



**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

**Date:** 2 April 2013  
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**SECOND DECISION ON ACCUSED NUON CHEA'S FITNESS TO STAND TRIAL**

**Co-Prosecutors**  
CHEA Leang  
Andrew CAYLEY

**Accused**  
NUON Chea

**Civil Party Lead Co-Lawyers**  
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## 1. INTRODUCTION

1. On 15 November 2011, the Trial Chamber found the Accused NUON Chea fit to stand trial.<sup>1</sup> On 18 December 2012, the Trial Chamber noted the Accused suffers from chronic physical ailments and ordered that the Accused be re-assessed by Professor A. John CAMPBELL (“Geriatrician”) and Dr. Seena FAZEL (collectively “Medical Experts”).<sup>2</sup> Subsequent to the appointment order, the 86 year-old Accused contracted an illness and was hospitalised on two occasions.<sup>3</sup> Since his discharge from hospital on 19 February 2013, medical reports indicate his health is stable.<sup>4</sup> Having received the Medical Experts’ report of 20 March 2013, and following a hearing during which the experts testified and the parties made submissions, the Trial Chamber issues its decision concerning the Accused’s fitness to stand trial.<sup>5</sup>

## 2. PROCEDURAL BACKGROUND

2. After the Accused was arrested in September 2007,<sup>6</sup> the Co-Investigating Judges ordered a complete medical check-up in which the Accused presented with heart disease, moderate prostate hypertrophy, arthrosis of the lumbar column and a congenital single kidney.<sup>7</sup> In October 2007, three cardiologists examined the Accused and diagnosed him with uncontrolled hypertension and a moderate kidney deficiency.<sup>8</sup> The cardiologists also found

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<sup>1</sup> Decision on NUON Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, E115/3, 15 November 2011 (“First NUON Chea Fitness Decision”), para. 34.

<sup>2</sup> Re-Appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea during the week of 11 March 2013, E256, 18 December 2012. Although Dr. HUOT Lina was originally appointed to assist in this expertise, he was unavailable for this examination; *see also* “Consolidated schedule of witnesses and experts for early 2013”, E236/4, 8 January 2013 (rescheduling assessment for week of 18 March 2013).

<sup>3</sup> Medical check up for NUON Chea, E1/160.3, 14 January 2013; Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/116/4, 5 February 2013.

<sup>4</sup> Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/119/1, 18 February 2013; Rapport médical hebdomadaire de NUON Chea, E10/120, 20 February 2013; Rapport médical hebdomadaire de NUON Chea, E10/121, 27 February 2013; Rapport médical hebdomadaire de NUON Chea, E10/122, 6 March 2013; Rapport médical hebdomadaire de NUON Chea, E10/123, 13 March 2013.

<sup>5</sup> Expert Medical Report – Mr. NUON Chea Prepared in Response to Trial Chamber Request (E256), E256/4, 20 March 2013 (“Expert Report of March 2013”).

<sup>6</sup> Written Record of Arrest of NUON Chea, C7, 19 September 2007.

<sup>7</sup> Internal Memorandum on the Health of NUON Chea (OCIJ), A38, 27 September 2007; Doctor’s Report answering to the Internal Memorandum on the health of NUON Chea, A38/I, 29 September 2007.

<sup>8</sup> Nuon Chea’s medical report from BNH hospital of Thailand, D24/II, 14 October 2007; Report of Cambodian Doctor (Dr. LIV Chhinh), D24/IV, 19 October 2007; Medical Report of French Doctor (Dr. Antoine LAFONT), D24/VII, 22 October 2007.

that the Accused had moderate impairment of his memory, but that remote memory was intact and that his intellectual autonomy was satisfactory considering his age.<sup>9</sup>

3. In 2008 and 2009, two cardiologists re-examined the Accused and found there was no change in his health status.<sup>10</sup> They also concluded that the Accused showed no signs of mental retardation, temporal-spatial disorientation or other signs of dementia.<sup>11</sup> In September 2009, the Co-Investigating Judges appointed two psychiatrists to evaluate the Accused and determine whether the Accused was fit to stand trial.<sup>12</sup> The NUON Chea Defence, however, challenged the basis for the 2009 appointment and advised the Accused not to cooperate with the psychiatric evaluation.<sup>13</sup> In December 2009 and July 2010, the cardiologists re-examined the Accused, confirmed their prior findings and reported that the Accused's health was stable.<sup>14</sup>

