



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

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Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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**DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL AND DEFENSE MOTION FOR
ADDITIONAL MEDICAL EXPERTISE**

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1. INTRODUCTION

1. In order to assess the Accused NUON Chea's fitness to stand trial, the Trial Chamber appointed an expert geriatrician, Professor A. John Campbell. The Chamber is currently seised of a report prepared by this Expert.¹ The present decision follows a hearing on 29-31 August 2011, which enabled oral presentation of the expert's report and submissions by the parties in relation to its conclusions.²

2. PROCEDURAL HISTORY

2. On 2 February 2011, NUON Chea filed an application seeking the appointment of an expert to determine his fitness to stand trial, to which responses and replies were filed on 8 and 23 February 2011, respectively.³

3. On 9 March 2011, the Trial Chamber informed the parties that in view of the various medical and psychiatric issues raised by all accused requesting assessment of their fitness to stand trial, the Chamber intended to obtain a comprehensive assessment from a specialist geriatrician.⁴ The Chamber provided information concerning the geriatrician it intended to appoint to undertake this initial assessment, and invited the Defence teams for IENG Sary, IENG Thirith and NUON Chea to submit any questions or comment on particular medical or cognitive issues not already raised in relation to accused whom they represent for the assistance of the expert in making his assessment.⁵

¹ Geriatric expert report of NUON Chea dated 13 June 2011 in response to Trial Chamber's Order Assigning Expert - E62/3", strictly confidential, 13 June 2011, E62/3/4, para. 29 ("Expert Report"); *see also* Initial Objection to Geriatric Expert Report and Requests for Disclosure and Oral Hearing, strictly confidential, 8 July 2011, E62/3/4/1 ("Initial Objection") and Request for Appointment of Additional Expert to Assess NUON Chea's Fitness to Stand Trial, 7 September 2011, confidential, E115 ("Request for Additional Expertise").

² T., 29-31 August 2011 ("Fitness Hearing").

³ Urgent application for appointment of fitness expert, confidential, 2 February 2011, E30 ("Urgent application"); Co-Prosecutors' Response to NUON Chea's Urgent Application for Appointment of a Fitness Expert, confidential, 8 February 2011, E30/1 and Reply to Co-Prosecutor's Response to NUON Chea's Urgent Application for Appointment of a Fitness Expert, public, 23 February 2011, E30/3.

⁴ Following a request of the Chamber, the ECCC Detention Facility officers had earlier provided observations regarding the physical and psychological condition of the four accused on 11 February 2011, noting that NUON Chea has generally adapted well to the conditions of detention (Memorandum from ECCC Detention Liaison Officer entitled "Request for confidential reports regarding the physical and psychiatric health of all four Accused (Case 002)", confidential, 11 February 2011, E31/1; *see also* Request for confidential reports regarding the physical and psychiatric health of all four Accused (Case 002), confidential, E31, 3 February 2011).

⁵ Memorandum for Defence teams for IENG Sary, IENG Thirith and NUON Chea, confidential, 9 March 2011, E62. The NUON Chea Defence indicated to the Chamber that they did not wish to raise issues additional to those contained in their application of 2 February 2011 (Order Assigning Expert, confidential,



4. On 4 April 2011, the Chamber appointed Professor A. John Campbell (“Expert”) to undertake a medical assessment of all accused who wished to avail themselves of assessment, requesting him to prepare individualized reports in relation to each Accused.⁶
5. On 13 June 2011, the Expert filed his report in relation to NUON Chea, concluding that the Accused was fit to stand trial and indicating that a reassessment prior to the commencement of trial proceedings may be necessary if there is deterioration in his physical condition in the interim.⁷ Although the Chamber had not been informed of any such change to NUON Chea’s physical health, it invited the Expert to reassess him prior to the fitness hearing, scheduled for August 2011. Following his reassessment of the Accused on 25 August 2011, the Expert noted that there had been no significant change in NUON Chea’s physical and cognitive function since the Expert’s initial assessment of him on 9 May 2011.⁸
6. On 27 June 2011, during the Initial Hearing, the Chamber requested the Defence and the other parties to file objections or observations, if any, to the Expert Report by 8 July 2011 and 15 July 2011, respectively.⁹ The Defence filed their objections on 8 July 2011, to which the Co-Prosecutors responded on 15 July 2011.¹⁰ Preliminary hearings in relation NUON Chea and IENG Thirith’s fitness to stand trial were held between 29 and 31 August 2011.¹¹
7. On 7 September 2011, following this hearing, the Defence filed a written Request for Additional Expertise, attaching to this request a preliminary report from an external medical

4 April 2011, E62/3, para. 3, note 4 (“Order Assigning Expert”). The Accused KHIEU Samphan indicated that he did not wish to avail himself of this assessment (Order Assigning Expert, para. 4).

⁶ Order Assigning Expert, para. 6. In advance of his assessment, the Chamber provided the Expert with a list of all relevant medical information on the case file or held by Calmette Hospital or the ECCC Office of Administration (*see* Trial Chamber memorandum to the Expert entitled “Categories of medical materials to be supplied in advance of your assessment of Accused NUON Chea, IENG Thirith and IENG Sary,” confidential, 5 May 2011, E62/3/1).

⁷ Geriatric expert report of NUON Chea dated 13 June 2011 in response to Trial Chamber’s Order Assigning Expert - E62/3”, strictly confidential, 13 June 2011, E62/3/4, para. 29 (“Expert Report”). On 26 August 2011, the Expert filed a supplement to his Expert Report after having performed a follow-up medical assessment of the Accused (Follow up Geriatric Report Concerning Mr. Nuon Chea in Accordance to Trial Chamber’s Expertise Order E62/3 dated 4 April 2011, strictly confidential, 26 August 2011, E62/3/13 (“Supplement”). Both reports were reclassified as public on 22 September 2011 and 6 October 2011, respectively. On 13 June 2011, the Expert also concluded that IENG Sary was fit to stand trial (Expert Report, 13 June 2011, E/62/3/5). On 30 June 2011, the IENG Sary Defence indicated that the Accused did not intend to challenge this assessment (Scheduling Order for Preliminary Hearing on Fitness to Stand Trial, public, 11 August 2011, E110, p. 2).

