical Report – Mr. NUON Chea Prepared in Response to Trial Chamber Request (E256) ("Expert Report of March 2013), E256/4, 20 March 2013.

¹⁷ Expert Report of March 2013, para. 8, 15.

problems and poor muscle bulk due to a low level of physical activity.¹⁸ It was also noted that the Accused receives treatment for heart failure but that his cardiovascular disease was stable at that time.¹⁹

7. The Accused is now 87 years old.²⁰ The NUON Chea Defence asserts that the Accused continues to suffer from numerous medical ailments, including “a very short term memory (often no more than a few minutes)”, and that some of his ailments have since deteriorated.²¹ As conceded by the Defence, only an expert can definitively assess whether NUON Chea is capable of meaningful participation in the proceedings and, if so, for how long each day.²² Although the NUON Chea Defence has not put forward concrete proof to support its request, the Chamber considers that, in the context of trial planning, it is appropriate and necessary to reassess the Accused’s fitness given his advanced age and frail condition, the significant time that has elapsed since he was last assessed by experts and the many demands the trial proceedings in Case 002/02 will impose upon the Accused.²³

8. At the 11 February hearing, counsel for KHIEU Samphan insisted that the Accused is currently in good health and that questions pertaining to his health status are completely unfounded.²⁴ These assertions are at odds with the KHIEU Samphan written submissions which note that KHIEU Samphan has a reduced attention span, tires easily, is no longer capable of following a 4 day trial schedule, and therefore seeks a significantly reduced sitting schedule for Case 002/02. The written submissions also note that KHIEU Samphan recently suffered from a respiratory infection which required his hospitalization (although failing to recognize that KHIEU Samphan was diagnosed with pneumonia).²⁵ Given this contradictory information, the Chamber is not in a position to assess the merits of the Defence request for a

¹⁸ Expert Report of March 2013, para. 11, 12, 15.

¹⁹ Expert Report of March 2013, para. 9.

²⁰ T. 5 December 2011 (Accused NUON Chea), p. 37; T. 30 January 2012 (Accused NUON Chea), pp. 41-42. *See also* NUON Chea Record of Initial Appearance, E3/54, 19 September 2007, ERN (En) 00148814-00148815.

²¹ NUON Chea Request, para. 7.

²² NUON Chea Request, para. 8.

²³ The Trial Chamber denied a prior request by the NUON Chea Defence for additional expertise on the Accused’s ability to concentrate because the proposed expertise was likely to be irrelevant and of limited probative value and because ordering such expertise was contrary to the Chamber’s duty to ensure an expeditious trial. *See* First Decision on NUON Chea’s Fitness, para. 38. That request was made in order to impeach the results of a contemporaneous and thorough assessment of NUON Chea’s fitness. Whereas the current request is made nearly one year after the last assessment by a court-appointed expert and with a view to determining whether there have been changes in his medical condition. A reassessment is therefore appropriate at this time.

²⁴ T. 11 February 2014, p. 24.

²⁵ KHIEU Samphan Medical Report dated 26 December 2013, E13/162/1, 30 December 2013; Letter of discharge of KHIEU Samphan from hospital dated 3 January 2014, E13/162/5.1, 20 January 2014.

reduced schedule unless and until KHIEU Samphan has been medically assessed by an expert.²⁶

9. The Chamber is cognizant of the need to commence the proceedings in Case 002/02 as soon as possible.²⁷ The Chamber notes however that the current assessment of the Accused is undertaken at a time when the Chamber is considering other pre-trial matters that must be resolved prior to the start of evidentiary proceedings, including a decision on the scope of Case 002/02, preliminary objections, and the filing of witness, expert, and civil party lists. As these matters are being addressed in parallel, the present appointment will not delay the start of proceedings. On the contrary, delaying the assessment of the Accused, as proposed by the Co-Prosecutors, could lead to disruptions in the evidentiary proceedings in Case 002/02 after they have started and adversely impact judicial efficiency. These factors militate in favour of an assessment of both Accused at this time.

