



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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Nation Religion King
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Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

ឯកសារដើម
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TRANSCRIPT OF HEARING
ON SPECIFICATION OF CIVIL PARTY REPARATIONS AWARDS
AND ACCUSED IENG THIRITH'S FITNESS TO STAND TRIAL
PUBLIC

Case File N° 002/19-09-2007-ECCC/TC

20 October 2011, 0900H

Before the Judges: NIL Nonn, Presiding
Silvia CARTWRIGHT
YA Sokhan
Jean-Marc LAVERGNE
YOU Ottara
THOU Mony (Reserve)
Claudia FENZ (Reserve)

For the Accused: SON Arun
Michiel PESTMAN
ANG Udom
Michael KARNAVAS
PHAT Pov Seang
Diana ELLIS

Trial Chamber Greffiers/Legal Officers:
DUCH Phary
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MOCH Sovannary
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Martine JACQUIN
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For the Office of the Co-Prosecutors:
CHAN Dararasmey
Tarik ABDULHAK
VENG Huot

For Court Management Section:
UCH Arun

The Accused: NUON Chea
IENG Sary

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List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. ABDULHAK	English
MR. ANG UDOM	Khmer
JUDGE CARTWRIGHT	English
MR. CHAN DARARASMEY	Khmer
MR. DIAKESE	French
MS. ELLIS	English
MR. FAZEL	English
MR. HONG KIMSUON	Khmer
MR. KARNAVAS	English
MR. LINA HUOT	Khmer
MR. PESTMAN	English
MR. PHAT POUV SEANG	Khmer
MR. PICH ANG	Khmer
MS. SIMONNEAU-FORT	French
THE PRESIDENT (Nil Nonn, Presiding)	Khmer

1

1 PROCEEDINGS

2 (Court opens at 0900H)

3 (Judges enter the courtroom)

4 MR. PRESIDENT:

5 The Court is now in session.

6 [09.00.50]

7 Counsel Phat Pouv Seang, you may now proceed.

8 MR. PHAT POUV SEANG:

9 Mr. President, Your Honours, in my capacity as the counsel for
10 Ieng Thirith, may I inform the President and Your Honours that
11 today, due to my client's health condition, she is not able to
12 attend today's session.

13 We therefore request that -- she has already requested that the
14 Chamber can proceed without her presence, and she has already
15 waived her right to be present, to be here, and asked her counsel
16 to represent her in the courtroom.

17 MR. PRESIDENT:

18 Thank you, Counsel Phat Pouv Seang. Your request is granted, and
19 that it is pursuant to our internal rule Rule 81 request, and
20 that Ieng Thirith has already asked her counsel to represent her
21 when she is absent.

22 [09.02.43]

23 We would like now to proceed to the defence team for Ieng
24 Thirith, to put questions to the experts.

25 Please be reminded that you have one hour to put these questions

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1 regarding the report prepared by the experts on Ieng Thirith's
2 cognitive function and the fitness to stand trial matter.

3 MR. PHAT POUV SEANG:

4 Mr. President, Your Honours, good morning again, and good morning
5 to the whole Court and the experts.

6 [09.03.40]

7 I have five questions to put to the experts. The purpose of these
8 questions are for seeking clarification.

9 QUESTIONING BY MR. PHAT POUV SEANG

10 Q. First, have you met with Ieng Thirith? And how many times
11 have you met her?

12 MR. LINA HUOT:

13 A. We met her on three occasions.

14 Q. After the meetings, have you observed that her health
15 condition is consistent with that, as reported by Dr. John
16 Campbell?

17 MR. FAZEL:

18 A. Yes, we found that her health condition was consistent.
19 There were some differences, but they're not, in our view,
20 relevant to diagnosis. But there are differences in some details
21 in relation to how she answered some questions and some details
22 of her memory.

23 Q. According to Dr. John Campbell's recommendation, there are
24 -- two types of sedative medicines should be reduced, and also
25 the medicine to help her with her sleep. My question is that

3

1 whether you have observed that her cognitive function has
2 improved after such a reduction.

3 MR. LINA HUOT:

4 A. According to the reports by the doctors who have examined
5 Ieng Thirith on a regular basis and according to the
6 recommendation by Dr. Campbell regarding the reduction of the
7 medication, we have learned that her sleep has been reduced from
8 eight to -- nine hours to six hours.

9 [09.06.35]

10 And the medication that has been reduced is the anti-psychotic
11 medicine, the medicine that helps her with her behaviour. After
12 such a reduction, there is no indication that there is changes,
13 significant changes in her cognitive functions.

14 Q. Question number 4. According to the statement by Mr.
15 Chamroeun, who indicated that her cognitive function is declining
16 after the reduction of the medication -- do you agree with such
17 assertion?

18 MR. LINA HUOT:

19 A. Dr. Hun Chamroeun noted that he met with Ieng Thirith on
20 several occasions and observed that her cognitive function is
21 declining, and we also met with the Chief of the Detention
22 Facility, who also confirmed such a statement.
23 However, our expert group have not examined her previously, but
24 we observed -- we administered some tests, as we already
25 indicated, and learned that her cognitive function has declined

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1 to moderately -- moderately declines. So we can conclude that her
2 cognitive function is declining moderately.

3 Q. The final question. Yesterday, you indicated to the Judges
4 of the bench that Ms. Ieng Thirith is able to understand the
5 proceedings, the charges and able to testify, but in your
6 paragraph of the report, paragraph 51, you stated that Ieng
7 Thirith has not -- doesn't have sufficient understanding of the
8 proceedings.

9 [09.09.26]

10 Can we seek your clarification to see whether your previous
11 statement to the Chamber is consistent with that in paragraph 51?

12 MR. FAZEL:

13 A. I don't think we said that she was able to follow the Court
14 proceedings at any point yesterday. What we did say was that she
15 did have an understanding of the charges, in our opinion, and she
16 was able to testify, in our opinion. However, we were of the view
17 that she would have considerable difficulty understanding the
18 proceedings because of her memory impairment, which meant that
19 she was not able to retain information that she had just heard or
20 had heard recently for long enough to be able to weigh it up, and
21 then to think about it and comment on it in discussion with her
22 legal team.

23 So our view is that the ability to understand the course of legal
24 proceedings is compromised, and we're of the opinion that she
25 would have considerable difficulty in following legal

5

1 proceedings.

2 MR. PHAT POUV SEANG:

3 Thank you very much.

4 Mr. President, I have no further questions but wish to hand over
5 to my colleague.

6 MR. PRESIDENT:

7 Counsel Diana Ellis, you may now proceed.

8 MS. ELLIS:

9 May it please you, Mr. President, Your Honours.

10 [09.11.12]

11 QUESTIONING BY MS. ELLIS

12 Q. Dr. Fazel, you told us yesterday you were a forensic
13 psychiatrist. What does that actually mean?

14 MR. FAZEL:

15 A. It means that I have some training, specialist training in
16 the assessment and treatment of mentally disordered offenders,
17 and it means that I work in what are called secure hospitals with
18 individuals who are thought to be at risk of violence or in the
19 past have been convicted of serious offences. And also I work and
20 have worked in prison settings where I have assessed and treated
21 prisoners from all different backgrounds.

22 Q. Thank you.

23 And could you just indicate, please, how much experience you've
24 had in the clinical treatment of geriatric patients?

25 MR. FAZEL:

6

1 A. Yes. I'm not what one would call a geriatric psychiatrist.
2 I have, as part of my basic training in psychiatry, worked for
3 six months in geriatric psychiatry, and subsequently I worked for
4 another six months as a clinical research fellow in geriatric
5 psychiatry, whereas it happens I developed an instrument to test
6 capacity in people with mild dementia to write living wills, and
7 we published a number of articles about this instrument.

8 [09.13.08]

9 Then, once my basic training had ended, I worked for two years
10 interviewing older prisoners diagnostically. So I administered to
11 over 200 prisoners diagnostic tests, including specifically
12 looking for dementia, and that represents one of the largest case
13 series in the international literature on the assessment of older
14 prisoners. That is not to say that I was involved in their
15 treatment, this was purely a diagnostic interview to assess their
16 needs, their diagnosis, and specifically look at whether these
17 individuals have dementia.

18 And for that period of work I received the equivalent of one year
19 higher training in geriatric psychiatry, and subsequent to that I
20 then trained in -- my higher training was in forensic psychiatry.
21 So I have some experience, but I wouldn't be called and I am in
22 no way a geriatric psychiatrist per se.

23 Q. Would it follow from what you've said that you would defer
24 to Professor Campbell on issues of clinical assessment of
25 geriatric patients with dementia with his 42-year experience?

7

1 MR. FAZEL:

2 A. I would certainly defer to Professor Campbell on issues of
3 treatment. I think, on issues of assessment, we would complement
4 each other, possibly, and his experience as a geriatrician would
5 be complementary to our experience as psychiatrists. So I think
6 we would bring slightly different perspectives and different ways
7 of assessing individuals, which would complement each other.

8 Q. Thank you.

9 Can I now just ask you a few questions about the approach you
10 took to interviewing Madam Ieng Thirith?

11 [09.15.34]

12 The order you had, which is E111/5, was that the Accused should
13 be taken to a small courtroom, in fact in this building, in order
14 to be interviewed. You've told us that you saw her on three
15 occasions: twice in her cell, once in the meeting room in the
16 detention centre. Can you indicate why that was?

17 MR. FAZEL:

18 A. Yes. We felt, in our preliminary discussions as a team,
19 that we should interview Ieng Thirith in a setting that would
20 mean that she was most comfortable, and we felt that bringing her
21 to a courtroom would not be helpful in terms of developing some
22 rapport and being able to talk to her for a long period of time.
23 So we were of the view that assessing her in a more familiar -- a
24 more familiar setting would be more helpful to her, she would
25 feel more comfortable, and that was important for us to make sure

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1 that she was not in a setting which was unfamiliar to her, which
2 may confuse her in some way or other.

3 Q. So you were anxious to be in the best possible environment
4 where you -- to avoid her becoming confused or disorientated; is
5 that right?

6 MR. FAZEL:

7 A. Yes, that is right, but also to develop -- to help us
8 develop some rapport, broadly speaking. And we didn't feel being
9 in a courtroom would do that.

10 [09.17.56]

11 Q. The first of the interviews took place in the afternoon.
12 Was that in her cell or in the meeting room?

13 MR. FAZEL:

14 A. That was in her cell.

15 Q. The interview that took place on the morning of the 13th of
16 September, where was that?

17 MR. FAZEL:

18 A. That was in the meeting room.

19 Q. And so it follows the afternoon interview on that day was
20 again in the cell.

21 MR. FAZEL:

22 A. Yes.

23 Q. And on each of those occasions, were all four of the
24 experts -- all four doctors present?

25 MR. FAZEL:

1 A. I cannot recall exactly if -- there was always three of us
2 present. I think on the last interview -- but I will ask my
3 colleague to confirm this -- on the last interview, so in the
4 afternoon of the second day, one of our colleagues may not have
5 been present at the beginning of the interview, partly because of
6 the confines of the cell and -- but he did, with the agreement of
7 Ieng Thirith, join us very shortly after we begun the interview.
8 [09.19.38]

9 Q. Dr. Lina, do you want to add anything to that?

10 MR. LINA HUOT:

11 A. I do not think I have anything to add at this moment yet.

12 Q. When the questions were asked of Ieng Thirith was it always
13 the same person that asked the questions, or did all of you ask
14 different questions at different times?

15 MR. LINA HUOT:

16 A. With regard to the MMSE, the questions were put to her to
17 assess her cognitive ability. We put the same questions because
18 we tried to avoid being biased with questions, and other doctors
19 also prepared their own questions. We all had our questions to
20 put to her and we assessed her cognitive abilities with questions
21 on both days.