⁸ Supplement, paras 6, 7 and 9.

⁹ T., 27 June 2011, pp. 32-33.

¹⁰ *See* Initial Objection and Co-Prosecutors’ Response to NUON Chea’s Initial Objection to Geriatric Expert Report and Requests for Disclosure and Oral Hearing, strictly confidential, 15 July 2011, E62/3/4/2 (“Response to the Initial Objection”).

¹¹ Scheduling Order of 11 August 2011.

consultant concerning the Expert's assessment of the Accused.¹² The Co-Prosecutors and the Civil Party Lead Co-Lawyers opposed this request on 12 September 2011.¹³

3. SUBMISSIONS

8. The Defence submits that the Expert Report is defective as it fails to set out clearly the test employed by the Expert when assessing the Accused.¹⁴ Further, the Expert Report and its Supplement do not provide an adequate and comprehensive assessment of the Accused's cognitive functions by standardized psychometric testing, in particular regarding his concentration, attention span and long-term memory.¹⁵ The Expert also failed to seek what he admitted to be relevant information and his assessment, which was too short to enable observation of any possible impairment, did not address issues raised explicitly by the Accused.¹⁶ His reliance on prior medical reports in reaching his conclusions, particularly on the Accused's cognitive functions, is misplaced since very limited weight may be attached to these reports.¹⁷

9. The Defence further alleges that the Expert does not possess sufficient knowledge concerning the diagnosis and possible consequences of the thalamic stroke suffered by the Accused in 1995,¹⁸ nor did he properly assess the underlying medical documentation regarding this feature of the Accused's medical history or its possible impact on his fitness to

¹² Request for Additional Expertise and Annex, confidential, 7 September 2011, E115.2, attaching preliminary report of Dr. Harold J. Bursztajn ("Bursztajn Report") and his curriculum vitae (E115.2.1 and E115.2.2, respectively); *see further* T., 31 August 2011, pp. 3; 108-110.

¹³ Co-Prosecutors' Response to the Defense Request for Appointment of Additional Experts, confidential, 12 September 2011, E115/1 ("Co-Prosecutors' Second Response") and Civil Party Lead Co-Lawyers' Response to Nuon Chea's Request for Appointment for Additional Experts to Assess Nuon Chea's Fitness to Stand Trial, confidential, 12 September 2011, E115/2 ("Civil Party response"). Leave to reply was denied by the Chamber pursuant to the modalities described in memoranda E64 of 10 March 2011 and E126 of 5 October 2011.

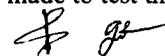
¹⁴ Initial objection, paras. 1, 14-16.

¹⁵ Request for Additional Expertise, paras. 17-21.

¹⁶ Request for Additional Expertise, paras. 8-9, 10-12.

¹⁷ Request for Additional Expertise, paras. 18-20 (alleging that these earlier reports were prepared by cardiologists lacking expertise in assessing cognitive impairment, that previous clinical examinations were not carried out with a view to assessing the Accused's fitness to stand trial, and that these reports were not verified by the Expert through comprehensive testing).

¹⁸ Request for Additional Expertise, paras. 3-7, 21-22 (alleging that none of the Expert's publications pertained to forensic topics and that he did not administer certain standardized tests with the expected precautionary measures used when assessing cognitive functions of possible malingering subjects, resulting in an "inexcusable failure to apply *any* form of psychometric cognitive testing"); *see also* T., 31 August 2011, pp. 108-110 (alleging that the Expert lacked relevant experience and knowledge of existing psycho-medical tests regularly used to assess fitness to stand trial, criticizing his methodology and alleging that no effort was made to test the cognitive functions of the Accused).



stand trial.¹⁹ In consequence, the Defence requests the appointment of a new expert to examine the Accused's cognitive functions, in particular the maximum duration for which he is able to effectively participate in his trial on a daily basis.²⁰

10. The Co-Prosecutors oppose the Request for Additional Expertise, and request that the Defence be ordered to refrain from further disclosing confidential information to third parties without the leave of the Chamber.²¹ They submit that the Expert conducted his assessment in accordance with the Chamber's order, which had requested him to provide a report enabling the Chamber to determine the fitness of the Accused. The fact that the Expert provided a conclusion on the fitness of the Accused to stand trial without identifying the precise fitness test does not render it incomplete or unreliable, and it is clear that the test used by the Expert in arriving at his conclusion was that identified by the International Criminal Tribunal for Yugoslavia ("ICTY") in the *Strugar* decision.²² The findings of the Expert are supported by, and consistent with, the medical documentation available since the Accused's arrest. The possible effects of thalamic stroke are an academic issue of no relevance to the issues before the Chamber.²³

11. The Co-Prosecutors also note that the Defence failed to raise any concerns regarding the Expert's qualifications at the time of his appointment, and their attempt to do so now can only be viewed as an *ex post facto* attempt to impeach the Expert, who is an authority in the areas of geriatrics and the assessment of the cognitive and physical capacity of elderly patients.²⁴ In addition, the Defence misconstrues the purpose of an assessment of fitness to stand trial, as the issues raised in the Request for Additional Expertise instead concern management of the Accused's ongoing participation. Complaints regarding fatigue and concentration do not warrant the appointment of an expert on fitness to stand trial.²⁵ The Co-Prosecutors further

¹⁹ Request for Additional Expertise, paras. 13-17 (providing in an addendum to this request a "preliminary forensic neuropsychiatric evaluation of the methodological reliability, for forensic purposes, of the evaluation conducted by the Expert" (E115.2)). According to this report, the Expert's evaluation of the Accused's fitness to stand trial was methodologically unreliable for forensic purposes as "the Expert failed" to perform the requisite neuropsychiatric examination needed to assess the impact of a left thalamic infraction noted in the brain scan of 22 February 2011 (Bursztajn Report, p. 3).