4. The Trial Chamber was seized of Case 002 on 13 January 2011.<sup>15</sup> From the outset of trial proceedings in Case 002, the Accused, with some exceptions, has participated in the morning trial sessions from the courtroom and participated in the afternoon sessions from the holding cell by audio-visual means.<sup>16</sup> The Accused, through his counsel, has complained of a number of symptoms that he asserts do not allow him to follow afternoon trial sessions, but has nonetheless waived his right to be present for sessions in which he participated from the holding cell.<sup>17</sup> The symptoms the Accused reported include a headache, back-pain, fatigue and a general lack of concentration.<sup>18</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> Medical Report on Nuon Chea (Dr. Antoine LAFONT), D24/IX, 5 March 2008; Medical Report of NUON Chea dated 09 October 2008 (Dr. Antoine LAFONT), B14/1, 9 October 2008, p. 2; Medical expertise report on Nuon Chea (Dr. SOK Chour and Dr. Antoine LAFONT), B27/1, 11 June 2009.

<sup>11</sup> *Id.*

<sup>12</sup> Order on psychiatric expertise of NUON Chea, B35, 17 September 2009.

<sup>13</sup> Letter of NUON Chea's lawyers concerning order on psychiatric expertise of NUON Chea, B35/2, 14 October 2009.

<sup>14</sup> Medical Expertise Report on Nuon Chea (Dr. SOK Chour and Dr. Antoine LAFONT), B41/1, 18 December 2009; Medical Report of Mr NUON Chea (Dr. SOK Chour and Dr. Antoine LAFONT), B48/1, 18 July 2010.

<sup>15</sup> Decision on IENG Thirith and NUON Chea's appeal against the closing order, D427/2/12, 13 January 2011.

<sup>16</sup> See Internal Rule 81(5).

<sup>17</sup> See e.g. Letter from NUON Chea to President of Trial Chamber on "Waiving right to be present", E1/122.4, 5 September 2012; Letter from NUON Chea to President of Trial Chamber on "Waiving right to be present", E1/153.5, 13 December 2012.

<sup>18</sup> See e.g., T., 26 July 2012, p. 52; T., 6 November 2012, p. 59; T., 12 November 2012, p. 58.

5. On 2 February 2011, the Defence filed an application seeking the appointment of an expert to determine the Accused's fitness to stand trial.<sup>19</sup> The Chamber appointed the Geriatrician who found in his report of June 2011:

[the Accused] shows minimal residual signs of his [1995] stroke. Cognitive function is well preserved. I found no evidence of impaired cognition that would affect [his] ability to understand the proceedings, instruct Counsel, understand questions and the charges against him, respond appropriately and concentrate during the hearing.<sup>20</sup>

6. The Geriatrician opined that the Accused was able to participate in the proceedings and considered the courtroom and holding cell facilities were suited to the Accused's needs, but recommended a reassessment prior to the commencement of trial.<sup>21</sup> On 25 August 2011, having conducted a reassessment at the Chamber's invitation, the Geriatrician concluded that there had been no significant change in the Accused's physical and cognitive function since his initial assessment. The Accused scored 30 out of 30 on the Mini Mental State Examination ("MMSE") (a formal memory and cognition test). However, the Geriatrician noted the Accused's "chronic health problems [...] affect his ability to sit and concentrate for long periods [...]. The length of time he can concentrate does vary and can be shorter than the hour and a half. This will need to be considered when determining the Court sitting times."<sup>22</sup> The Chamber fixed sitting times from 9:00 am to 4:00 pm Monday to Thursday with sessions lasting no more than one hour and thirty minutes.<sup>23</sup>

7. On 15 November 2011, the Trial Chamber noted there was no evidence of any significant impairment in the Accused's short and long-term memory. Based on the expert's testimony and report, and all pertinent medical documentation, it considered there was no evidence of impairment in the Accused's physical or cognitive functions affecting his capacity to stand trial.<sup>24</sup>

8. The Accused's weekly medical reports since January 2012 generally indicate the Accused is in stable condition (*état conservé* or *stationnaire*), maintains normal consciousness

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<sup>19</sup> Urgent application for appointment of fitness expert, E30, 2 February 2011.

<sup>20</sup> Geriatric Expert report of NUON Chea dated 13 June 2011 in response to Trial Chamber's Order Assigning Expert – E62/3, E62/3/4, 13 June 2011, para. 15.