22 MR. FAZEL:

23 A. And in direct response to your question, two of us led the
24 interviewing, and that's myself and Dr. Lina, but this was
25 supplemented by our colleagues at various points, particularly

10

1 when clarification on certain issues was required. So in general
2 we tried to arrange interviews so that the same people would lead
3 it, and it was us two that led the interview.

4 Q. Were the interviews' audio recorded?

5 MR. FAZEL:

6 A. No.

7 Q. Was one of you assigned to make a note of all that occurred
8 in the interviews?

9 [09.22.11]

10 MR. FAZEL:

11 A. I took notes. I took notes.

12 MR. LINA HUOT:

13 A. I would like to add also that I also took notes when I put
14 questions to her. The response from her would be recorded on my
15 notes. And my colleagues also took some notes.

16 Q. Which of you was it that actually compiled the report that
17 we have been provided with?

18 MR. FAZEL:

19 A. By "compiled", do you mean "drafted" or -- can I just
20 clarify what you mean?

21 Q. I mean drafted the report.

22 MR. FAZEL:

23 A. Yes, I drafted the report.

24 Q. Did you draft -- provide a draft copy which was sent to the
25 three other doctors for them to consider?

11

1 MR. FAZEL:

2 A. Yes.

3 Q. As a result of that process was there any amendment or
4 addition that was made to your original draft?

5 MR. FAZEL:

6 A. Yes.

7 Q. Is there any information of any relevance which has been
8 excluded from the report as it finally appears?

9 [09.24.08]

10 MR. FAZEL:

11 A. Not to my -- not in my recollection. The changes were in
12 fact additional -- sections added or details added. But in my
13 recollection, nothing significant was deleted or removed.

14 Q. We've heard from you that, as part of your task, you spoke
15 to Dr. Chamroeun, who had been one of those caring for Ieng
16 Thirith, and you also spoke to Mr. Mao Sophearom, the Chief of
17 the Detention Facility. Did those conversations take place prior
18 to the commencement of the first of your three interviews with
19 Ieng Thirith?

20 MR. FAZEL:

21 A. The meeting with Dr. Chamroeun occurred prior to the
22 meetings with Ieng Thirith. The meeting with Mr. Sophearom
23 occurred before the second day of interviews, so between the
24 first and second interview.

25 Q. I'm looking at, now, page 4, paragraph 10 of your report.

12

1 What we see in those paragraphs 10 and onwards is your
2 consideration of the period over which there might have been some
3 kind of cognitive impairment; is that right?

4 MR. FAZEL:

5 A. I mean, I would say that it's a brief summary of the
6 medical history as we understood it but with a focus on physical
7 health problems and any other notable medical history.

8 Q. And what you've noted at paragraph 10 is the diagnosis of
9 organic mental disorder following a hip replacement which took
10 place on the 7th of January 2006.

11 [09.26.47]

12 MR. FAZEL:

13 A. Yes, that is how it was described in the information
14 available to us.

15 Q. And that phrase, "mental disorder", appears in reports of
16 November 2007, February 2008, and then there are behaviour
17 disturbances through 2009 and into 2010 that you've noted; is
18 that correct?

19 MR. FAZEL:

20 A. Yes.

21 Q. You told us that you only saw three brain scans. I just
22 want to ask you about this. You were provided with a document
23 that had been drafted by the Defence, it's E111/3.2, and
24 according -- it's a summary of what the Defence considered were
25 the main significant features of the records from Bumrungrad

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1 International Hospital in Bangkok, where Ieng Thirith was treated
2 over a period of time. Do you recall that document?

3 MR. FAZEL:

4 A. I recall the document, which were the questions put forward
5 by the Defence, yes.

6 Q. I'm just going to ask you about one entry, if you can
7 assist. The record shows that, on the 5th of January 2006, Ieng
8 Thirith was admitted to the hospital, and it was noted that she
9 was taking the following medication: she was taking quetiapine,
10 haloperidol, clonazepam, and another benzodiazepine.

11 [09.29.12]

12 You have told us quetiapine is an anti-psychotic drug; is that
13 right?

14 MR. FAZEL:

15 A. Yes.

16 Q. Haloperidol; what is that used for?

17 MR. FAZEL:

18 A. That is also an anti-psychotic drug. But just to be - just
19 to be clear, a class of drugs that are called anti-psychotic
20 drugs are sometimes used as major tranquilizers, so they are
21 sometimes used to treat behaviours or very severe anxiety and
22 related problems.

23 Q. And the clonazepam is a drug which helps anxiety and sleep
24 difficulties; doesn't it?

25 MR. FAZEL:

14

1 A. Yes. And in addition it can be used also to dampen down
2 behavioural problems in some individuals.

3 Q. From what you say, it would be correct to conclude that at
4 the time of admission to the hospital, on the 5th of January,
5 Ieng Thirith was being treated for some kind of behavioural
6 disturbances?

7 MR. FAZEL:

8 A. I think -- it's difficult for me to comment on that without
9 seeing the entries that led up to the treatment for these
10 illnesses -- sorry, for these treatments. So it's difficult to
11 know why these medications were being prescribed without having
12 access to the original decision by the doctor who started these
13 prescriptions.

14 Q. But you agree they are strong drugs prescribed for
15 behavioural problems; aren't they?

16 [09.31.32]

17 MR. FAZEL:

18 A. They -- No, I wouldn't put it in those terms. They can be
19 prescribed for behavioural problems but they can also be
20 prescribed for other reasons. And so, without more information,
21 it's difficult to know exactly what reason they were prescribed
22 for.

23 Q. Apart from prescribing them for behavioural or psychotic
24 problems, any other reason?

25 MR. FAZEL:

15

1 A. Yes. Two of those medications could be used for sleep
2 disturbance, they could be used for anxiety problems. They could
3 of course -- and this is always one possibility -- be diagnosed
4 -- prescribed for the wrong diagnosis, and so it's very difficult
5 to draw any conclusions without knowing more about the rationale
6 for their prescription.

7 Q. On the 6th of January, Ieng Thirith underwent a CT scan.
8 You've not seen the scan because it's not available, but you will
9 have seen the reference to it in the report of Dr. Ka Sunbaunat
10 of November 2009. That CT scan was reported to show generalized
11 brain atrophy. Do you recall reading about that?

12 MR. FAZEL:

13 A. I don't recall reading about it. I focused -- we focused
14 our attention on the scans that we had access to and that we
15 could see and also review in the presence of a radiologist. So I
16 can't recall that at this moment, sorry.

17 Q. Would you agree that the use of those two anti-psychotic
18 drugs plus a finding of generalized brain atrophy could be
19 indicative of cognitive impairment?

20 MR. FAZEL:

21 A. Yes and no. Generalized brain atrophy may be
22 age-consistent, and of course, with age, people do suffer normal
23 -- what are considered normal declines in memory. And so it's a
24 little bit dependent on the terminology that's being used.

25 [09.34.45]

16

1 I don't think the medication per se -- one can draw any
2 conclusions about the presence or absence of cognitive
3 impairment. The CT brain scan report, as you've described it to
4 me, could be indicative of normal changes, normal in the sense
5 that these are expected changes for someone at that age, but it
6 could also be indicative of someone with changes which are more
7 -- which are more severe than you would expect at that age, so
8 cognitive changes which are more -- have progressed more than you
9 would expect at that age.

10 Q. The view of Dr. Chamroeun and of Mr. Sophearom was that
11 Ieng Thirith's memory has worsened in the preceding two years and
12 she complained about forgetting things, and that's at paragraphs
13 17 and 18. And she also complained of memory problems when she
14 first arrived in the detention unit.

15 So it follows, doesn't it, that this difficulty was something
16 that she'd clearly been experiencing for at least four years --
17 she's been in detention four years; doesn't it?

18 MR. FAZEL:

19 A. So I agree that there is informant history that her memory
20 has declined since her reception into detention.

21 Q. Which was four years ago.

22 MR. FAZEL:

23 A. Which was four years ago.

24 [09.36.49]

25 Q. Now, you were told by Mr. Sophearom, who is aware of what

17

1 happens in the detention centre, that her difficulties included
2 needing assistance with dressing, she would forget where her
3 clothes were, and where they were within her cell.

4 You've been to the cell. It's a very small space; isn't it?

5 MR. FAZEL:

6 A. Yes.

7 Q. This sort of difficulty is indicative of one of the
8 criterions used in diagnosing memory difficulties in dementia --
9 isn't it? - difficulty in dealing with your daily normal regular
10 social activity and personal habits; is that right? And he
11 identifies her being found unclothed on her bed.

12 Dr. Lina, you might please be able to assist with this: modesty
13 is something particularly of concern to Cambodian women of the
14 age of Madam Ieng Thirith, to the extent that, in the cells, for
15 example, they will wear a sarong when showering; is that right?

16 MR. LINA HUOT:

17 A. Yes, for a typical Cambodian woman, if she was found lying
18 naked, it is inappropriate and it is not our custom.

19 And, according to Mr. Sophearom, he said that this kind of
20 situation happens occasionally only. And if we look at the
21 location of this cell, it is not visible by people outside,
22 except those who stay close to her, for example the security
23 guards of the Detention Facility are female who attend to her,
24 and she found her naked on a bed, but nobody else other than the
25 female security guard saw that.

18

1 But of course it is inappropriate in Cambodian context of women
2 lying naked on bed. But, once again, nobody saw it, even though
3 Mr. Sophearom mentioned that, but he himself did not see, he
4 learned it from the female security, he only got the report from
5 his subordinate who attends to Madam Ieng Thirith.

6 [09.39.47]

7 And if we look at the location of her cell, if we -- we cannot
8 see her bed unless we actually unlock the door and see. Those who
9 simply walk along the corridor cannot see the place where she was
10 lying. Thank you.

11 Q. But nevertheless she does shower, doesn't she, in a sarong;
12 do you know that?

13 MR. LINA HUOT:

14 A. I am not aware of this. Actually, Mr. Sophearom has never
15 reported that to us, and we do not have any information about
16 that.

17 Q. He also reported the difficulties that she had with memory
18 of names, and he told you that she was disorientated in time. And
19 that's at paragraph 18. He also said that she occasionally
20 misplaced things and accused staff of stealing.

21 Again, is that something that is not unfamiliar in people who are
22 suffering from dementia, that when they lose items they think
23 that somebody has actually stolen them?

24 MR. FAZEL:

25 A. Yes.

1 Q. Thank you.

2 [09.41.30]

3 During your interviews with Ieng Thirith, she appeared on one
4 occasion to think that one of the interviewing Cambodian doctors
5 was a family member; is that correct?

6 MR. FAZEL:

7 A. Yes. It was on more than one occasion. If I recall
8 correctly, it was on two, but possibly three occasions, so on all
9 the interviews, she thought that one of the doctors was a family
10 member.

11 Q. Could I ask you, please, to look at paragraph 21? I'm going
12 to suggest to you that there's an error there. Four lines down,
13 it says she was unable to answer most of the orientation
14 questions and was able to recall any of three objects on both
15 occasions.

16 If we look down to paragraph 24, it said "she was not able to
17 recall any of three objects after a few minutes, on two
18 occasions". I want to suggest to you that the word "not" has been
19 missed out of paragraph 21; would you agree? Is that your
20 recollection?

21 MR. FAZEL:

22 A. Yes -- and we happened to discuss this yesterday -- that is
23 an error and it should be "not able to recall any of three
24 objects on both occasions", yes.

25 [09.43.09]

20

1 Q. And, Dr. Lina, it follows that you were in error yesterday,
2 when you said she had good recall of the three objects, because,
3 in fact, she did not; did she?

4 MR. LINA HUOT:

5 A. In our assessment on her cognitive function, we employed an
6 instrument known as mini-mental screening examination and we
7 conducted in two stages. The first stage, we asked her to repeat
8 after us. So we simply asked her to try to recall what has been
9 said to her, and a few minutes later we asked her, but we asked a
10 completely different question. And a few minutes later we asked
11 her to recall the earlier question that we asked, but she could
12 not recollect that. So technically speaking, if she could
13 register information, in other words if she can recall the
14 statement or information we mentioned to her, that was fine. But
15 a few minutes later we asked her to recall what was just said to
16 her a few minutes ago; she could not recall it.