²⁰ Request for Additional Expertise, paras. 1, 21-22; *see also* T., 31 August 2011, pp. 3, 109-110.

²¹ Co-Prosecutors' Second Response, paras 12-13, 28.

²² Response to the Initial objection, paras 4-16.

²³ Co-Prosecutors' Second Response, paras 17-19 (referring to the Pre-Trial Chamber's Decision on NUON Chea's Appeal Regarding the Appointment of an Expert, 22 October 2008, D54/V/6, and noting that "subjective complaints about [the Accused's] mental capacities do not [...] in themselves justify the appointment of an additional expert").

²⁴ Co-Prosecutors' Second Response, para. 20-22 (noting that the fact the Expert has not previously testified in criminal trials is irrelevant as he is not called upon to reach legal conclusions).

²⁵ Co-Prosecutors' Second Response, para. 14-16

submit that the in-court statements and conduct of the Accused also clearly support the conclusion that he is capable of effective participation in proceedings.²⁶

12. The Civil Party Lead Co-Lawyers agree that the Request for Additional Expertise is belated.²⁷ They further note that the request is ambiguous, as it seeks the appointment of an expert to assess the Accused's fitness to stand trial while stating that it does not attempt to have the Accused declared "wholly unfit".²⁸ They further note that fitness to stand trial "cannot possibly be disproved by what the Defence describes as a 'subtle impairment' of the concentration level of the Accused", on the grounds that "an accused could then be considered fit to stand trial at 8 a.m and unfit 3 hours later."²⁹ The threshold for a determination of lack of fitness to stand trial instead requires a severe impairment of comprehension.³⁰ It is only in cases of clear hindrance to the exercise of an accused's fair trial rights that proceedings may be discontinued on medical grounds.³¹ An alleged difficulty in concentrating for more than an hour and a half neither supports a successful challenge to the Accused's fitness to stand trial nor justifies the appointment of additional experts.³²

13. The Civil Party Lead Co-Lawyers also dispute that the Expert lacks the required expertise, noting that there was simply no clinical evidence of any particular impairment which would have warranted the appointment of an additional specialist.³³ No further test of the Accused's cognitive function is required given the absence of symptoms of any potential cognitive impairment.³⁴

4. FINDINGS

4.1. Applicable law

14. Internal Rule 32 provides that the Chamber may order a medical, psychiatric or psychological examination by an expert for the purposes of determining whether an accused is

²⁶ Co-Prosecutors' Second Response, paras, 23-26.

²⁷ Civil Party Response, paras. 2-3.

²⁸ Civil Party Response, paras 6-10.

²⁹ Civil Party Response, para. 7.

³⁰ Civil Party Response, paras 7- 8, 11-12 (noting that the Accused has never alleged that concentration difficulties led to severe cognitive impairment and that no explanation is offered as to how the alleged deficiencies in concentration affects his fitness to stand trial).

³¹ Civil Party Response, paras 9-10.

³² Civil Party Response, para. 13.

³³ Civil Party Response, para. 15.

³⁴ Civil Party Response, paras 16-18.

physically and mentally fit to stand trial. Principles established at the international level indicate that

fitness or competence to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present [...] but rather is better approached by determining whether [an accused] is able to exercise effectively his rights in the proceedings against him.³⁵

15. In relation to the fair trial rights protected before the ICTY (which are in substance identical to those enshrined within the ECCC legal framework³⁶), the *Strugar* case held that the appropriate approach to be adopted in determining fitness to stand trial is to evaluate the capacity of the accused

- 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.³⁷

16. The applicable standard in determining fitness to stand trial is that of “meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the

³⁵ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision re Defence Motion to Terminate Proceedings, ICTY Trial Chamber, 26 May 2004, para. 35 (“*Strugar* Decision”); see also Article 12(1) of the ECCC Agreement and Article 33 new of the ECCC Law (“If ... existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application ... guidance may be sought in procedural rules established at the international level”).

³⁶ See Article 13 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea (“Agreement”), referring to Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”); see also Internal Rule 21(1)(d); ECCC Law, Article 33 new (“[T]he trial court shall ensure trials are fair and expeditious [...] with full respect for the rights of the Accused [...]”) and Article 35 new of the ECCC Law (enshrining the right to be informed of the nature of the charges against him, to adequate time and facilities for the preparation of a defence, to communicate with counsel of his choice, to be tried without undue delay, to examine the evidence against him and to the free assistance to an interpreter).

³⁷ *Strugar* Decision, para. 36; see also *Prosecutor v. Strugar*, Judgement, ICTY Appeals Chamber (IT-01-42-A), 17 July 2008 (“*Strugar* Appeal Judgement”), para. 55 (“in assessing Strugar’s fitness to stand trial, the Trial Chamber correctly identified the non-exhaustive list of rights which are essential for determination of an accused’s fitness to stand trial”); see also *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 Panel for Serious Crimes (Timor-Leste), 1 March 2005 (“*Nahak* Decision”), para. 56.



proceedings.”³⁸ An accused’s fitness to stand trial should therefore turn on whether his capacities

viewed overall and in a reasonable and commonsense manner, [are] 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.³⁹