<sup>21</sup> *Id.*, paras 28-29.

<sup>22</sup> Follow up Geriatric Report Concerning Mr. NUON Chea in Accordance to Trial Chamber's Expertise Order E62/3 dated 4 April 2011, E62/3/13, 26 August 2011, para 9.

<sup>23</sup> Trial Chamber Memorandum entitled "Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011", E141, 17 November 2011.

<sup>24</sup> First NUON Chea Fitness Decision, paras 24, 33.

and alertness, although they occasionally note problems of balance while walking.<sup>25</sup> On several occasions during the months of November and December 2012, the Chamber received medical reports prior to the start of the trial proceedings indicating the Accused suffered from dizziness, fatigue, and elevated blood pressure.<sup>26</sup> The physicians charged with monitoring the health of the Accused nonetheless considered he was capable of participating in the proceedings from the holding cell.<sup>27</sup>

9. On 13 January 2013, the Accused was hospitalised and diagnosed with acute bronchitis and hypotonia in both legs.<sup>28</sup> He was released on 31 January 2013 subject to a mandatory two-week period of convalescence.<sup>29</sup> The Accused was again hospitalised with hypertension and drowsiness on 2 February 2013.<sup>30</sup> Later hospital reports indicate the Accused experienced coughing and extreme fatigue.<sup>31</sup> His physical strength gradually improved and he was released on 19 February 2013 with an indication that he would be able to follow proceedings from the holding cell.<sup>32</sup> Medical reports since his discharge indicate the Accused's health status to be stable.<sup>33</sup>

<sup>25</sup> See e.g., Rapport médical hebdomadaire de NUON Chea, E10/51, 4 January 2012; Rapport médical hebdomadaire de NUON Chea, E10/88, 19 September 2012.

<sup>26</sup> T., 12 November 2012, pp. 3 (experiencing dizziness), 53-56 (medically examined, accused fatigued), 58; T., 11 December 2012, p. 66 (Accused awoke with elevated blood pressure); T., 17 December 2012, p. 2 (elevated blood pressure and feeling weak).

<sup>27</sup> Medical report for NUON Chea before the Trial Proceedings on 12 November 2012, E1/143.2, 12 November 2012; Medical check-up for NUON Chea before the hearing on 14 November 2012, E1/144.3, 14 November 2012; Medical Report for NUON Chea during the Trial Proceedings on 22 November 2012, E1/145.3, 22 November 2012; Medical report for NUON Chea during the Trial Proceedings on 23 November 2012, E1/146.3, 23 November 2012; Medical report for NUON Chea before the Trial Proceedings on 11 December 2012, E1/151.211 December 2012; Medical report for NUON Chea before the Trial Proceedings on 17 December 2012, E1/155.3, 17 December 2012.

<sup>28</sup> Medical check up for NUON Chea, E1/160.3, 14 January 2013; Medical Report for NUON Chea, E10/105, 17 January 2013.

<sup>29</sup> Hospital Discharge – NUON Chea, E10/116/1, 30 January 2013; Rapport médical de NUON Chea, E10/116/2, 31 January 2013.

<sup>30</sup> Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/116/4, 5 February 2013.

<sup>31</sup> Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/116/5, 6 February 2013; Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/117/1, 7 February 2013; Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/118/1, 8 February 2013; Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/118/4, 13 February 2013; Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/118/5, 14 February 2013; Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/118/6, 15 February 2013.

<sup>32</sup> Letter from Khmer-Soviet Hospital to Acting Director of the ECCC concerning medical report of NUON Chea, E10/119/1, 18 February 2013.

<sup>33</sup> Rapport médical hebdomadaire de NUON Chea, E10/120, 20 February 2013; Rapport médical hebdomadaire de NUON Chea, E10/121, 27 February 2013; Rapport médical hebdomadaire de NUON Chea, E10/122, 5 March 2013; Rapport médical hebdomadaire de NUON Chea, E10/123, 13 March 2013.