17 So, on the first day, we asked her the same thing, but the next
18 day we asked her again, she could not recall what we were asking
19 her yesterday. For register, it seems to be okay, but in terms of
20 immediate recollection of what was said to her, she cannot recall
21 it.

22 Q. (Inaudible) -- that Ieng Thirith is disorientated, from
23 what you've said, in time and place; do you agree?

24 MR. LINA HUOT:

25 A. Well, in the use of words, I used the word -- I would

21

1 rather not use "disorientation", but rather "recollection" of the
2 words we use or the objects that we refer to her. We introduced
3 different objects -- to introduce to her. We did not introduce
4 identical objects, but we chose different objects and we actually
5 asked her whether or not she remember it. So it is a matter of
6 memory question than disorientation.

7 [09.46.07]

8 Q. Dr. Fazel, can I ask you this: When you interviewed Ieng
9 Thirith, she believed that she was currently being interviewed on
10 the first floor of a hospital in Phnom Penh; didn't she?

11 MR. FAZEL:

12 A. Yes.

13 Q. And she, in fact, hadn't been moved from the surroundings
14 she'd been occupying for four years. So that's a clear sign of
15 disorientation; isn't it?

16 MR. FAZEL:

17 A. Yes.

18 Q. She didn't know her age when you asked her, only her date
19 of birth. Is that a sign of disorientation in person?

20 MR. FAZEL:

21 A. I don't know whether that technically is a sign of
22 disorientation in person. It's clearly a deficit, a cognitive
23 deficit. Dr. Lina?

24 MR. LINA HUOT:

25 A. Allow me to add a bit. She can recall her birth date, but

1 when we ask her how old she was, she could not know her age. And
2 actually, when she mentioned her birth date, she actually spoke
3 in French, which she refers to the 10th of March 1932. But when
4 we asked her her exact age, she cannot answer that question.

5 [19.47.43]

6 Q. So that shows a deficit in reasoning or calculating from
7 1932, doesn't it, to what she is today?

8 MR. FAZEL:

9 A. Yes, and it may be indicative of disorientation in time,
10 because she was not aware of the year, the current year.

11 Q. She is also not able to describe accurately the
12 relationship she has with other people or whether they are dead
13 or alive. Does that touch upon memory and disorientation?

14 MR. ABDULHAK:

15 I'll object to this question, Your Honours. Mr. President, the
16 question is based on an assumption as to what and whom Ieng
17 Thirith recognizes. If Counsel could specifically indicate whom,
18 and how, and at which page of the report this is confirmed, and
19 then perhaps the expert can be invited to opine on that. All I'm
20 asking is just for a slightly more specific question.

21 MS. ELLIS:

22 Due to the lack of time, I was trying to act on the basis we've
23 all read the report.

24 BY MS. ELLIS:

25 Q. If you look at what she says on paragraph 9, if you look at

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1 the questions that were being put to her or the report by Dr.
2 Sophearom -- Mr. Sophearom at paragraph 18, if you look at the
3 contents of paragraph 23, all of those deal with an inability to
4 name, identify correct relationships, identify whether a person
5 is still dead or alive, to summarize; is that correct, Dr. Fazel?

6 [09.49.38]

7 MR. FAZEL:

8 A. Yes. In terms of naming, there were clear problems
9 recalling, for instance, the name of her children -- she was
10 unable to on any occasion. And in relation to whether people were
11 alive or dead, we also felt there were clear deficits, and she,
12 for instance, thought that her mother was still alive, which we
13 understand is not correct. So our interpretation of that is that
14 there are deficits in long-term memory, and these are indications
15 of that.

16 Q. Dr. Fazel, you helpfully provided us with an article on
17 competence to stand trial, Evaluations of geriatric defendants,
18 by Dr. Friersen. The conclusion of that was that "deficits in
19 orientation, memory abstraction, concentration, calculation, and
20 thought process were associated with incompetence"; would you
21 agree with that proposition?

22 MR. FAZEL:

23 A. Yes.

24 Q. And that "deficits in orientation and memory correlated
25 most highly with incompetence"; would you agree with that?

1 MR. FAZEL:

2 A. Yes, with a caveat, of course, that some people that were
3 found to be competent did have deficits in orientation and
4 memory. But the article presents correlations or associations
5 which you've described.

6 Q. And I want to ask you about memory, please: Would you agree
7 that memory impacts on all the capacities that we've been
8 concerned with in this hearing?

9 [09.51.43]

10 MR. FAZEL:

11 A. I can't say that without going through each capacity one by
12 one, to be honest, so I can't make a general comment on that.

13 Q. Let me ask you this. I'm looking at page 20, paragraph 23
14 of your report. You say that there was "some preservation of
15 long-term memory". In the report, there is nothing to indicate
16 that she remembered any facts in her past life, except, on a
17 second occasion, her secondary school, her mother's name on one
18 occasion, but significantly nothing else.

19 Have you left anything out that we should know as to facts she
20 was able to give you?

21 MR. FAZEL:

22 A. We didn't extensively interview her about her childhood,
23 and adolescence, and adult life. We asked her for some -- we
24 asked her specific questions about it, and in relation to those
25 specific questions, she did, at the -- on the second or third

25

1 interview, recall that she had been a minister in the period --
2 in the 1970's. But there is -- it's just to point out really that
3 we've highlighted to us the key parts of her memory that we felt
4 she had deficits in that were consistent with our clinical
5 diagnosis.

6 [09.54.00]

7 Q. What you said at paragraph 9 was: "Towards the end of our
8 third interview she seemed to accept she'd been a minister, but
9 could not provide any details of her role."

10 Your wording tends to suggest that it was being repeatedly put to
11 her that she was and that she agreed with you, it was not
12 volunteered by her; is that accurate? If you could just say yes
13 or no to that, please?

14 MR. LINA HUOT:

15 A. Our team did ask her on that point. Once, she said she used
16 to be a minister. Then we asked her for the detail of her role,
17 but she failed to answer that question. We kept insisting that
18 she answer the question, but she could not provide any details of
19 that role.

20 Q. Would you agree that she is not in a position, due to her
21 lack of memory, to describe in any detail episodes in her life
22 from the 1950's through until the present time?

23 MR. FAZEL:

24 A. She -- in our view, I mean, she would have problems
25 remembering details of her adult life. We can't say specifically

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1 what deficits exist. I mean, we asked her very generally about
2 some key events in her life, but our impression was that,
3 overall, there were significant gaps in her long-term memory, and
4 it's likely that they will apply also to the period you are
5 describing, from 1950 to the late 1970's.

6 Q. And if confronted with statements from witnesses, would you
7 agree that she would have tremendous difficulty or would be
8 unable to recall the individuals, where she was, what she had
9 done, and what she had said 35 years ago?

10 [09.56.38]

11 MR. FAZEL:

12 A. Yes, I think she would have considerable difficulty in
13 remembering details of what she did in those periods you
14 describe.

15 Q. And just coming to look at what you said in respect of her
16 ability to understand the indictment as read out to her, do you
17 agree that an understanding needs to be rational in order to
18 exercise one's fair trial rights?

19 MR. ABDULHAK:

20 I would object to that question, Mr. President. This is a legal
21 question; it's not one that the experts can opine on.

22 MS. ELLIS:

23 Well, Mr. President, that can't be right. It's not a legal
24 question. There are levels of understanding, and if an individual
25 can understand she's being accused of a wrong doing, but can't

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1 rationally respond, that must be a medical question that the
2 doctors are capable of answering.

3 MR. PRESIDENT:

4 So the expert can continue answering this question, but I would
5 like to remind the counsel for Ieng Thirith that you have five
6 minutes left for your questioning for the experts.

7 MS. ELLIS:

8 Thank you very much.

9 [09.58.42]

10 MR. FAZEL:

11 Could I just ask you to repeat the question?

12 BY MS. ELLIS:

13 Q. Yes. I'm asking you whether you would agree that it's not
14 sufficient for an individual to understand a question to exercise
15 fair trial rights, it's necessary that there is a rational
16 understanding. Would you agree with that?

17 MR. FAZEL:

18 A. I would agree that one would have to apply one's mind to
19 answering questions in order to exercise one's -- in order to
20 deal with some of these competencies that I've described or we've
21 described in our report. The term "rational" is difficult in
22 terms of the fact that it's my understanding that you can
23 disagree, or people can disagree with the reasons someone gives,
24 and the reasons can be -- they don't necessarily have to be
25 credible or reliable. That doesn't mean, if the reasons given are

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1 not credible or reliable, that the person is not competent. So I
2 would just say that I agree in the sense that you have to apply
3 your mind to answering questions; I do think that that is an
4 important part of some of the capacities that we've described.

5 Q. I'm looking at paragraph 44. You suggest that she put
6 forward a number of defences which you describe as mostly not
7 credible; for example, being too young, Cambodian women would
8 never do harm to others, and her mother had brought her up well.
9 Would you agree that those answers are indicative of somebody who
10 is really not thinking and reasoning about what they're saying?
11 She was 43 in 1975.

12 [10.01.15]

13 MR. FAZEL:

14 A. As we state, these do not appear to be credible answers. We
15 were under the view that doesn't make them automatically
16 indicative of lack of competence. It's -- you know, it's possible
17 for people to give all sorts of explanations that aren't
18 necessarily credible, and that doesn't necessarily mean that
19 people are -- lack this particular capacity. I think --

20 Q. Doesn't it have to be looked at in line of everything you
21 know about her and in line of all that you know and that you've
22 told us? Wouldn't you agree it shows a lack of ability to reason?

23 MR. FAZEL:

24 A. It does show a lack of ability to reason, because we did
25 point out to her the possible contradiction in this, and she

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1 didn't respond to that, the request from us to clarify it. The
2 only reason I'm hesitating is because there are other possible
3 explanations for someone refusing to countenance these facts that
4 don't seem to add up. So we can't be a hundred percent certain
5 that it's purely because of lack of reason. I mean, that's one
6 likely reason for that -- for these explanations that she
7 provides.

8 [10.03.22]

9 Q. And finally this: As I understand it, you don't disagree in
10 any matter of any substance or consequence with the conclusions
11 set out in the report of Professor Campbell, including the fact
12 that there is really no evidence that Ieng Thirith was failing
13 impairment; is that right?

14 MR. FAZEL:

15 A. The -- Professor Campbell's report touches on many
16 different areas, and in relation to the question of feigning, we
17 are in agreement with Professor Campbell's view, that it's very
18 unlikely that she was feigning, and we found no evidence in our
19 interviews that we could pinpoint that she was feigning her
20 cognitive impairment. Clearly, her ability does fluctuate, and
21 with that in mind, we still are of the opinion that it's very
22 unlikely that she was feigning this degree of cognitive
23 impairment.

24 MS. ELLIS:

25 Thank you, Dr. Fazel and Dr. Lina.

1 MR. PRESIDENT:

2 Thank you, Counsel. Thank you, the experts.

3 We next proceed to the Co-Prosecutors to put questions to the
4 experts.

5 QUESTIONING BY MR. CHAN DARARASMEY:

6 Mr. President, Your Honours, the Court and the experts,
7 representing the prosecution, I would like to put some questions
8 to the experts for further clarification.

9 Q. First question. According to your report, paragraph 27, you
10 indicated that Ieng Thirith has experienced cognitive --
11 dementia, rather, but doesn't have any other psychotic illness,
12 including mental illness. Can you please describe the two
13 differences?