17. The ICTY Appeals Chamber has further emphasised that an accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.⁴⁰ Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of the factual and legal complexity of those tried by international tribunals. Accordingly, what is required for an accused to be deemed fit to stand trial is “a standard of overall capacity allowing for a meaningful participation in the trial, provided that he or she is duly represented by counsel”.⁴¹ The availability of counsel may enable an accused to more adequately understand the evidence and the course and consequence of proceedings. While in a particular case, the availability of counsel “may well adequately compensate for any deficiency of a relevant capacity”, the use of counsel “requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose.”⁴² The effective exercise of an accused’s fair trial rights, even where represented, “may [therefore] be hindered, or even precluded, if an accused’s mental and bodily capacities, especially the ability to understand, *i.e.* to comprehend, is affected by mental or somatic disorder”.⁴³ The Accused must consequently possess “in each case [capacities] in a sufficient degree to enable the defence of the accused to be presented.”⁴⁴

18. The ICTR Appeals Chamber has observed that “in practice, Trial Chambers generally consider various professional opinions before taking an important procedural decision arising from an accused’s medical condition which may impact the course of a trial”.⁴⁵ The appointment of multiple experts is, however, not required. A decision on fitness to stand trial may be based on the conclusions of a single expert assessment where the Trial Chamber,

³⁸ *Strugar* Appeal Judgement, para. 55.

³⁹ *Strugar* Appeal Judgement, para. 55.

⁴⁰ *Strugar* Appeal Judgement, para. 60.

⁴¹ *Strugar* Appeal Judgement, para. 60.

⁴² *Strugar* Decision, para. 22.

⁴³ *Strugar* Decision, para. 23.

⁴⁴ *Strugar* Decision, para. 24.

⁴⁵ *Edouard Karemera, Matthieu Ndirumpatse & Joseph Nzirorera v. Prosecutor*, Decision on Appeal Concerning the Severance of Matthieu Ndirumpatse, Case No. ICTR-98-44-AR73.16, 19 June 2009, International Criminal Tribunal for Rwanda (“ICTR”) Appeals Chamber, para. 19.

having assessed all pertinent material before it and all relevant factors, is in possession of sufficient information to ground its decision. A Trial Chamber may, in determining fitness to stand trial, also rely on its own observations of an accused during the proceedings.⁴⁶

19. The ICTY jurisprudence has further noted that a Trial Chamber “needs medical facts in order to make certain legal determinations. With regard [however] to the specific methodology to be employed [by an expert in assessing an accused], including [which] medical tests to be administered, [...] this is a matter to be determined by the court-appointed expert.”⁴⁷

20. A hearing need not be held in every case involving claims of abnormal behaviour or some form of mental disorder.⁴⁸ Although further examinations have been ordered where material discrepancies between the views of medical experts affect the conclusions reached, adequate reasons must exist to justify any enquiry.⁴⁹ It follows that where reassessment is sought following the submission of an expert report, the onus rests on the moving party to demonstrate its necessity. Minor omissions or other alleged errors which do not affect an overall conclusion on fitness to stand trial do not warrant the appointment of further expertise.

4.2. Expert Qualifications

21. Professor A. John Campbell is an expert in the field of geriatric medicine (the care of elderly persons) and has been in medical practice for over 40 years.⁵⁰ His expertise, which is recognized both in his home country of New Zealand and internationally, extends also to acute internal medicine, and therefore includes both physical and cognitive impairment.⁵¹

⁴⁶ *Strugar* Decision, para. 51 (considering as relevant comments by the accused which appeared to be “collected, relevant, well-structured and comprehensive”, his apparent understanding of the evidence, note-taking, attentiveness and reaction to matters of greater interest to him, appearing to follow proceedings and raising concerns when he could not (for instance, due to technical problems)); see also *Prosecutor v. Florencio Tacaqui*, Judgement, 9 December 2004, Case no 20/2001, pp. 8-9; *Nahak* Decision, para. 120.

⁴⁷ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Decision on Urgent Defense Request for Further Submissions of Psychiatric Medical Expert and Decision on Defense Motion to Redact Medical Reports, Case No. IT-03-69-PT, 6 August 2009, para. 15 (further noting that “the Chamber expects all reporting doctors, within their respective areas of expertise, use all information pertinent to the diagnosis of the Accused in their reports”).

⁴⁸ *Nahak* Decision, paras 7, 49-50 (finding that an independent investigation requires a “sufficient basis” or “some degree of doubt” regarding the Defendant’s competence to stand trial).

⁴⁹ See e.g. *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, para. 17; Decision on Nuon Chea’s Appeal Regarding the Appointment of an Expert, 22 October 2008, D54/V/6, paras 32-34.

⁵⁰ Summary of Expert Witness Qualifications, Professor Campbell, E62.1, 9 March 2011; see also T., 29 August 2011, p. 10.

⁵¹ T., 29 August 2011, pp. 9-10, 12, 32-39, 92, 102.

4.3. Professor Campbell's Report and Testimony

22. In assessing NUON Chea, the Expert considered four areas potentially relevant the Accused's fitness to stand trial (cardio-vascular disease, cerebro-vascular disease, musculo-skeletal problems and other systems).⁵² He considered that the Accused's cardiovascular disease is medically well-controlled and currently asymptomatic.⁵³ He further found that the Accused has no current musculo-skeletal problems and his pre-existing renal condition and history of gastrointestinal problems were presently stable.⁵⁴ The Expert concluded that none of these clinical conditions currently affect the Accused's fitness to stand trial.