### **3. SUBMISSIONS**

10. The NUON Chea Defence submits the Accused continues to suffer from a number of ailments, including hypertension, an inflamed respiratory system, back pain and worsening episodes of dizziness. It submits the Accused's cognitive functions are likewise diminished. It also contends that it is meaningless to bring the Accused to the holding cell because the Accused is unable to participate effectively in the proceedings. The Defence therefore requests the Chamber to order further mental and physical examinations of the Accused and to place him under treatment until such time as he is fit to stand trial.<sup>34</sup> It appears to request in the alternative, that the Accused be permitted to participate in the trial proceedings by audio-visual means from the Detention Facility because it fatigues the Accused to move him to the holding cell beneath the courtroom each trial day.<sup>35</sup>

11. The Co-Prosecutors submit that that the Defence requests for additional examinations are not warranted by the expert report. The Co-Prosecutors acknowledge that the Accused's health is fragile but assert that his physical conditions are controlled or within normal limits. Any dizziness he experiences is, to a large extent, the result of his own inactivity. They submit that the Accused scored well on the MMSE and was able to respond to the questions given to him by the experts. Therefore, they submit it was clear that he understands the nature of the charges and proceedings and is capable of participating in his defence.<sup>36</sup>

12. The Lead Co-Lawyers oppose further medical evaluation as requested by the Defence. They assert the Medical Experts are well-qualified, and that the expert report is objective and comprehensive. Considering the Accused's health is stable, the Lead Co-Lawyers request that proceedings continue with the Accused participating from the courtroom or the holding cell.<sup>37</sup>

### **4. APPLICABLE LAW**

13. A Trial Chamber, on its own motion or that of the parties,<sup>38</sup> must be satisfied that an accused is currently capable of "meaningful participation which allows the accused to

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<sup>34</sup> T., 25 March 2013, pp. 93-94.

<sup>35</sup> Response to Chamber's Request for Submissions Concerning the Scope of NUON Chea's Fitness Review, E256/2/1, 15 March 2013.

<sup>36</sup> T., 25 March 2013, pp. 95-97.

<sup>37</sup> T., 25 March 2013, pp. 97-102.

<sup>38</sup> Internal Rule 32; *see also Prosecutor v. Mladić*, ICTY Trial Chamber (IT-09-92-PT), Scheduling Order, 15 February 2012, paras 12-13 ("despite numerous intimations both in court and in various filings by both parties

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 proceedings”.<sup>39</sup> In making this determination, a Chamber shall consider all pertinent material and relevant factors, including, as appropriate, its own observations.<sup>40</sup> A Chamber should further consider both the existence of particular medical conditions and their resulting impact on fitness.<sup>41</sup> The availability of practical measures mitigating the negative effects of any impairment must also be examined.<sup>42</sup>

14. The ICTY Appeals Chamber has 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.<sup>43</sup> 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”.<sup>44</sup> 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”.<sup>45</sup> The effective

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[the Chamber] had not been seised of a request from either party for a medical examination, and as such ordered, *proprio motu*, a complete expert medical examination” and finding, on the basis of that medical examination, that there was nothing indicating that the accused could not attend court proceedings or that his health required modification of the trial schedule).

<sup>39</sup> The existence of fair trial rights presumes the capacity to exercise them: *see e.g.* Internal Rules 21(d) (right to be informed of charges, to be defended by a lawyer and to remain silent); 22(3) (right to freely and confidentially communicate with counsel); 81(1) (qualified right to be tried in his or her presence) and 85(1) (guaranteeing “the free exercise of defence rights”); *see also Prosecutor v. Gbagbo*, ICC Pre-Trial Chamber (ICC-02/11-01/11), Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings Before this Court, 2 November 2012 (“*Gbagbo Decision*”), paras 43, 49, 56 (rejecting the balance of probabilities standard in favour of a standard requiring that the Chamber is “satisfied”) and 86 (“The question is not whether [the accused] is at present in full possession of the higher or better faculties he may have had in the past but whether his current capacities are sufficient for him to take part in proceedings against him”) and Decision on IENG Thirith’s Fitness to Stand Trial, E138, 17 November 2012 (“*IENG Thirith First Fitness Decision*”), para. 27 (*citing Prosecutor v. Strugar*, ICTY Appeals Chamber (IT-01-42-A), Judgement (“*Strugar Appeal Judgement*”), 17 July 2008, para. 55).

<sup>40</sup> *IENG Thirith First Fitness Decision*, para. 29.

<sup>41</sup> *Gbagbo Decision*, para. 51 (*citing*, amongst others, *Strugar Appeal Judgement*, paras 61, 66).

<sup>42</sup> Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused IENG Thirith (SCC), E138/1/7, 13 December 2011, para. 37; *Gbagbo Decision*, paras 51, 102 and *Prosecutor v. Stanišić & Simatović*, ICTY Appeals Chamber (IT-03-69-AR73.2), Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 (“*Stanišić Appeals Decision*”), paras 19-20.