14 [10.06.16]

15 MR. LINA HUOT:

16 A. I would like to respond to your question as follows.
17 According to the diagnosis, she has been found to have dementia.
18 And, as a doctor, after conducted such examination on any
19 particular patient, we also conducted further examination to find
20 out whether there is any other related or associated illness,
21 too, that we focused on, but we only found that she has dementia.
22 And our group also questioned - or asked her a few questions to
23 find out whether she has experienced some episode of depression.
24 We asked her whether she used to be suicidal or whether she had
25 any problems with that, but her response indicated that she did

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1 not develop any kind of depression, and we all agreed that she
2 has no symptom of depression. And according to the inquiries to
3 Dr. Chamroeun, we learned that there is no indication that she
4 has a symptom of depression or the state of being despair, and we
5 put these questions.

6 And I -- we can conclude that, when a person has developed
7 dementia, he or she may at the same time have a symptom of
8 depression, and we try to find out whether it is the case in our
9 examination, but it proved to be not the case.

10 And we also asked her several other questions, for example to
11 compare the record by the doctors when she was admitted to
12 Bumrungrad Hospital to find out whether she had hallucinations.
13 With these questions, we found out that she did not really have
14 that kind of symptom.

15 [10.09.56]

16 We also noted the statement by the Chief of the Detention
17 Facility who indicated that Ieng Thirith, at times, accused
18 someone of stealing her misplaced objects, but that only happened
19 on one occasion, it did not happen in any other occasions. And if
20 she had the problem, for example, the problem that she -- that
21 led her to accuse someone of stealing her misplaced things on
22 several occasions, then we perhaps conclude that she developed
23 other related illness to the dementia. But that only happened
24 once, and we noted that she has no other related illness to the
25 dementia, including depression.

1 We again confirmed that we conducted rigorous tests and found no
2 other related illness to dementia. We, as experienced doctors,
3 having looked at the patient, at the beginning, could indicate
4 whether the patient developed any particular symptoms, but I --
5 we can conclude that -- after meeting or consulting with the
6 chief of detention facility, we found no other related illness
7 other than that dementia we mentioned.

8 Q. Thank you, Dr. Huot Lina.

9 The next question is: According to your question, is dementia
10 cured? If it is not hundred percent cured, can it be alleviated,
11 and to what extent can we do that?

12 MR. LINA HUOT:

13 A. With regard to dementia, I would like to inform the Court
14 that "dementia" is rather a broad term. In Khmer, "dementia" is
15 translated into only one term, but in the technical term, there
16 are other sub-related categories of dementia, and they can be
17 treated, hundred percent cured.

18 [10.13.11]

19 We tried also to locate other dementia-related illness that can
20 be treated, for example dementia that can be resulted from the
21 lack of vitamin B12 or the lack of folate acid-- folic acid,
22 rather, and other infections that may cause this episode of
23 dementia, or whether there is a tumour in her brain or infections
24 that lead to this state of dementia.

25 We tried to observe some tests and also reviewed the reports by

1 doctors at Calmette Hospital, the blood tests, and also the
2 results of the test on the thyroid glands, but the reports were
3 normal. So there is no reason to believe that we need to treat
4 her. And according to the CT scans, there is no indication that
5 Ieng Thirith developed any kind of tumour that need to be
6 treated. We can conclude that there is no reason that she needs
7 such a treatment or can be -- or treatment is required, and we
8 agreed, in the team, it is most likely that she has dementia that
9 has been caused by Alzheimer's.

10 And the Alzheimer's itself, we can do something to reduce or to
11 help restore her memory and cognitive functions, but it is not in
12 our view that such Alzheimer's can be fully treated or hundred
13 percent cured, because the cause of this disease is not known.
14 In her brain, there are some cells that are damaged and they
15 cannot be identified, although there can be some medicine to
16 treat or to improve her memory, but such treatment is also most
17 likely limited, which is not really to the satisfaction of what's
18 expected by the family members or the doctors.

19 Q. Thank you. Is there any possibility that we can conduct any
20 test to find the real cause or realistic cause that lead to the
21 dementia?

22 MR. LINA HUOT:

23 A. I, perhaps, need you to clarify your question.

24 [10.17.27]

25 Q. My question is, as rephrased: Is there any possibility to

1 find the real causes of dementia? And can we find any remedy to
2 treat these causes or to prevent them?

3 MR. LINA HUOT:

4 A If I understand your question correctly, you asked whether
5 there is any possibility to locate or to find other means to
6 identify the causes of dementia; to be precise, are there related
7 causes that may lead to dementia?

8 According to our review of the reports by Calmette Hospital, we
9 conducted -- or we studied in details to find out whether there
10 is any tumour in her brain that can affect the functioning -- her
11 cognitive function, for example, and the CT scans tests already
12 proved that it is not -- that there is no clear indication that
13 such a tumour is in her brain. According to this examination,
14 there is no physical indication to indicate that she has
15 developed any tumour in her brain.

16 And the cause of the illness, for example the infection -- the
17 infections, or whether there is any other virus or bacteria that
18 lead to this illness, cannot be located. For example, if a person
19 is coughing or has a fever or any other related symptoms, it
20 could -- we could locate such symptoms already according to the
21 physical check-up and also the review of the tests. And if she
22 had developed such symptoms, she would also be treated by the
23 doctors who care for her on a regular basis.

24 With regard to the dementia that's caused by thyroid gland, we
25 also noted that, from the blood test, the -- the blood test is

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1 normal, and there is no remarkable change to this thyroid gland
2 that needs any treatment.

3 [10.21.04]

4 With regard to the lack of vitamin B12 and folic acid, as I
5 indicated, we have found no significant problem in that aspect
6 that she needs any particular treatment.

7 We are convinced that, in our hospitals, there are
8 state-of-the-art medical equipments that can be used to conduct a
9 serious examination on her and that, if such a problem happened
10 to her, then she would be treated. We have been working our best
11 to see whether we can recommend treatment, but we found out that
12 there is no other reasons to believe that she can be treated
13 hundred percent, for example.

14 So the underlying condition behind her dementia is not obvious,
15 so we can say that perhaps -- and it is most likely that she has
16 the dementia in the form of Alzheimer's. Why we use the term
17 "most likely", as Dr. Fazel already indicated, it is really
18 difficult to conclude hundred percent that she developed
19 Alzheimer's without having taken the -- or examined (inaudible)
20 the substance of her brain or the brain cell to be checked
21 seriously at the hospital. But it is really impossible except
22 that the person is deceased that we can examine her brain by
23 conducting such a test.

24 [10.23.45]

25 I hope we -- I have answered your question, or my colleague can

1 add further on this.

2 MR. PRESIDENT:

3 Counsel Pich - rather, Ang Udom?

4 MR. ANG UDOM:

5 Can we ask that Mr. Ieng Sary be excused to observe the
6 proceeding from the holding cell?

7 MR. PRESIDENT:

8 Your request is granted. Mr. Ieng Sary can now observe the
9 proceeding from the holding cell. Security personnels are now
10 instructed to take him downstairs.

11 The international expert, you may now proceed.

12 MR. FAZEL:

13 A. Yes, just to add, what we've done is we've tried to exclude
14 those causes of dementia that are arrestable, such as thyroid B12
15 deficiency and folic acid deficiency, but in order to confirm a
16 diagnosis of Alzheimer's disease or vascular dementia, you need a
17 brain tissue. And the other point is that they can coexist, so
18 you may also have predominantly Alzheimer's, but with some
19 vascular dementia changes, or you may have it the other way
20 around.

21 [10.25.25]

22 In terms of remedy, we've indicated in our report that there are
23 approaches to enhance the quality of life, but also cognitive
24 abilities of people with dementia, and they include a trial of
25 medication, which Professor Campbell commented on, and also some

1 modifications to the environment, and some programs to stimulate
2 memory and thinking, which can be instituted. So those we've
3 covered in our report.

4 BY MR. CHAN DARARASMEY:

5 Q. Thank you, the experts, for your response. We would like to
6 proceed with another question.

7 Normally, dementia which has been caused by the loss of memory or
8 Alzheimer's -- do you think that there is other causes that
9 really make dementia worse?

10 MR. FAZEL:

11 A. Well, the presentation will be affected if an individual
12 has a physical illness such as a serious infection or being in
13 pain, so that will make an individual with an underlying dementia
14 even worse in terms of their presentation, in terms of their
15 cognitive functioning. So people are susceptible to fluctuations
16 in their presentation if they have other illnesses, particularly
17 if these other illnesses are untreated. These include, as Dr.
18 Lina said, depression being another important illness to assess
19 and exclude.

20 Q. Thank you.

21 Can you please describe to us the moderate dementia that can be
22 revealed by having looked at her physical appearance?

23 [10.28.36]

24 MR. LINA HUOT:

25 A. With regard to her cognitive impairment, it means that the

1 decline in her cognitive function, it is a symptom of
2 Alzheimer's.
3 I think, if I understood your question correctly, what kind of
4 causes that lead to this moderate decline in her cognitive
5 function, as I already indicated yesterday, we administered the
6 MMSE test, and we asked several questions with regard to the
7 orientation of time, place and events, and we noted that there is
8 a decline in her cognitive function with regard to the
9 orientation. And we cannot really conclude that there is any
10 particular cause of that, although we know that she has a problem
11 -- there is a deficit in her memory. She scored only 15 out of 30
12 on the first day, while 18 out of 30 on the second interview.
13 She has a main or significant problem with the orientation with
14 regard to time and places. We asked questions with regard to the
15 names of the cities, countries and offices that she could not
16 really give us a good response.
17 And she also has poor memory, when she could not recall the three
18 objects we asked her to repeat, for example, the objects that are
19 not related, and we tried to make sure that her response is
20 genuine, and finally -- but the three words with regard to the
21 objects are not related because we attempted to make sure that,
22 although she remembered the first object, that first object would
23 not make a clue for her to guess what the second object would be.
24 But after all she could not really recall the objects we
25 presented to her.

1 And when we asked her to -- we asked her to write us a phrase or
2 a sentence on the score card, she scored between 10 to 20, which
3 is a moderate score. That is why she has been classified to fall
4 under Category 5 -- it is the early dementia stage.

5 [10.33.12]

6 I believe that the Court may also be taken by surprise why we
7 classified her situation at the level 5, why not other level. We
8 agreed, after considerable discussion, that she would be best fit
9 in that Category 5 among the 7. The 7 is considered to be the
10 most severe stage, but Ieng Thirith is graded 5, which is the
11 early stage of dementia.

12 She still recalls the main -- some main events of her past life,
13 for example her address. She cannot recall or remember any
14 telephone name (inaudible) and she has problem remembering her
15 close relatives or close family members, including her children.
16 She has problem recalling the name of her school and she also has
17 a decline in her orientation with regard to the location, because
18 she did not know that she was interviewed at the detention
19 facility; she had mistaken the place for the first floor of the
20 hospital building.

21 [10.35.13]

22 The reason why she has been classified at level 5 is because -
23 because she still recognizes some of the people. And the reason
24 why she cannot be classified at the 6th -- level 6, because she
25 has delusional behaviour, because she tends to repeat - to repeat

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1 things.

2 And according to our observation -- I mean, the idea is that, if
3 she were to be classified at level 6, she would have experienced
4 this phenomenon already, but during our interview, she did not
5 really make us feel that she experienced such things. So we in
6 the group concluded that she shall not be described as falling
7 under Category 6 or 7, but 5, which is the best level to be given
8 to her.

9 [10.37.08]

10 Q. I would like to know your observation in accordance with
11 the physical of Ieng Thirith at the moment. Do you think that
12 Ieng Thirith is able to -- how long each time that Ieng Thirith
13 can stay in her seat, participating in the proceeding or hearing?

14 MR. FAZEL:

15 A. Well, we can only talk about our experience, which is that
16 she was able to be interviewed for a two-hour period without any
17 obvious problems and without the need for a break, although this
18 was offered to her. She declined the offer of a break.

19 Q. Thank you.

20 [10.38.12]

21 Next, we would like to know your observation on -- your
22 assessment on the fitness of Ieng Thirith. According to paragraph
23 46 of your report, you say that Ieng Thirith is able to
24 understand the charges against her.