23. In assessing the Accused's cerebro-vascular condition and cognitive functions, the Expert observed that although the Accused shows minimal residual signs of the thalamic stroke suffered in 1995, he has since recovered well and has not suffered from further strokes.⁵⁵ Professor Campbell agreed that the thalamus, which regulates the motor system, may be affected by this type of stroke, although he found no indication of thalamic dysfunction.⁵⁶ Further, this type of stroke is not associated with areas of the brain concerned with cognitive function and would not affect memory, concentration or attention span.⁵⁷

24. The Expert further noted that there was "no evidence of impaired cognition that would affect [the Accused's] ability to understand the proceedings, instruct counsel, understand questions and the charges against him, respond appropriately and concentrate during the hearing."⁵⁸ He observed in particular that there was no evidence of any significant impairment in the Accused's short and long-term memory.⁵⁹ Nor did medical examination of the Accused or his clinical history suggest he suffers from brain damage not detectable on a CT scan.⁶⁰

⁵² The Accused, who is 85 years old, has been in the ECCC's custody since 19 September 2007. He has suffered from cardiovascular disease following a stroke in 1995 and his medical condition has been constantly monitored by the ECCC since 2007 (*see e.g.* E/62/3/1, pp. 3-4 (confidential) with a list of medical reports since 2007, in particular A38-1 of 29 September 2007; D24/VII/3 of 20 October 2007; D24/IX, 5 March 2008; B14/1 of 9 October 2008; B27/1 of 11 June 2009; B35/7 of 12 November 2009; B41/1 of 18 December 2009; B45 of 11 June 2010, B48/1 of 18 July 2010; and all weekly medical reports since 2007); *see also* E110/4/2.2.7 of 21 September 2007; E110/4/2.2.8 of 8 June 2010 and E62/3/4.2 of 22 February 2011.

⁵³ Expert Report, paras 9-23, Supplement, para. 7; T., 30 August 2011, p. 127, 135; T., 31 August 2011, pp. 68-72; 89.

⁵⁴ Expert Report, paras. 19-23; T., 30 August 2011, pp. 128,133-134; T., 31 August 2011, pp. 72-74.

⁵⁵ Expert Report, paras. 13-18, T., 30 August 2011, pp. 127-128, 130; Supplement, para. 8.

⁵⁶ T., 31 August 2011, pp. 45; 90-91.

⁵⁷ T., 29 August 2011, p. 26. T., 30 August 2011, p. 136; T., 31 August 2011, pp. 8-36-39, 46.

⁵⁸ Expert Report, para. 15.

⁵⁹ T., 29 August 2011, pp. 66, 68, 106; T., 31 August 2011, pp. 102-103 (noting that this assessment was confirmed by the Mini Mental Status Examination ("MMSE") performed in February 2011, which indicated that

25. Professor Campbell therefore concluded that the Accused was fit to stand trial but recommended reassessment if his physical condition was to deteriorate.⁶¹ The Expert further recommended that the length of time the Accused can concentrate without a rest period (*i.e.*, about an hour and a half or shorter) be considered when determining court sitting times.⁶²

4.4. Trial Chamber's Assessment of NUON Chea's Fitness To Stand Trial

26. The Trial Chamber notes that the Expert has identified no incapacity sufficient to support any finding that the Accused NUON Chea is presently unfit to stand trial. It rejects all objections put forward by the Defence regarding the Expert's methodology and competence to assess the Accused NUON Chea's fitness to stand trial, on grounds that they are belated and lacking in merit.⁶³ When provided with information regarding the Expert in March 2011, the Defence did not challenge the sufficiency of his qualifications or experience to assess the Accused. The fitness hearing provided the Defence with a further opportunity to address any alleged shortcomings in the Expert's qualifications and methodology. The Defence availed themselves fully of this opportunity and the Expert responded to all such questions.⁶⁴

27. At this hearing, the Expert also responded in full to the Defence allegations that he failed to administer certain tests or that he relied improperly on previous reports. The Expert explained that an MMSE test performed in February 2011 had returned a normal result.⁶⁵ The Accused's memory was further tested during his examination in May 2011.⁶⁶ As further

the Accused's cognitive functions and memory were normal. The Accused also demonstrated a normal level of understanding in memorizing and reading a text).

⁶⁰ T., 31 August 2011, p. 50.

⁶¹ Expert Report, para. 29; T., 31 August 2011, pp. 82-83.

⁶² Supplement, para. 9 (following re-assessment of the Accused on 25 August 2011, which, according to the Expert, revealed no basis on which to revise the conclusions reached in his Expert Report).

⁶³ T., 31 August 2011, pp. 41-42.

⁶⁴ Under questioning, the Expert indicated that he neither lacked clear instructions nor the necessary expertise to assess the Accused's fitness to stand trial: *see* T., 29 August 2011, pp. 34-35, 57, 71-74, 104-106 and 110 (noting that the absence of direct experience in criminal trials was no barrier to his assessment of the Accused, as he had provided reports to the New Zealand High Court concerning the testamentary capacity of elderly persons, which involves the same techniques as when evaluating cognitive impairment in relation to criminal trials. Further, the capacities enumerated in *Strugar* are in essence the same capacities as those assessed before other courts in other cases. The Expert indicated that he made no explicit reference to the *Strugar* criteria in the Expert Report as he was not instructed to do so by the Chamber in the Order Assigning Expert (T., 30 August 2011, pp. 102-108); *see also* T., 29 August 2011, p. 60 (the Expert noted that he was aware of, and used, standardized cognitive tests (such as the MMSE) that are usually applied to assess fitness to stand trial).

⁶⁵ T., 29 August 2011, p. 28; T., 30 August 2011, p. 134; T., 31 August 2011, pp. 29-30, 33, 35.