<sup>43</sup> *Strugar Appeal Judgement*, para. 60.

<sup>44</sup> *Strugar Appeal Judgement*, para. 60.

<sup>45</sup> *Prosecutor v. Strugar*, ICTY Trial Chamber (IT-04-42-T), Decision re the Defence Motion to Terminate Proceedings, 26 May 2004 (“*Strugar Decision*”), para. 22.

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".<sup>46</sup> The Accused must consequently possess "in each case [capacities] in a sufficient degree to enable the defence of the accused to be presented."<sup>47</sup>

15. Moreover, an Accused has a qualified right to be physically present during the proceedings.<sup>48</sup> The ECCC Internal Rules and relevant international jurisprudence indicates that disruption of the proceedings may justify alternatives to an Accused's physical presence where these are suitable, necessary and proportionate.<sup>49</sup>

16. Within the ECCC legal framework, an Accused may opt to participate in proceedings remotely. The Chamber may also order participation through audio-visual means where the interests of justice so require pursuant to Internal Rule 81(5), which provides as follows:

Where, due to health reasons or other serious concerns, the Accused cannot attend in person before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused's absence with his or her consent or, where the Accused's absence reaches a level that causes substantial delay and, where the interests of justice so require, order that the Accused's participation before the Chamber shall be by appropriate audio-visual means.

## **5. FINDINGS**

### **5.1. Medical Experts' Report and Testimony**

17. The Medical Experts, who have previously been appointed by this Chamber as experts on several occasions, assessed the Accused's mental and physical health over the course of three days (18, 19, and 20 March 2013).<sup>50</sup> Physically, they found the Accused to be frail.<sup>51</sup> He has longstanding degenerative back problems and poor muscle bulk due to a low level of

<sup>46</sup> *Strugar* Decision, para. 23.

<sup>47</sup> *Strugar* Decision, para. 24.

<sup>48</sup> Internal Rule 81(1); *see also Stanišić* Appeals Decision, para. 6; *Milošević v. Prosecutor*, ICTY Appeals Chamber (IT-02-54-AR73.7), Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Appeal Decision"), para. 13; *Zigiranyirazo v. Prosecutor*, ICTR Appeals Chamber (ICTR-01-73-AR73), Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Appeal Decision"), para. 13.

<sup>49</sup> Disruption to proceedings need not be intentional in order to warrant these measures: *see* Internal Rules 37(2) and 81(5); *see also Stanišić* Appeals Decision, paras 6, 19 and *Milošević* Appeal Decision, para. 14.

<sup>50</sup> Summary of Expert Witness Qualifications, Professor Campbell, E62.1, 9 March 2011; *see also* T., 29 August 2011, p. 3; Curriculum Vitae of expert Seena Fazel, E111.4 and Expert Report of March 2013, para. 3.

<sup>51</sup> Expert Report of March 2013, para. 8, 15.

physical activity.<sup>52</sup> The Accused receives treatment for heart failure but his cardiovascular disease is stable.<sup>53</sup> He also has difficulty reading due to bilateral cataracts.<sup>54</sup> The Medical Experts were of the view that the Accused's complaint of dizziness is due principally to a feeling of insecurity when standing, but may also be brought on due to his blurring of vision when reading due to his cataracts.<sup>55</sup> However, the Medical Experts consider these issues can be mitigated.<sup>56</sup> They also recommend several measures that would help alleviate symptoms suffered by the Accused.<sup>57</sup> They do not consider that these issues would interfere with the Accused's capacity to plead or his fitness to stand trial.<sup>58</sup>

18. The Medical Experts note the Accused was previously admitted to hospital for acute bronchitis, but found no residual signs of chest infection at the time of the assessment. They report that a bronchial infection will leave the Accused feeling exhausted for a period of time and that he may experience a period of delirium for a few days.<sup>59</sup> There were no permanent effects from the bronchitis and any delirium has resolved on its own.<sup>60</sup>

19. Regarding the Accused's mental health, the Medical Experts note the Accused reported some gradual decline in his memory over the last few years.<sup>61</sup> However, the Accused scored 28 out of 30 on the MMSE on two separate occasions.<sup>62</sup> He also exhibited intact short and long-term memory although the Medical Experts noted that short-term memory would decline as part of the normal ageing process.<sup>63</sup> The Medical Experts therefore conclude that the Accused has no mental or physical problems that would affect his ability to exercise the capacities necessary to plead and stand trial.<sup>64</sup>

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<sup>52</sup> Expert Report of March 2013, para. 11, 12, 15.