25 So do you still maintain that she is able to understand the

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1 charges against her? Do you think that that remains as it is?

2 MR. FAZEL:

3 A. Well, it partly depends on the threshold you use to make
4 that judgment, of course. What we described in our report is that
5 there was some ability to understand the charges, although she
6 refused to discuss in any detail some of the charges. So we've
7 described already -- and we mentioned this yesterday -- the
8 specific questions that she responded to. And, taken together, we
9 felt that, overall, she had some capacity to understand the
10 charges.

11 MR. CHAN DARARASMEY:

12 Thank you, Mr. President, and thank you, both, national and
13 international expert. Since we are running short of time, I would
14 like to conclude my question and I would like to hand over to my
15 colleague, Mr. Tarik, to proceed with his questions. Thank you.

16 [10.40.02]

17 MR. PRESIDENT:

18 Thank you.

19 Since we are now coming to a break, we would like to now announce
20 a short recess, and we will come back at 11 o'clock. Thank you.

21 (Court recesses from 1040H to 1106H)

22 MR. PRESIDENT:

23 Please be seated. The Court is now back in session.

24 Before the adjournment, the national Co-Prosecutor already
25 concluded his questioning and he used up 35 minutes out of the

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1 one hour allocated to the prosecution, so the International
2 Co-Prosecutor will be allowed 25 minutes to proceed with his
3 remaining questions.

4 MR. ABDULHAK:

5 Thank you, Mr. President, and good morning, Dr. Lina and Dr.
6 Fazel.

7 I have limited time, so I hope you'll bear with me if my
8 questions are somewhat touching on different topics and perhaps
9 disjointed. But we'll do our best to get through them quickly.

10 [11.07.42]

11 QUESTIONING BY MR. ABDULHAK:

12 Q. I'd like to, just very briefly, touch upon an issue which,
13 I think, you also mentioned this morning, which is the
14 possibility of fluctuation that exists with Ieng Thirith. I think
15 Dr. Lina testified yesterday that Ieng Thirith was able to
16 complete the three-step folding tests which, if I'm correct,
17 involves taking a piece of paper, folding it, and placing it on
18 the ground, as instructed; is that correct?

19 MR. FAZEL:

20 A. Yes.

21 Q. And do you recall what Professor Campbell had to say about
22 this in his report? He also administered this particular test.

23 MR. FAZEL:

24 A. No, I don't recall.

25 Q. Well, perhaps to -- in the interest of efficiency, I'll

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1 just indicate that in his first report, at paragraph 25, he
2 indicated that she was able to complete the first two steps, but
3 by the time of the third step, she could no longer recall the
4 instruction. Is that - is that accurate? Just wait for the
5 microphone.

6 [11.09.04]

7 MR. FAZEL:

8 A. Yes.

9 Q. Thank you.

10 Also, you administered another test which, I believe, is again an
11 instruction-based test where you presented Ieng Thirith with a
12 piece of paper on which the words "close your eyes" were written,
13 which then she was required to follow. And I believe Dr. Lina
14 testified yesterday that she was able to execute that
15 instruction.

16 MR. LINA HUOT:

17 A. That is correct.

18 Q. And again, looking at that paragraph 25 of Professor
19 Campbell's first report, again, do you agree with me that, when
20 tested by him, she read the words but didn't understand that they
21 were an instruction and, therefore, didn't close her eyes as the
22 instruction suggests?

23 MR. FAZEL:

24 A. Yes.

25 Q. Now, there were also variances in your interviews with her,

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1 and I'll just touch upon a couple of those.

2 [11.10.29]

3 I believe Dr. Lina testified yesterday that Ieng Thirith was able
4 to spell the word "world" in English when asked by you; is that
5 correct?

6 MR. LINA HUOT:

7 A. Actually, she did not really write it down, but she
8 spelled the word. She spelled backward.

9 Q. And was it the case that she was unable to do so in the
10 first interview, but then was successful in the second interview,
11 to be comprehensive on this point?

12 MR. LINA HUOT:

13 A. In the first interview, she could spell only -- she scored
14 only one mark, and on the second day she could do better, that
15 she scored five.

16 Q. That was because her performance in the second interview
17 was improved as compared to the first interview.

18 MR. LINA HUOT:

19 A. Our observation is that she could perform better on the
20 second day of the interview because she scored -- her scores
21 increased from 15 to 18 out of 30.

22 Q. Thank you very much.

23 [11.12.13]

24 Now, you would be familiar, of course -- correct me if I'm wrong
25 -- that there might be some concerns with the application of the

1 MMSE test in a cultural setting that's different from that in
2 which the test was designed.

3 Am I correct in summarizing that such concerns exist?

4 MR. FAZEL:

5 A. Yes, but, I mean, we're using it as purely a screening
6 instrument. It's not in any way definitive or making us diagnose
7 someone one way or the other.

8 Q. In other words, it's not a definitive, precise diagnostic
9 instrument, but it's one of the measures that you would take into
10 account.

11 MR. FAZEL:

12 A. Yes, absolutely. It's not a diagnostic instrument.

13 Q. And the assessment you conducted places her, if I'm
14 correct, at the higher end or perhaps better performing end of
15 moderate. If that's correct, if she's at 18, in the second
16 interview, out of 30 -- and I believe you said 20 and above is
17 mild -- so then it's correct to say that she is performing -- at
18 a better performing range of moderate; would that be correct?

19 [11.13.32]

20 MR. FAZEL:

21 A. Yes, in relation to cognitive impairment as scored by the
22 MMSE.

23 Q. Thank you.

24 You commented at paragraph 34 of your report, and again in line
25 -- staying with this theme of fluctuations, that Ieng Thirith's

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1 overall performance and attention might be improved under certain
2 conditions and with rehearsal. And you testified earlier that you
3 didn't interview her extensively about her childhood and her
4 adult life; and is that correct?

5 [11.14.16]

6 MR. FAZEL:

7 A. Yes, that is.

8 Q. Would it then be fair to assume that, if one refreshes her
9 memory or perhaps presents her with documents from her life or
10 other -- uses other means of refreshment, such as photographs or
11 video material, would her recall -- would it be fair to say that
12 her recall might improve in such circumstances?

13 MR. FAZEL:

14 A. Yes.

15 Q. Thank you.

16 [11.15.04]

17 I'd like to deal briefly with the issue of communication. That's
18 one of the issues that you very helpfully examined in some
19 detail. And again, in the interests of time, I might just
20 paraphrase some of your findings, and please correct me or add if
21 I've left something important out.

22 At paragraph 20, I think you commented that there was no
23 abnormality in the rate or rhythm of speech, that the thought,
24 possession and form were normal; there was no evidence of
25 delusions or abnormal perceptions. She explained to you that she

1 would agree to take medication as prescribed by her doctors for
2 pain and memory problems.

3 [11.15.46]

4 Now, at paragraph 32, I think you also commented that there was
5 no obvious word finding difficulties and the form and structure
6 of her sentences were normal. Am I describing -- am I summarizing
7 your evidence correctly?

8 MR. FAZEL:

9 A. Yes, that's accurate.

10 Q. And did you also find that she was able to demonstrate
11 appropriate humour and candour in conversation?

12 MR. FAZEL:

13 A. Yes.

14 Q. Does that indicate that she's able to understand and
15 process information communicated to her and then respond to that
16 information at that point in time?

17 MR. FAZEL:

18 A. It indicates some capacity to do so, yes.

19 Q. Thank you.

20 [11.16.46]

21 You also -- I think this was Dr. Lina -- testified yesterday
22 that, in the course of your testing, you also conducted an
23 exercise where you asked her to write a phrase containing
24 subject, object, and verb, and she was, I believe you said, able
25 to do this in the first interview but then refused to do so in

1 the second interview.

2 MR. LINA HUOT:

3 A. Yes, that is correct.

4 Q. Does this also indicate an ability to express oneself, to
5 reduce thoughts to writing, and to understand what is being asked
6 of her in doing so?

7 MR. FAZEL:

8 A. Yes.

9 Q. You commented at paragraph 20 that she spoke to you brief
10 sentences in French and English, which you found comprehensible;
11 is that correct?

12 MR. FAZEL:

13 A. Yes.

14 Q. I think you also said she could read in English without any
15 problems.

16 [11.18.06]

17 Could you describe to us how you were able to assess that?

18 MR. FAZEL:

19 A. She read to us parts of a newspaper that was in English,
20 that was in her possession, and also she read to us parts of an
21 Internet press report that we showed her.

22 Q. And that leads me on to my next question in relation to the
23 use of newspapers.

24 [11.18.43]

25 Is it correct that you were informed by both the Chief of the

1 Detention Facility and Dr. Chamroeun that Ieng Thirith reads
2 newspapers on a regular basis?

3 MR. FAZEL:

4 A. Yes.

5 Q. Did Dr. Chamroeun also indicate to you that she
6 occasionally mentions to him items, matters that she has read in
7 the newspapers? I think this might be at paragraph 17 of your
8 report.

9 MR. FAZEL:

10 A. Yes, he did. I can't recall the time frame that he said
11 that this was happening, but he said in general terms that
12 occasionally she discussed what she had read in the newspapers
13 with him.

14 Q. Did he mention to you that those matters were -- seemed
15 completely inaccurate or distorted or not in accordance with what
16 she might have read?

17 [11.19.48]

18 MR. FAZEL:

19 A. No, he didn't say that. He said that, you know, "she
20 sometimes discusses with us what she reads". Yes.

21 Q. Thank you.

22 Looking at these incidents which I think you've considered, there
23 were a number of incidents recorded in 2008 and 2009 which I
24 think were instances of perhaps aggressive or emotional
25 behaviour. You've had access to those reports?

1 MR. FAZEL:

2 A. A summary of them only.

3 Q. Is it the case that most of these incidents were directed
4 at a particular individual?

5 MR. FAZEL:

6 A. I don't know the answer to that question.

7 Q. Thank you.

8 [11.20.48]

9 Were you able -- I'll just briefly refer -- and again, in the
10 interests of time, I won't show this document on the screen, but
11 I'll just read out the relevant section. This is the report of
12 Dr. Brinded and Professor Ka, B37/9/8, on page 7.

13 They considered this -- and, of course, this was written in
14 November 2009, so one assumes that they had access to the same
15 reports, or certainly it related to the same incidents -- and
16 they said, in the second paragraph:

17 "Her apparent anxiety with respect to co-accused persons did not
18 appear to the authors to be truly paranoid in nature but more a
19 reflection of the complex relationship and a realistic
20 appreciation of events that had taken place historically."

21 [11.21.44]

22 To the extent that some of these incidents relate to her perhaps
23 exhibiting aggressive behaviour towards a co-accused, would you
24 agree with that finding, that they seemed to -- that these
25 instances are more of a reflection of the complex relationship

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1 that exists between the Accused?

2 This is at page 7, in the second paragraph -- third paragraph,
3 I'm sorry.

4 MR. FAZEL:

5 A. We understood it. It also referred to her interaction with
6 detention staff as well. So Mr. Sophearom told us that on -- in
7 the early periods of her detention, she would be verbally
8 aggressive towards detention staff. So I think what you said is
9 possible, but also I don't think it's the only explanation for
10 these incidents or the only context for these incidents.

11 Q. Were there any reported incidents in 2010 or 2011 that
12 you're aware of?

13 MR. FAZEL:

14 A. No. I mean, the only report we haven't recited is that, in
15 the 19th of May 2010, there is a description in the medical notes
16 of her being aggressive and confused at times.

17 Q. Thank you.

18 [11.23.17]

19 I'd like to look at, very briefly, the assessments conducted over
20 the last four years that Ieng Thirith has been in detention. You
21 commented at paragraph 36 that, in terms of disease progression,
22 it is difficult to comment on this due to the lack of previous
23 detailed examination.