4. EXPERT ASSIGNMENT

10. The Trial Chamber has decided therefore pursuant to Internal Rules 31 and 32 to appoint Dr. Seena FAZEL, Dr. CHAN Kin Ming²⁸, geriatrician and Dr. HUOT Lina, psychiatrist (“Experts”) to undertake assessments of both Accused and, working in collaboration, to provide the advice specified below, and to prepare a written report (“Report”) in respect of each Accused individually.

11. After the Experts have taken an oath in writing to assist the Trial Chamber faithfully, confidentially and to the best of his ability, they will submit to the Trial Chamber a copy of each Report on NUON Chea and KHIEU Samphan. Each Report will include a statement certifying that they have personally, individually or jointly, completed the examinations and the report. This Order therefore authorises the Experts to communicate with the detainees NUON Chea and KHIEU Samphan for this purpose.

12. The Experts are to examine each Accused and provide a report which will enable the Trial Chamber to determine whether or not each named Accused is fit to stand trial.²⁹ In order

²⁶ KHIEU Samphan Request, para. 5.

²⁷ Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002 (SCC), E284/4/8, 25 November 2013, para. 72.

²⁸ *curriculum vitae* attached.

²⁹ See *Prosecutor v. Strugar*, Judgement, ICTY Appeals Chamber, IT-01-42-A, 17 July 2008, para. 55(“[...] the applicable standard is that of meaningful participation which allows the accused to exercise his fair trial

to ensure the most effective participation of each Accused at trial, and to enable the Trial Chamber to schedule its hearings to accommodate specific, significant medical problems, the Experts are to include in their Report comment on the suitability of the physical conditions provided for the Accused, including the provision of audio-visual facilities or limits on sitting hours that might appropriately be put in place.

13. In order to fulfill his assignment, the Experts are to:

- (a) Examine all relevant expert and medical reports and material currently on the case file or referred to therein or held by the Khmer Soviet Friendship Hospital or other medical facility. In this regard, the Trial Chamber requests the Offices of Administration of the ECCC and the Khmer Soviet Friendship Hospital respectively, to provide all necessary assistance to the Expert for the period of his assignment;
- (b) Examine each Accused in order to determine his level of physical and/or cognitive ability, and give a prognosis for improvement or deterioration in the medical or cognitive status of each Accused;
- (c) Consult as needed with other medical or psychiatric experts who have previously reported to the Office of the Co-Investigating judges or who have treated each Accused for medical or other related issues during their detention by the ECCC;
- (d) Inform the Trial Chamber in their Report, of all additional medical and other tests in relation to each Accused, ordered by the Experts but not undertaken by them personally and the identity of the person or medical facility that performed that test;
- (e) Report to the Trial Chamber on the results of the examinations and consultations in respect of each Accused;

14. The Experts' assignment shall be treated by them as a confidential doctor-patient relationship and no details of the medical condition of each Accused shall be disclosed except

rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings. In this regard, the Trial Chamber applied the standard correctly, as evidenced by its conclusion that an accused's fitness to stand trial should turn on whether his capacities, 'viewed overall and in a reasonable and commonsense manner, 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'."

to the Trial Chamber or to other medically-trained personnel during any consultations referred to in paragraph 13 (c) above.³⁰

15. Through the Witnesses and Experts Support Unit and the Court Management Section, the Trial Chamber will make available to the Experts all relevant confidential medical material currently on the case file and all pending requests seeking orders in relation to each named Accused that he or she is not fit to stand trial or is fit to stand trial only under limited circumstances, as well as the responses.

16. The examination of the Accused shall take place on 24-25 March 2014 and a report finalized in English by 25 March 2014. Translations of the report will be provided to counsel for the Accused in their primary working language by 27 March 2014. The Chamber has tentatively scheduled a hearing for 28 March 2014, to be held only upon the request of the parties, in order to permit questioning of the Experts on the conclusions contained in their Reports. If parties have questions for the Experts, they should inform the Chamber by 26 March 2014 at latest to allow the Chamber to confirm or cancel the hearing.

17. Until the receipt of the Experts' reports, the Chamber considers it is premature to consider the sitting times for Case 002/02 evidentiary proceedings.

Phnom Penh, 17 February 2014
President of the Trial Chamber



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³⁰ The Experts will have interpreters available to assist them as well as Cambodian medically trained assistants who are themselves obliged to respect the confidentiality of examinations and the report.