<sup>53</sup> Expert Report of March 2013, para. 9.

<sup>54</sup> Expert Report of March 2013, para. 14.

<sup>55</sup> Expert Report of March 2013, para. 11, 33.

<sup>56</sup> Expert Report of March 2013, para. 12, 49.

<sup>57</sup> Expert Report of March 2013, para. 16-21.

<sup>58</sup> Expert Report of March 2013, para. 46, 48, 49.

<sup>59</sup> Expert Report of March 2013, para. 10.

<sup>60</sup> T., 25 March 2013, p. 17.

<sup>61</sup> Expert Report of March 2013, para. 27.

<sup>62</sup> Expert Report of March 2013, para. 34.

<sup>63</sup> Expert Report of March 2013, para. 28-32; T., 25 March 2013, p. 52-53.

<sup>64</sup> Expert Report of March 2013, para. 48.

## **5.2. Trial Chamber's Assessment of NUON Chea's Fitness to Stand Trial**

20. The Chamber finds that the physical ailments suffered by the Accused, in combination with any reported deficits in memory and concentration, do not prevent him from participating meaningfully in the trial proceedings.

21. The Accused's chronic physical ailments include heart disease and degenerative back problems. The Chamber notes that he has suffered from these impediments since he was first arrested by the Co-Investigating Judges in 2007.<sup>65</sup> The Medical Experts concluded that the Accused's cardiovascular disease is stable and well-controlled by his current medication.<sup>66</sup> They also concluded that the Accused's long-standing back problems are best managed by positioning, lumbar support and pain medication.<sup>67</sup> The Chamber considers that these practical measures adequately mitigate the potential impact of these factors on the Accused's ability to participate in the proceedings against him.

22. Although the onset of bilateral cataracts will affect the Accused's ability to read legal documents and documentary evidence, his counsel may mitigate the effects of this impairment by explaining legal issues to their client and reading documents to him when necessary.<sup>68</sup> Insofar as complaints of dizziness are due to a blurring of vision when reading due to his cataracts, assistance of counsel in reading documents may mitigate this impairment.<sup>69</sup>

23. Regarding the recent hospitalisation of the Accused due to a bronchial infection, the Medical Experts found that there are no residual signs of chest infection and the temporary delirium resulting from the bronchial infection has since resolved. The Chamber therefore does not consider the illness necessitating the Accused's hospitalization to affect his capacities at this time.

24. The Accused's memory and ability to concentrate are factors that relate to his capacity to instruct counsel and testify, amongst other capacities. The Chamber considers that in order to properly instruct counsel, an Accused must have adequate long-term and short-term memory to recall events from the time of the alleged criminal conduct and to comment on evidence presented. The Medical Experts found the Accused has good long-term memory but

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<sup>65</sup> Doctor's Report answering to the Internal Memorandum on the health of NUON Chea, A38/I, 29 September 2007.

<sup>66</sup> Expert Report of March 2013, para. 9, 18; T., 25 March 2013, p. 23.

<sup>67</sup> Expert Report of March 2013, para. 12, 49.

<sup>68</sup> *Strugar* Decision, para. 22.

<sup>69</sup> Expert Report of March 2013, para. 11, 33.

he complains of a gradual decline in his short-term memory.<sup>70</sup> The Accused nonetheless scored 28 of 30 on the MMSE and performed well on two other tests designed to test cognitive ability.<sup>71</sup> The experts found overall that the Accused's short-term memory and attention were preserved, and that he was oriented in relation to his present location and time.<sup>72</sup> Furthermore, the Medical Experts asked a number of detailed questions to test the Accused's long-term memory in response to which he provided internally consistent responses.<sup>73</sup> Although the Medical Experts have noted that the normal ageing process will reduce an individual's ability to recall events, the Chamber considers the Accused does not suffer from any long-term or short-term memory that would render him incapable of participating in his own defence.

25. On multiple occasions during trial proceedings, the Defence argued the Accused was not actively participating in proceedings from the holding cell because he lacked concentration and therefore fell asleep.<sup>74</sup> In their report, however, the Medical Experts found that the Accused had no significant concentration or attention problems.<sup>75</sup> They found the Accused is able to concentrate for up to two hours at a time, did not obviously tire, and remained alert throughout the interviews conducted by them.<sup>76</sup> The Chamber does not consider the Accused to be impaired by any medical inability to concentrate.