24 Is it the case that it's really not possible to determine the
25 date of onset of Alzheimer's or dementia, in this case, and how

1 quickly it's progressed to where it is now?

2 MR. FAZEL:

3 A. I would agree with that statement.

4 Q. And also I think you said at paragraph 36 that her current
5 restricted environment limits your clinical assessment of the
6 degree of the progression of the disease.

7 MR. FAZEL:

8 A. Yes. It limits our assessment of the -- how you would rate
9 it in terms of its severity, because some of the items which you
10 consider in rating severity are -- can only be done in settings
11 where people have more freedom to do things.

12 Q. I'd like to just very, very quickly, if we may, look at
13 potential contributing factors to the degree of cognitive
14 impairment we're seeing here.

15 [11.24.48]

16 You state that, at paragraph 37 of your report, you agree that
17 the continued reduction in quetiapine is good practice; is that
18 correct?

19 MR. FAZEL:

20 A. Yes.

21 Q. Does quetiapine cause difficulty thinking or concentrating?

22 MR. FAZEL:

23 A. It can do, and it can do partly because one of the side
24 effects of quetiapine is sedation, but also it's thought to
25 actually accelerate cognitive decline in some people as well. So

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1 it may have also a more direct effect on the brain.

2 Q. So it cannot be excluded as a potential at least
3 contributing cause in this instance.

4 MR. FAZEL:

5 A. It cannot be excluded as a potential contributing cause to
6 the progress of her illness, but I wouldn't agree with you that
7 it's a contributing cause to the cause of the dementia. I think
8 that that is not the view that we took.

9 Q. Thank you. We take no issue with that at all.

10 [11.25.58]

11 I think you also commented that her living conditions in
12 detention mean that the range of activities she participates in
13 are limited and restricted; is that correct?

14 MR. FAZEL:

15 A. Yes.

16 Q. Might that be contributing to her overall psychological
17 wellbeing and her cognitive functioning as it is now?

18 MR. FAZEL:

19 A. Yes, that may well be contributing because, as we've said,
20 cognitive stimulation is an important part of trying to at least
21 slow down the rate of cognitive decline.

22 Q. Thank you very much. You've answered one of my questions in
23 advance.

24 [11.26.45]

25 I'd like to touch upon this recommendation that Professor

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1 Campbell gave for the -- for a trial or use of donepezil.
2 You testified earlier, Dr. Fazel, that you would defer to him on
3 issues of treatment. So is it fair to say that you agree with him
4 that this treatment should be attempted?

5 MR. FAZEL:

6 A. I think I would simply say I would not disagree with him,
7 with the caveat that I don't have experience of treating
8 individuals with donepezil. So I would not disagree.

9 Q. Would you also agree with him that, until we've explored
10 all possibilities, including a trial of this medication, that we
11 can't come to a firm determination as to her current state and
12 prospects of improvement?

13 MR. FAZEL:

14 A. I would defer to Professor Campbell's views on this
15 question. I'm not confident in discussing the donepezil issue in
16 any more detail.

17 Q. Thank you.

18 MR. FAZEL:

19 A. Sorry. Do you want to --

20 [11.28.10]

21 I just wondered whether my colleague wants to add something about
22 this issue.

23 Q. Perhaps not.

24 [11.28.28]

25 Now, given that time is limited, I'll jump to another theme. In

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1 considering the consequences of any conviction or Ieng Thirith's
2 understanding of the consequences of any conviction, is it the
3 case that you showed her an article in which the word "dementia"
4 appeared? Was that an article that dealt with these proceedings?

5 MR. FAZEL:

6 A. Yes, it dealt with her attendance at these proceedings, an
7 earlier - an earlier hearing.

8 Q. And did she say to you, in reaction to that article, and
9 I'm quoting here from paragraph 46 of your report: "You see, they
10 accused me of being mad, so no one can do anything to the mad
11 person."

12 [11.29.06]

13 How would you interpret that statement?

14 MR. FAZEL:

15 A. Well, I interpret it to mean that she understood something
16 about consequences of at least one possible outcome, and I
17 inferred from that the ability to see, to see consequences, to be
18 able to see through to consequences of various decisions. It's an
19 inference based on one discrete example, but as she refused to
20 answer any questions relating to the conviction, that was all we
21 were left with to some -- in this respect.

22 Q. In other words, if your inference is correct, it would
23 appear that she understood the purpose of these proceedings and
24 the possible consequences of them.

25 MR. FAZEL:

1 A. The -- I would agree with you in terms of the consequences
2 of them.

3 Q. And one very last question, if I may.

4 [11.30.21]

5 At paragraph 41 of your report, you mention that you read to Ieng
6 Thirith a part of the indictment. In doing so, did you discuss
7 with her in any detail the events that were alleged in the
8 indictment in relation to her role and participation in the
9 alleged crimes?

10 MR. FAZEL:

11 A. My recollection was that we didn't discuss in any detail
12 those issues. We read her the indictment and we didn't go into
13 any more detail. That was my recollection. I'll just check with
14 my colleague if that was his recollection as well.

15 (Short pause)

16 [11.31.17]

17 MR. ABDULHAK:

18 Thank you. We'll stop there. We've run out of time. No further
19 questions.

20 Thank you, Mr. President.

21 MR. PRESIDENT:

22 Thank you, Co-Prosecutors.

23 [11.31.54]

24 We now hand over to the Lead Co-Lawyers for civil parties to put
25 questions to the two experts, if any. And please be reminded that

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1 the Lead Co-Lawyers have 30 minutes for questioning.

2 You may now proceed.

3 MR. PICH ANG:

4 Good morning, Mr. President. Good morning, Your Honours, members
5 of the bench. Good morning, everyone.

6 [11.32.30]

7 On behalf of the Lead Co-Lawyers, I would like to hand over to
8 Mr. Hong Kimsuon, one of the Civil Party Lawyers, and we would
9 give the floor to his international colleagues to proceed with
10 the questions as well, after Mr. Hong Kimsuon.

11 MR. HONG KIMSUON:

12 Thank you, Mr. President. Thank you, Your Honours. My respects to
13 venerable monks and members of the public. I would like to put
14 some questions to the experts.

15 QUESTIONING BY MR. HONG KIMSUON

16 Q. In your report on Ieng Thirith, I would like to know the -
17 I would like to know how old can -- at what age can an old-age
18 person suffer from a cerebral atrophy or the shrinking of the
19 brain. So by "shrinking of the brain", what does it imply? It
20 implies that the person does not have the capacity to remember
21 things or they cannot explain themselves or express themselves
22 easily? Could you please elaborate on that?

23 [11.34.09]

24 MR. LINA HUOT:

25 A. For the average person, when we get old, in other words

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1 once we reach a certain age, we suffer certain things. For
2 example, even the height of the person may also reduce, or if --
3 our muscle is also shrunk to a certain extent once we get old. So
4 that is normal in human beings. So for the brain, the same thing,
5 it shrinks to a certain extent once we get older. So this is the
6 organic issue, and at the same time it applies to the capacity to
7 remember things as well.

8 But in relation to dementia, I don't think that shrinkage of the
9 brain is a -- may result in the dementia. That is not the case.
10 The members of public or -- may understand that sometimes people
11 who are actually 80 years of age, they do not suffer from
12 dementia or any Alzheimer's. So, once again, the shrinkage of the
13 brain does not necessarily result in the loss of -- or dementia
14 or Alzheimer's so, but there might be some problem with memory.
15 So, organically, people's organs may reduce in terms of size when
16 people get old.

17 Q. So I would like to ask you to distinguish between the term
18 "cognitive impairment" and "dementia". Do you think that she is
19 now suffering from dementia, or she is suffering from cognitive
20 impairment?

21 [11.36.43]

22 MR. LINA HUOT:

23 A. Well, I think that she is now suffering from cognitive
24 impairment.

25 Q. Before the break, you informed the bench the seven

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1 conditions for the assessment -- or seven criteria for the
2 assessment of Alzheimer's disease, and you informed the bench
3 that she has problem with the fifth criterion.

4 Could you let us know, among the five criteria -- if you look at
5 your report at paragraph 39, first one on the ability to respond
6 to the touches or the ability to plea, and in paragraph 41, your
7 team conclude that Madam Ieng Thirith is capable to plead in
8 court. Does it have any contradiction or so between the ability
9 to plead and the ability to memorize things?

10 MR. FAZEL:

11 A. So, just for the sake of clarity, one can have cognitive
12 impairment and dementia.

13 In order to have dementia, you have to have cognitive impairment,
14 but what gives you a diagnosis of dementia is that there are
15 other things that are affected, in particular in relation to more
16 complex tasks like dressing, washing, planning. So dementia, you
17 need cognitive impairment, but to have dementia you need a bit
18 more, so the cognitive impairment impacts on your life in a way
19 which reduces your ability, or actually stops you doing certain
20 things. So that's why the terms are sometimes used
21 interchangeably.

22 But, to be very precise, dementia is a clinical diagnosis.

23 Cognitive impairment is a description of someone's cognitive
24 function which may or may not be impaired because of underlying
25 disease process. Dementia is an underlying disease process, and,

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1 in our view, this is an Alzheimer's dementia which is an organic
2 brain disease.

3 Now, in relation to your question, does the first of the criteria
4 that we've mentioned have -- does memory have some bearing on the
5 ability to plead, and we were of the view that the key elements
6 of this particular criteria is the understanding of whether
7 someone understands the words "guilty" and "not guilty" and the
8 concepts, which we felt that Ieng Thirith did, and also that she
9 provided us with a consistent view as to whether she agrees or
10 disagrees with the charges, and she did provide a consistent
11 view, which is that she felt that she had never done -- in her
12 words "I never done it", or she said at other times "I've never
13 done that".

14 And so, on those two elements, we felt that she had some capacity
15 to enter a plea.

16 Q. Thank you.

17 Paragraph 46 of your report, you mention that Ms. Ieng Thirith
18 understands the term "dementia". She pointed to the term
19 "dementia" in the article. In Khmer, it refers to madness. And
20 she even understands the consequence of being mad?

21 MR. LINA HUOT:

22 A. Yes, that's correct.

23 [11.41.36]

24 Q. Thank you.

25 You informed the bench that Ms. Ieng Thirith has a difficulty

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1 remembering the date, she has lost her orientation of times and
2 place.

3 So, during your interview, did she refer to the watch she was
4 wearing or to the calendar also? If she actually looked at those
5 objects and then she could not remember a thing or she did not
6 even bother to look at those stuff?

7 MR. LINA HUOT:

8 A. No, she did not look at those objects, either the calendar
9 or the watch.

10 Q. This is a general question for geriatric patients. For
11 geriatric patients, the ability to remember their own personal
12 story, do you think that it is common among old people to recall
13 their past experience or stories of their life?

14 MR. FAZEL:

15 A. Yes, it's my understanding that people who are old --
16 older adults are able to remember their early life, and there's
17 usually preservation of what's called long-term memory, and that
18 would be expected in people without a disease process --
19 underlying disease process.

20 Q. Thank you.

21 You mentioned that you conducted interview with Ms. Ieng Thirith
22 for two hours, and she did not complain at all during the
23 two-hour interview.

24 Could you let us know, if she participates in the proceedings,
25 it's not going to be - it's not going to last for two hours; do

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1 you think that she is able or capable of participating in a short
2 session in the hearing?

3 [11.44.06]

4 MR. FAZEL:

5 A. If you mean is she physically capable of sitting in court,
6 then I would agree that, on the basis of our interviews, she is
7 physically able to sit in court without any obvious problems.

8 Q. Thank you.

9 I would like to ask my very last question concerning paragraph 51
10 of your report. As a follow-up question to my previous questions,
11 you said -- allow me to read in Khmer -- in paragraph 51:

12 "It was also our view that the compensation suggested in
13 paragraph 11 of the Co-Prosecutor's questions, namely oral
14 summaries, regular and continuous contacts throughout the trial,
15 having Khmer-speaking lawyers engaged in all consultation will
16 not provide the necessary improvements such that she would gain a
17 sufficient level of understanding to follow the course of the
18 proceedings."