⁶⁶ Supplement, para. 8; T., 29 August 2011, pp. 31-32 and 96; T., 31 August 2011, pp. 25-26, 52 (noting that all medical reports indicated an intact memory, no visual-spatial problems or problems with concentration. As the Accused's cognitive functions did not give rise to concern and as he was satisfied with the information obtained during his examination of him, the Expert saw no need to consult family members or view videotapes of hearings (T., 29 August 2011, pp. 43, 77-78, 81-82; T., 31 August 2011, pp. 30, 101).

cognitive testing is required only upon indication from clinical examination or medical history of impaired intellectual function or memory, the Expert did not consider the Accused's condition to warrant the application of further tests.⁶⁷

28. In response to allegations of improper reliance on previous medical reports, the Expert noted that although the doctors who previously examined the Accused were cardiologists, as trained physicians they would likely have observed any change in memory.⁶⁸ Further, these cardiologists had regularly examined the Accused since 2007 and would have noted any impairment of cognitive functions. The Chamber observes that the prior medical reports in question were not prepared solely by cardiologists but also by other physicians who would also have had observations relevant to the Accused's cognitive functions.⁶⁹ There are, in addition, consistency in the diagnoses concerning the Accused's cognitive function in these prior medical reports, and the Chamber has no reason to doubt their reliability. The Chamber therefore agrees with Professor Campbell that these previous medical reports were reliable and rejects the Defence's contention that the Expert's reliance on them was inappropriate.⁷⁰

29. Further, the Defense arguments concerning the Expert's alleged failure to take full account of the concerns expressed by the Accused concerning his memory and concentration are baseless in view of the Expert's express findings and testimony in this regard.⁷¹

⁶⁷ T., 29 August 2011, pp. 17-18, 26-27, 113, 116; T., 30 August 2011, pp. 134-136; T., 31 August 2011, p. 18 (indicating that additional cognitive testing was not needed given the Accused's ability to provide a good history and account of himself, and explaining that family history is of lesser significance when assessing cognitive impairment in elderly people. The Expert had also expressed reservations as to the efficiency of cognitive testing considering the potential translation and cultural issues).

⁶⁸ T., 31 August 2011, pp. 61, 64 (noting that these specialists would have undergone post-graduate training in internal medicine, which would cover cognitive functioning, in particular memory and attention span).

⁶⁹ In a medical report dated 18 June 2010, the neurologist's comments indicated that an examination was performed to determine if there had been any neurological change (Medical Report of 8 June 2010, B45, taking into account the CT scan performed on the same date (Document E110/4/2.2.8). Other physicians subsequently undertook medical examination of the Accused (Medical Report of 22 February 2011, E62/3/4.2, taking into consideration the CT scan performed the same date (Document E110/4/2.2.9)); *see also* E110/4/2.2.7 (*compte rendu scanographique*, 21 September 2007); *see further* T., 29 August 2011, p. 24 (the Expert explained that he also discussed the Accused's medical history with the Calmette Hospital physicians, who have been responsible for his treatment since his arrival at the ECCC Detention Facility). The court-appointed cardiologists examined the Accused in July 2010 (B48/1), December 2009 (B41/1), June 2009 (B27/1), January 2009 (B14/1), March 2008 (D24/IX) and October 2007 (D24/VII), respectively. When tested in 2008, the Accused's vision was also found to be normal (T., 31 August 2011, p. 98; *see also* Document A195/I/2 (medical certificate following ophthalmological examination of the Accused on 8 July 2008)).

⁷⁰ Request for Additional Expertise, paras 18-20.

⁷¹ Expert Report, para. 19; Supplement, para. 8; T., 29 August 2011, pp. 62, 64-65, 74, 78; T., 31 August 2011, pp. 6, 22 (noting that the main concerns expressed to the Expert by the Accused had been primarily related to the amount of time he could remain seated and not specifically on the length of time he could concentrate, and clarifying that he did take into account the Accused's concerns with concentration during his assessment of him

30. Regarding the length of his examination of the Accused and the Expert's selection of information, the Expert indicated that he considered he had adequate time to fully assess the Accused.⁷² The Expert also provided reasons for not seeking certain types of information; responses which were generally disregarded in the Defence's written submissions.⁷³

31. Nor does the Chamber agree that the Expert improperly assessed NUON Chea's cognitive functions or disregarded the consequences of the thalamic stroke suffered by the Accused more than ten years ago. Contrary to the Defence allegations, the Expert at no stage showed reluctance to acknowledge the possible consequences of a thalamic stroke.⁷⁴ However, the Accused's cognitive functions have been consistently diagnosed as normal during the past four years. Further, the Defence arguments concerning the Expert's alleged failure to apply certain cognitive tests are without merit in view of the Expert's testimony and the available medical documentation, which concluded that in the absence of any impairment, further tests were unwarranted.⁷⁵ The Expert's examination of the Accused was comprehensive and a neurological examination carried out on the Accused in February 2011 showed no evidence of any cognitive impairment: findings that are consistent with both the Expert's conclusions as well as with prior medical reports performed by various physicians, including a neurologist, a psychiatrist and a forensic psychiatrist.⁷⁶

32. Finally, the Chamber observes that the Defence Request entirely disregards the Expert's testimony regarding the Accused's alleged lack of concentration and deficient attention

in May 2011. Further, and when asked about court sessions, the Accused had not raised any concerns other than the temperature of the room).

⁷² T., 29 August 2011, pp. 23-25, 92-93 (indicating that this assessment was conducted in consultation with the Calmette Hospital doctors responsible for the Accused's treatment since 2007).

⁷³ See e.g. Request for Additional Expertise, para. 9. The Defense further omits to mention that the lack of testing specifically targeting cognitive functions was due to the Accused's prior refusal to meet with the previously-appointed expert, on the grounds that he did not have any psychiatric difficulties and therefore did not seek psychiatric evaluation (see Document B35/7); see further, T., 31 August 2011, p. 96.

⁷⁴ See e.g. T., 31 August 2011, pp. 36-37.

⁷⁵ See e.g. T., 29 August, pp. 26-27; T., 31 August 2011, pp. 7, 18, 24, 30, 33-35.