26. The Defence requests the Chamber to order additional physical and mental tests prior to ruling him fit to stand trial without identifying particular tests or areas they allege to have been improperly conducted by the Medical Experts. The Chamber agrees with the Medical Experts that no additional examinations are necessary.

27. In conclusion, based on the Medical Experts' report and the testimony provided by the Medical Experts, the Chamber finds the Accused is capable to plead; understand the nature of the charges, the course of the proceedings, the details of the evidence and the consequences of the proceedings; to instruct counsel; and to testify.<sup>77</sup> The Accused is capable of meaningful

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<sup>70</sup> Expert Report of March 2013, para. 27.

<sup>71</sup> Expert Report of March 2013, para. 34.

<sup>72</sup> Expert Report of March 2013, para. 35.

<sup>73</sup> Expert Report of March 2013, para. 28-32.

<sup>74</sup> T., 12 January 2012, p. 55; T., 16 January 2012, pp. 113-114; T., 18 January 2012, p. 78; T., 14 March 2012, pp. 112-116; T., 15 March 2012, pp. 49-65; T., 21 March 2012, pp. 7-8; T., 18 July 2012, p. 74; T., 26 July 2012, pp. 52, 55; T., 31 July 2012, pp. 50-51; T., 23 November 2012, pp. 64-65; T., 5 December 2012, pp. 39-40; *see also*, T., 16 February 2012, p. 4.

<sup>75</sup> Expert Report of March 2013, para. 49.

<sup>76</sup> Expert Report of March 2013, para. 26, 41, 49.

<sup>77</sup> Expert Report of March 2013, para. 38-44.

participation in these proceedings, and the above-mentioned practical measures are sufficient to mitigate the effects of the medical conditions suffered by the Accused. The Chamber therefore finds that the Accused remains fit to stand trial.

### **5.3. Modalities for the Accused's Participation**

28. The Chamber agrees that reasonable efforts should be made to accommodate the physical ailments suffered by the Accused in order to permit his participation in the trial. However, the Medical Experts found no medical reason that would preclude the Accused from participating in proceedings from the holding cell.<sup>78</sup> The specially-equipped holding cell contains audio-visual equipment transmitting a live feed of the proceedings, a telephone enabling the Accused to freely and confidentially communicate with his counsel and an adjustable bed, specifically designed to alleviate the Accused's physical condition. Further, as the holding cell is located in the ECCC court building, members of his Defence team have ready access to the Accused throughout the day.<sup>79</sup> Based on these considerations, the Trial Chamber finds the Accused should participate in the proceedings from the holding cell or the courtroom. The request to participate from the Detention Facility is therefore denied.

29. Further, and as the Medical Experts found no basis to recommend any modification of the Trial Chamber's current hearing times, the Chamber shall maintain its normal sitting times of Monday through Thursday 9:00 am to 4:00 pm with several breaks throughout the day.<sup>80</sup>

30. Notwithstanding the precarious physical health of the Accused, which is described by the Medical Experts as frail, the Medical Report is clear that the Accused's current condition permits him to continue his participation in these proceedings. The Chamber shall therefore shortly order the resumption of proceedings in order to safeguard the right of all Accused to a fair and expeditious trial, and the interests of justice in reaching a timely verdict in Case 002.

### **FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

**AFFIRMS** its earlier finding that the Accused NUON Chea is capable of meaningful participation in his own defence and is therefore fit to stand trial;

**DENIES** the Defence request to order additional mental and physical examinations of the Accused;

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<sup>78</sup> Expert Report of March 2013, para. 16, 50.

<sup>79</sup> Decision on Accused's IENG Sary's Fitness to Stand Trial, E238/9, 26 November 2012, para. 21.

<sup>80</sup> Expert Report of March 2013, para. 49.

**DENIES** the Defence request to permit the participation of the Accused in the trial proceedings from the Detention Facility; and

**DIRECTS** the Medical Unit and Detention Facility, with the assistance of the Office of Administration, to implement the recommendations of the Medical Experts set out in paragraphs 17, 19, 20, and 21 of the Expert Report of March 2013. *RP*

Phnom Penh, 2 April 2013

President of the Trial Chamber



*Nil Nonn*