19 So there are two important terms here. The first one, "it will
20 not provide necessary improvement"; so I would like you to
21 elaborate as to what level is -- constitutes a necessary
22 improvement.

23 And the other terms you used, "gain a sufficient level of
24 understanding"; could you elaborate on this? What is constituted
25 as a sufficient level of understanding? Thank you.

1 [11.46.22]

2 MR. FAZEL:

3 A. So these are our clinical opinions, and they're based on
4 our interviews, obviously, and of thinking about the implications
5 of her cognitive problems.

6 We really tried to address the question whether these
7 interventions, which are all, I think, reasonable and sensible
8 interventions, whether these could, on their own, provide her
9 with the necessary improvements to be able to follow the course
10 of the proceedings. And what we mean is that do these things --
11 do these suggestions -- will they enable her to address the
12 deficits? And the deficits are specifically relating to the fact
13 that she seemed, to us, not able to retain information long
14 enough so that she could weigh it, reason it, make a balanced
15 view on what this information that was presented to her could
16 mean.

17 So it was really whether these things, these suggestions, these
18 three items -- oral summaries, regular and continuous contact and
19 having Khmer-speaking lawyers -- these three things would enable
20 her to overcome this memory -- the short-term memory problem that
21 we felt was necessary in order to follow the course of legal
22 proceedings.

23 Relating to your second question, what do we mean by
24 "sufficient", I mean, we are just using the term as we understand
25 it in a sort of common-sense way. We don't want to say anything

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1 more about that word. We just used it in a common-sense way. Do
2 we think it would -- do we think those compensations would allow
3 her to follow the course of the proceedings? And I don't want to
4 say anything else, really, about that.

5 [11.49.13]

6 MR. HONG KIMSUON:

7 Thank you.

8 Mr. President, that is all for me, and I would like to hand over
9 to Mr. Diakiese.

10 MR. PRESIDENT:

11 Yes. Thank you, lawyer Hong Kimsuon. And, lawyer Diakiese, you
12 may now proceed.

13 MR. DIAKIESE:

14 Mr. President, Your Honours, Ladies and Gentlemen, Dr. Fazel, Dr.
15 Lina, good morning. My name is Maître Hervé Diakiese, I represent
16 the civil parties.

17 QUESTIONING BY MR. DIAKIESE

18 Q. I have a few questions to put to you with respect to your
19 report.

20 Let us refer to paragraph 43 of your report, under which you
21 refer to certain difficulties of Ms. Ieng Thirith to understand
22 certain elements of the procedure, particularly in an adversarial
23 debate. Would this apply to anyone who is not familiar with a
24 legal framework or procedural technicalities?

25 [11.50.34]

1 MR. FAZEL:

2 A. That is possibly true. I think what we had concerns about
3 was that, even after explanation, Ieng Thirith did not seem to
4 comprehend the adversarial nature of this process, and we would
5 have expected someone with at least a basic level of education to
6 understand this after explanation.

7 But I take the point that it's not something that every person in
8 the general population will know about, but our view was that,
9 even once it was explained, it did not appear to us that she was
10 able to comprehend this.

11 Q. Thank you. Therefore, this would require at least 50
12 cognitive abilities, and there are even students who are unable
13 to understand certain concepts or notions, Therefore, this is not
14 a very surprising observation.

15 MR. FAZEL:

16 A. I think, as I said, I mean, we did not have an expectation
17 that many details of the procedures would be understood, it was a
18 very basic understanding of just the fact that there would be
19 parties on two sides -- a prosecution, a defence -- and that she
20 may well -- she would be asked questions on both sides and that
21 that is part of the examination of defendants and witnesses.

22 And, as I said, our view is that we would expect somebody, after
23 a basic explanation, to have some comprehension of this and it
24 was our impression that she had very little, if any,
25 comprehension of this.

1 Q. Thank you very much. And I'll need to refer to paragraph 44
2 of your expertise report.

3 [11.52.52]

4 Can you please confirm that those who would be charged with the
5 same offences as Ms. Ieng Thirith could possibly fall into a
6 state of amnesia if they were to be explained that -- just the
7 nature of the charges?

8 MR. FAZEL:

9 A. I think we just wanted to make the point that, if someone
10 is amnesic about the details of evidence or about their role in
11 an accusation or a charge, that doesn't automatically render them
12 lacking capacity. So it was just the general point that the fact
13 that someone cannot remember the time around the charges or their
14 involvement in any potential charges doesn't automatically render
15 them incompetent. So it was more a general point in relation to
16 that criteria of understanding the details of the evidence, that
17 it was our view that, just because someone can't remember the
18 details, the evidence, it doesn't necessarily mean they're not
19 competent. For us, what was important was that -- whether they
20 were able to actually comment intelligibly on what was being said
21 and put forward defences that were intelligible rather than
22 credible.

23 Q. Thank you.

24 One last question, in the interest of time. Allow me to express
25 how we understand paragraph 44 of your report. And what we draw

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1 is the following conclusion: Madam Ieng Thirith is fit to
2 understand a statement of guilt or innocence; she understands the
3 nature of the crimes with which she is being charged; she
4 understands the nature of the proceedings that have been launched
5 against her; she is fit to understand the meaning of "dementia"
6 and what it means to suffer from dementia; and she is also in a
7 position to interact with her counsel.

8 Does this not, in your opinion, indicate that she is indeed fit
9 to stand the trial that concerns her?

10 [11.55.50]

11 MR. FAZEL:

12 A. I think we've highlighted in our report that we believe
13 this to be a finely balanced decision, and our own discussion
14 about it was that we felt, in our own findings, that it was
15 finely balanced. So that is an important part of our overall
16 finding, in a sense.

17 In terms of the comments that you made and the ways that you
18 described them, the questions remain for me anyway in relation to
19 what you said, is you said that she was able to interact with
20 counsel. So the question really was what level of interaction the
21 expectation is. Because, of course, people are able to interact
22 with their counsel; but are they able to do so in a way which
23 gives them access to a fair trial is the key question.

24 And, secondly, you saying she's able to understand the nature of
25 the proceedings, I think, again, it depends on the threshold one

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1 takes for that criteria, because we've pointed out that we do
2 think that Ieng Thirith will have considerable difficulty on
3 being able to retain information that is made in court long
4 enough to be able to comment on it, and, therefore, it's
5 difficult to say that she can fully understand the nature of
6 proceedings. There is obviously a basic level that she
7 understands, for instance the role of the judge, but any more
8 details than that we've addressed in our reports, and we did have
9 concerns about understanding the adversarial nature of the
10 process and also her ability to understand and comment on things
11 that were said in court.

12 So we were of the view that this was a finely balanced judgement
13 and that a couple of the items that you've mentioned --
14 interacting with counsel and understanding the nature of
15 proceedings -- we felt there were problems and deficits in Ieng
16 Thirith's case.

17 [11.58.43]

18 Q. Thank you.

19 And one final question, Doctor. Referring to paragraph 39 of your
20 report with respect to the Strugar criteria, if you were asked to
21 specify the criteria that you would put in a sequence of
22 priorities, would you put -- what kind of weighting would you put
23 on each of those criteria, or how would you assess them taken as
24 a whole?

25 MR. PRESIDENT:

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1 That question is legally technical questions that are not
2 relevant to the experts. The experts can remain silent to this.

3 MR. DIAKIESE:

4 Thank you very much, Mr. President, I have no further questions
5 for the experts.

6 MR. PRESIDENT:

7 Thank you, Counsels and the experts.

8 It is appropriate time for the lunch adjournment. However, before
9 the adjournment, the Chamber would like to inform parties and the
10 counsel who are allowed by the Chamber to make observation, as
11 follows.

12 [12.00.43]

13 As scheduled, the other defence teams were invited to address
14 whether, in light of accused Ieng Thirith's condition and from
15 the perspective of the rights of the other Accused to an
16 expeditious trial, they consider it to be in the interests of
17 justice that the Accused, Ieng Thirith, be severed from these
18 proceedings, pursuant to Internal Rule 89ter.

19 [12.01.34]

20 The Chamber reminds the Nuon Chea and Ieng Sary teams that the
21 purpose of this intervention is limited to the issue of whether
22 severance of Accused Ieng Thirith would be desirable from the
23 perspective of the other Accused's fair trial rights.

24 Previous hearings have considered the issue of whether the
25 Accused, Nuon Chea and Ieng Sary, are fit to stand trial, and

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1 this is not a subject for discussion today.

2 Each counsel will be allowed 15 minutes to confirm their position
3 on this, and the session will -- the session for such observation
4 will be started after we convene, after lunch.

5 The Chamber will also offer an opportunity to Ieng Thirith's team
6 for 30 minutes, and the Co-Prosecutors for another 30 minutes,
7 while the Lead Co-Lawyers for 15 minutes too -- by the end of the
8 session, and that -- they should prepare for that.

9 [12.03.28]

10 We -- I have noted that the time allocated seemed to be
11 misconveyed. I would like to repeat.

12 Ieng Thirith's team will be given 30 minutes; Co-Prosecutor, 45
13 minutes; while the Lead Co-Lawyers will be offered 15 minutes for
14 this observation. And this includes all the observations that
15 expressed also by both counsels, Nuon Chea and Ieng Sary's team,
16 who will be presenting the observation after lunch break, when we
17 resume our session after lunch.

18 Counsel Diana Ellis, you may now proceed.

19 MS. ELLIS:

20 Mr. President, could we be allowed a few minutes after the lunch
21 break to re-examine the two doctors on a few points that have
22 arisen as a result of the other questioning? It's my first
23 request.

24 And the second request is for clarification as to whether we have
25 30 minutes in which to address the five questions that were posed

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1 to us. Is that my correct understanding of the position?

2 [12.05.20]

3 (Judges deliberate)

4 JUDGE CARTWRIGHT:

5 Yes, the President has asked me to respond to your two requests,

6 Ms. Ellis.

7 Yes, you have the right to re-examine the two experts. We ask

8 that you be extremely brief, because we want to conclude all the

9 other submissions this afternoon, which is benefitting you, and

10 the experts, and everyone else.

11 Secondly, the submission time that you have been given of 30

12 minutes is to encompass any submissions you wish to make in

13 relation to the evidence that we have -- the expert opinion that

14 we have been hearing as well as, if you wish, to respond to the

15 defence teams, the two teams that have indicated they wish to be

16 heard this afternoon on the questions put by the Chamber.

17 [12.08.19]

18 Is that sufficient information for you?

19 MS. ELLIS:

20 Thank you, yes, it is.

21 But from that, I understand that we're not specifically

22 addressing, at the moment, the five questions that were put?

23 JUDGE CARTWRIGHT:

24 What is the fifth question? You've got me confused now, Ms.

25 Ellis, I'm sorry.

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1 MS. ELLIS:

2 The fifth question deals with, in the event of severance, what
3 are the possible consequences.

4 JUDGE CARTWRIGHT:

5 Well, please cover everything that you wish to, but, I'm sorry,
6 you have only 30 minutes. Is that clear to everyone?

7 [12.09.18]

8 MS. ELLIS:

9 Thank you very much.

10 JUDGE CARTWRIGHT:

11 Thank you.

12 MR. PRESIDENT:

13 Since that the message has already been clearly conveyed after
14 all, we would like to take the adjournment.

15 The session will be resumed by 1.30.

16 (Court recesses from 1210H to 1331H)

17 MR. PRESIDENT:

18 Please be seated. The Court is now back in session.

19 Before the lunch adjournment, we already informed the parties
20 concerning the following session. We will proceed with the two

21 counsels for the accused persons Nuon Chea and Ieng Sary. And

22 since there is a request from Ieng Thirith's team to put some

23 questions, we would like now to hand over to Ieng Thirith's

24 counsel to proceed with the questions to the experts. They should

25 be allowed 10 minutes to do this.