⁷⁶ See e.g. Document B45, medical report of neurologist, 8 June 2010 (strictly confidential) (concluding, following a clinical neurological examination, that the Accused had normal consciousness and that his brain scan revealed no particular anomalies); B35/7, medical report from psychiatrist and forensic psychiatrist, 12 November 2009 (concluding, following a review of the medical files of the Accused (as the latter had refused to meet with them) that they revealed no past history of mental disorder, and further assessing the numerous health problems suffered by the Accused as not contributing to any symptoms of mental disorder); see further E110/4/2.2.8, *Compte rendu scanographique*, 8 June 2010; E110/4/2.2.9, *Compte rendu scanographique*, 22 february 2011; Document B48/1, medical report of cardiologist, 18 July 2010 (confidential); B41/1, medical reports from cardiologist (confidential), 18 December 2009; B27/1, medical report from cardiologists, 10 June 2009 (confidential) (finding no signs of mental dysfunction or dementia); B14/1, medical report from cardiologists, 9 October 2008, (confidential); D24/IX, medical report from cardiologists, 5 March 2008 (confidential); D24/VII, medical reports from cardiologists, 20 October 2007 (confidential); D24/II, medical report from cardiologist, 14 October 2007 (confidential); see also, T., 31 August 2011, pp. 93-94.

span.⁷⁷ The Expert did consider the Accused's concerns in this area, while indicating that concentration problems are difficult to assess objectively.⁷⁸ In the Expert's opinion, if these alleged difficulties had been symptomatic of an underlying neurological disease, this would have been revealed by the cognitive tests and the medical examinations conducted.⁷⁹ However, and consistent with previous medical assessments of the Accused, no problems with concentration or deficiency in attention span were detected.⁸⁰ The Chamber therefore rejects all Defence submissions regarding the alleged deficiencies in the Expert's methodology and assessment of the Accused's cognitive functions. The Chamber has, however, noted the recommendations of the Experts regarding the length of court sessions and will implement these in due course, in relation to measures concerning trial management.

33. In view of the Expert's testimony and Report, and all pertinent medical documentation, the Chamber finds no evidence of impairment in the Accused's physical or cognitive functions affecting his capacities to the extent rendering him unfit to stand trial. There is accordingly no evidence to suggest that he lacks capacity to understand the nature of the charges against him, the course of the proceedings, the details of the evidence and the consequences of the proceedings. Nor is there evidence of any existing impairment that would render the Accused unable to instruct counsel, to testify or to respond to the charges against him. To the contrary, the Accused reiterated, in person or through his counsel, his wish to participate fully to the proceedings and his capacity to do so.⁸¹ Although no reassessment of

⁷⁷ Request for Additional Expertise, para. 10 (alleging that the Expert "does not even mention concentration issues in his initial report, even though NUON Chea raised it with him specifically").

⁷⁸ Expert Report, paras. 13-18; *see also* Supplement, paras 8- 9 and T., 29 August 2011, p. 64.

⁷⁹ Supplement, para. 8 (explaining that the Accused "[gave] a clear history of his physical conditions, "[reviewed] the past accurately and "[answered] questions appropriately"); *see further* T., 29 August 2011, pp. 27-28, T., 30 August 2011, pp. 134, 136 and T., 31 August 2011, p. 24 (indicating that the CT scan of February 2011 showed no change from earlier CT scans and that the assessment of the Accused through the MMSE, carried out as a routine assessment, indicated a normal score).

⁸⁰ T., 29 August 2011, p. 64 (explaining that there was no reason to suspect any lapse in concentration, as the Accused was properly focused and providing accurate answers during the Expert's examination); *see further* T., 31 August 2011, p. 22 (explaining that he did not specifically include findings on concentration in his Expert Report, as following his interaction with the Accused, he did not consider it to be in issue, but that he did address it subsequently (Supplement, para. 8)).

⁸¹ Urgent Application, para. 22; Request for Additional Expertise, para. 4; T., 29 August 2011, pp. 46-47; T., 30 August 2011, pp. 137-138. The Chamber also observed that the Accused appeared attentive, coherent, and articulate during recent hearings; *see further* T., 31 August 2011, pp. 88, 99 (Expert stated that the Accused's comments showed "a clear understanding of his situation, the processes and the issues at stake and also showed a degree of logical and coherent thought that one would judge as normal").

the Accused's health is currently warranted, the Chamber will continue to monitor the Accused's health in accordance with the provisions of the ECCC legal framework.⁸²

34. The Chamber finds the Accused to have the capacity to meaningfully participate in proceedings and to sufficiently exercise his fair trial rights. He is therefore fit to stand trial and in consequence there is no basis to grant the Defence's oral request for severance of the Accused's trial.⁸³

4.5. Request for Additional Expertise

35. The Request for Additional Expertise is limited to the alleged need for further testing of the Accused's cognitive functions, particularly regarding his ability to concentrate, his memory and maximum attention span. According to the Defence, these have been neither adequately tested nor properly evaluated by the Expert.⁸⁴

36. In addition to finding the Request for Additional Expertise to be a belated attempt to impeach the Expert, the Chamber finds this request to be speculative, on grounds that it merely asserts that the Expert may have misjudged the potential consequences of a thalamic stroke. The Chamber has found that the consequences of this stroke were adequately addressed by the Expert.⁸⁵

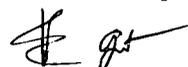
37. The Chamber therefore finds that the Request has failed to demonstrate that the Expert's findings were unreliable. Further, no clinical evidence likely to warrant further expertise or testing is presented in support of the Request. The latter is instead based on the hypothetical after-effects of a previous stroke, and an unauthorized preliminary report prepared by an

⁸² See e.g. Rule 11(4) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia, according to which the Accused may at any time notify the detention officers that he requires health care, which will be followed up by the ECCC Medical Unit through the Chief of the Detention Unit. Pursuant to Rule 11 (1), the ECCC Medical Unit "shall provide health care to detainees."

⁸³ T., 20 October 2011, pp. 84-85 (requesting that severance be undertaken to permit two separate trials: the first against those Accused capable of sitting for the entire length of trial proceedings and the second against those who are, by contrast, "not fully fit").

⁸⁴ Request for Additional Expertise, paras. 11, 21 (alleging that the Expert has not "assessed for how long and how effectively Nuon Chea can read" and that this is a key issue in relation to the maximum attention span of the Accused); see also T., 29 August 2011, pp. 46-47 (alleging that the Accused has also orally requested additional expert assessment and highlighted difficulties in concentrating after an hour and a half, and in understanding or reading any material).

⁸⁵ Above, paras. 26 and 31; see further T., 29 August 2011, p. 116 (testifying that referral to a specialist, such as a neuropsychiatrist, is only medically indicated in cases of functional or behavioral problems, which the Accused is not suffering).



external medical consultant.⁸⁶ According to this report, “[the Accused’s] cerebrovascular status, which [the Expert] lightly glosses over, [is] the most salient factor potentially impairing his fitness to stand trial.”⁸⁷ Contrary to what is suggested in the Bursztajn report, the Chamber finds that there is currently no need to address “less tangible *sequelae* of a cerebro-vascular accident”⁸⁸, particularly in view of the Expert’s consistent findings on the absence of any indication of cognitive impairment.⁸⁹

38. Further, Professor Campbell has clarified that even if further psychiatric testing could indicate deterioration attributable to difficulties in concentration, it is unclear whether the results of such tests would be objective and accurate.⁹⁰ An accused’s ability to concentrate may fluctuate depending on his general state of health on any given day.⁹¹ Additional expertise in this area is therefore likely to be irrelevant or of limited probative value, and would needlessly prolong or delay proceedings. The Chamber finds that the requested additional expertise would be unsuitable to provide the Chamber with reliable information on fitness to stand trial and further, that granting this request would contravene its duty to ensure the expeditiousness of the trial. The Chamber therefore rejects this request.

39. Finally, the Chamber notes that the external medical consultant was provided with a number of strictly confidential or confidential documents in breach of Article 8.1 of the Practice Direction on the Classification and Management of Case-Related Information.⁹²

⁸⁶ Bursztajn Report, pp. 1, 3–4 (c) (proposing a “forensic neuropsychiatric evaluation of the methodological reliability, for forensic purposes, of the evaluation conducted by the Expert”, in view of the Expert’s alleged failure to “conduct an evaluation that can reliably address the potential for subtle but significant disruptions in autobiographical memory to the left thalamic ischemic lesion noted on a previous CT brain scan (2/22/11)” and to indicate “how he addressed fitness to stand trial as constituting a specific area of competence with its own requisite capacities,” in particular the capacity to communicate effectively. He suggested further expertise due to the Expert’s alleged failure to appraise the significance of the CT scan, alleging that “a CT scan may under-represent effects of a stroke that would appear more fully on an MRI”).

⁸⁷ Bursztajn Report, p. 6, para. 5 and p. 5, para. 2 (disregarding the Accused’s views on his cognitive function on the ground that “[w]hatever [the Accused] may feel or say, lack of insight is a characteristic symptom of thalamic injury since impairment of autobiographical emotional memory – as opposed to straightforward, concrete memory – is by its very nature elusive”).

⁸⁸ Bursztajn Report, p. 5.

⁸⁹ Above, footnote 69 and accompanying text (showing that no further investigation was recommended following previous examination of CT scans by medical professionals).

⁹⁰ T., 29 August 2011, p. 65; T., 30 August 2011, p. 131 (considering that there would be no reliable or objective indicator of concentration given the circumstances of the Accused, who is in detention facing serious criminal charges).

⁹¹ T., 31 August 2011, pp. 27, 50, 92 (noting that the underlying reasons for loss of concentration after a certain period of time may be linked to various factors such as age, physical problems, cardio-vascular disease, previous stroke, poor mobility and stress).

⁹² The following documents, listed in the Bursztajn Report, p. 2 and which remain classified as confidential or strictly confidential, appear to have been disclosed to Dr. Bursztajn: E30; B45; D24/II; A38/1/4; D24/IV; B14/1; B41/1; D24/IX; D24/VII; B35/7; B48/1; E62/1; E62/3; and weekly medical reports of 6/3/11, 2/11/11, 3/4/11,

Pursuant to Internal Rules 35(5) and 38, the Chamber warns the NUON Chea Defence against further unauthorized disclosure of confidential or strictly confidential information.⁹³

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

FINDS the Accused NUON Chea to be fit to stand trial;

DISMISSES the Defence Request for Additional Expertise;

NOTES that unauthorized disclosure of material classified as confidential or strictly confidential was made by the NUON Chea Defence to a third party and warns that future conduct of this type may be sanctioned pursuant to Internal Rules 35(2) and 38; and

DIRECTS the NUON Chea Defence to ascertain whether classified material remains in the possession of third parties and to report to the Chamber within fifteen (15) days of this Decision regarding measures taken by the Defence to prevent further unauthorized distribution or disclosure of this material.

[Handwritten signature]

Phnom Penh, 15 November 2011



[Handwritten signature]
Nil Nonn

4/8/11 and 4/29/11. Others, such as the Expert Report and Supplement, were classified as strictly confidential at the time of disclosure but have since been reclassified as public.

⁹³ Article 8.1 of the Practice Direction on the Classification and Management of Case-Related Information provides that all persons having access to confidential or strictly confidential information are under a duty of confidentiality and shall not disclose such information to any person, except in accordance with this Practice Direction. Internal Rule 35(5) provides that “[i]f a lawyer is found to have committed any act set out in Internal Rule 35(1) (which includes the power to sanction persons who knowingly and wilfully disclose confidential information in violation of a court order), the Chambers making such finding may also determine that such conduct amounts to misconduct of a lawyer pursuant to Rule 38; *see also* Internal Rule 38(1) (empowering the Chamber to sanction a lawyer following a warning).