1 MS. ELLIS:

2 Thank you, Mr. President.

3 QUESTIONING BY MS. ELLIS:

4 Q. Firstly, could I just correct two pieces of evidence which
5 appear to be contradicted by the report? Dr. Fazel, could you
6 just look, please, at paragraph 18? At paragraph 18, you set out
7 that it was noted by Mr. Sophearom that she occasionally
8 misplaced things and accused staff of stealing. In other words,
9 there wasn't just one isolated incident. Do you agree with that?

10 [13.34.11]

11 MR. FAZEL:

12 A. I would have to refer to my notes to be certain if it was
13 one or more than one occasion. I could do so now.

14 Q. Well, I'm anxious because we've only got 10 minutes.

15 MR. FAZEL:

16 A. Yes.

17 Q. So I'm going to deal with another apparent error in the
18 evidence on the basis of this statement, where at paragraph 23 it
19 sets out that Ieng Thirith, when interviewed by you and your
20 colleagues, could not name her last address. She knew it was in
21 Phnom Penh but didn't give the address. And that is set out in
22 the document; isn't it?

23 MR. FAZEL:

24 A. So I don't understand the possible error.

25 Q. The evidence that was given by Dr. Lina was that she said

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1 she could remember her address. I'm just correcting that.

2 MR. FAZEL:

3 A. If I could just respond to those two questions. My notes,
4 which I've just referred to, my handwritten notes, are that she
5 occasionally misplaced -- occasionally misplaced items.

6 [13.35.26]

7 Q. And that accords with your report?

8 MR. FAZEL:

9 A. Yes.

10 Q. I don't want to spend a lot of time, I just want to correct
11 the mistake. Thank you.

12 MR. FAZEL:

13 A. I'm sorry, I don't understand --

14 Q. The evidence of Dr. Lina was that, once, it happened.

15 MR. FAZEL:

16 A. Yes, okay. Do you recall if -- do you remember that
17 exactly or --

18 Q. Dr. Fazel, I've made the point. I'm going to move on if I
19 can.

20 MR. FAZEL:

21 A. In response to the second question, she did not remember
22 her precise address. She remembered that she lived on a large
23 street in Phnom Penh, which we understand is correct, but she did
24 not remember her precise address. So it sort of partly depends on
25 how exact you want to be about that issue about the recall of her

1 address.

2 Q. Dealing with her condition, we've talked about her
3 cognitive impairment. In fact, it's a global cognitive
4 impairment; isn't it?

5 MR. FAZEL:

6 A. Yes.

7 Q. And that means that it affects all the brain functions?

8 [13.36.42]

9 MR. FAZEL:

10 A. It affects the brain functions. I can't say that it
11 affects every single brain function, because, for instance, there
12 isn't clear evidence of one or two items that we refer to in our
13 Mini-Mental State Examination, that she had deficits in.

14 Q. The medication that was suggested by Professor Campbell is
15 used quite widely in certain parts of the world, including the
16 United Kingdom; is it not?

17 MR. FAZEL:

18 A. It is definitely used in the United Kingdom. It's
19 difficult to say if it's used quite widely. Recently, there were
20 clinical guidelines issued a few years ago, which did not
21 recommend its routine use. So it's definitely used, but I'm not
22 sure you could say it's used quite widely.

23 Q. Is a concern about using it in the case of Ieng Thirith the
24 fact that it's not really a drug used here and it does have quite
25 severe side effects in some people?

1 MR. FAZEL:

2 A. That was one of our team's concerns, yes.

3 Q. And as we've already heard from Professor Campbell, which
4 perhaps you can confirm, any benefits are only of a temporary
5 nature?

6 MR. FAZEL:

7 A. Yes, that's my understanding.

8 Q. The suggestions to improve the condition of Ieng Thirith,
9 would it be fair to say that they are more likely to have an
10 impact on a younger person suffering from dementia than an older
11 one?

12 [13.38.43]

13 MR. FAZEL:

14 A. I do not know the answer to that question.

15 Q. You've told us that it was indicated to you that Ieng
16 Thirith read the newspapers. It's right, isn't it, that she was
17 unable to answer any question you posed to her as to what was in
18 the news, either nationally or internationally?

19 MR. FAZEL:

20 A. That is correct.

21 Q. Would you agree that there is a world of difference between
22 being able to read words on a page and being able to assimilate
23 the meaning of their contents?

24 MR. FAZEL:

25 A. Yes.

1 Q. Did you carry out any comprehension tests to ascertain
2 whether she was capable of actually understanding anything by
3 reading it in your presence or having anything read to her which
4 she was then questioned about?

5 MR. FAZEL:

6 A. We referred already to a sentence which we asked her to
7 follow. We also asked her to interpret a proverb and we asked her
8 to explain how various items were similar to each other, and we
9 presented her with three. And the responses to that are detailed
10 in our reports, but in summary, she was able to provide two out
11 of the three similarities between objects; she was not able to
12 interpret a proverb; and Dr. Lina has already discussed the
13 response to reading out a sentence.

14 Q. Thank you.

15 [13.40.31]

16 You talk about her being able to, you think, understand the
17 consequences of any conviction. Was there ever any indication to
18 you that she understood she was being detained in the detention
19 centre, which she seems to have thought was the hospital?

20 MR. FAZEL:

21 A. I just need a second to remind myself of my notes. I do not
22 recall her acknowledging the fact that she accepted or
23 acknowledged that she was in a detention centre.

24 Q. You say that you were of the view she had the ability to
25 plead. That obviously is more than saying "I didn't do it" in

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1 various ways. Can you assist, if you say that she has no memory
2 of the events in her life in the 1970's, how she's able to
3 meaningfully enter a plea to the charges?

4 MR. FAZEL:

5 A. My view is that that particular capacity doesn't depend on
6 memory for the alleged offences in the 1970's, it depends on her
7 view currently as to whether she believes or not that she is
8 guilty for those offences, and she understands those concepts. So
9 that is my understanding of what that criteria means, and hence,
10 our view is presented in our report.

11 Q. Her capacity to instruct counsel, you describe her as being
12 able to cooperate with her lawyers. And indeed she cooperated
13 with you; didn't she?

14 MR. FAZEL:

15 A. Yes.

16 Q. Would you agree that that is very different from being able
17 to assist in the preparation of her defence, which requires her
18 to give an account of what she was doing, where she was doing it,
19 who she was doing it with in the 1970's?

20 [13.43.42]

21 MR. FAZEL:

22 A. Yes, I would agree that cooperation with counsel is not
23 sufficient, in my opinion, to meet that particular capacity.

24 Q. And from what you've told us, she can't meet the capacity,
25 in the sense that she cannot recall anything of those times in

1 her life?

2 MR. FAZEL:

3 A. I mean, I think our wording is that there is considerable
4 difficulty in meeting that capacity because of the memory
5 impairment.

6 Q. How do you suggest she has an ability to testify about
7 events that took place -- that are the subject matter of this
8 Closing Order between 1975 and 1979, when she has no memory of
9 anything that she was doing at that time?

10 MR. FAZEL:

11 A. I think the view we took is that, if she could understand
12 the charges, and on the basis of a simple understanding of the
13 charges, and her ability to answer questions in the way that she
14 answered questions to us over two days -- she was able to
15 understand the language being used, she was able to provide
16 answers that were intelligible to us -- in that sense, we felt
17 she was able to testify.

18 We did not come to the view that memory was crucial for this
19 particular capacity, and we state the analogous situation of
20 defendants who may have amnesia who also have the ability to
21 testify because of the other capacities that are important in
22 this respect.

23 Q. Amnesia is a situation that arises in court, and you'll be
24 familiar with it, often self-induced by excessive alcohol, for
25 example. You would agree that global cognitive impairment, which

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1 has been described as, in this case, as dementia, which is
2 progressive, is rather different from somebody who is amnesic but
3 has all the other facilities about them. Is that -- would you
4 accept that?

5 [13.46.12]

6 MR. FAZEL:

7 A. I would accept it.

8 Q. Yes?

9 MR. FAZEL:

10 A. And there's also the possibility that people who
11 experience severe trauma also have amnesia for the events at the
12 time of an alleged offence. So there's a number of possible
13 causes of the amnesia, and they are, of course, different, in
14 aetiology, to dementia.

15 Q. Bringing you back to lack of memory of the 1970's, please,
16 how do you say Ieng Thirith has the ability to testify in her own
17 defence if, when she's asked where she was in April 1975, she has
18 absolutely no memory of that?

19 MR. FAZEL:

20 A. I think it partly depends on which criteria that
21 particular example you give fits into, and we felt that that fits
22 into following the course of the proceedings rather than the
23 ability to testify, which we took as a limited criteria in
24 relation to comprehending the questions and being able to answer
25 in sentences that make sense in terms of grammar and structure.

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1 So we would agree with you, I would agree with you that the
2 example you give does raise significant difficulties in relation
3 to following the course of the proceedings because, as part of
4 that process, you would expect someone to comment and discuss
5 issues raised during a court process with counsel, and this is
6 obviously compromised by the memory impairment.

7 [13.48.12]

8 MS. ELLIS:

9 That's very helpful. Thank you very much.

10 MR. PRESIDENT:

11 Thank you, Counsel.

12 Thank you, the experts, for doing your best to respond to
13 questions by parties in the proceeding for the last one day or
14 so.

15 And the session on the questionings to you with regard to your
16 report has come to the conclusion, and you can be dismissed from
17 this Court. You can feel free to return home. And as we have been
18 informed, you are to return to your country this afternoon; we
19 wish you all the best and safe trip home. Thank you very much.
20 Court officers are now instructed to escort the experts to his
21 place.

22 (Witnesses excused)

23 MR. PRESIDENT:

24 Next, we would like to proceed to Defence Counsel for Ieng Sary,
25 if they would wish to make the observations as we already

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1 indicated this morning concerning the severance issue. Please
2 make your observation by considering the rights of the other
3 Accused Person and the interests of justice. You have 15 minutes
4 for this observation.

5 MR. KARNAVAS:

6 Good afternoon, Mr. President. Good afternoon, Your Honours.

7 I will be rather brief on this matter.

8 First, we do wish to thank Your Honours for giving us this
9 opportunity to be heard and we fully understand the limits within
10 which we are to respond on this particular issue.

11 [13.51.11]

12 We just wish to convey that your decision that you will make on
13 this particular issue, with the deepest respect, will not express
14 objective truths, but rather will reflect your subjective
15 intentions. And by that, what I mean is, if one accused is to
16 remain in this trial where it would appear, to a reasonable
17 degree of forensic psychiatric certainty, she is not capable of
18 fully participating all the time, on all aspects of her case, if
19 she were to remain, obviously it would be an injustice.

20 Article 33 new of the ECCC Law provides that "the Extraordinary
21 Chambers of the trial court shall exercise their jurisdiction in
22 accordance with international standards of justice, fairness and
23 due process of law, as set out in Articles 14 and 15 of the 1966
24 International Convention (sic) on Civil and Political Rights".

25 Our client, of course, has the right to be tried in an

1 expeditious manner. Sometimes, there is a debate; what does that
2 mean? Does it mean that you go to trial as quickly as possible or
3 does it mean that you have a trial that is held as quickly as
4 possible? That is, once you get into trial, you move as quickly
5 as possible.

6 We do think that disruptions during a trial that, I think, even
7 severed as it will be, even the first phase, it would appear is
8 going to take one, perhaps two years, perhaps even longer,
9 considering the challenges that lie ahead, if there are going to
10 be disruptions, obviously it's going to take a lot longer.

11 Now, listening to the testimony of the doctors and some of the
12 questions that have come from the parties of the doctors, one of
13 the things that kept popping up was, well, what if she is
14 medicated; would she be able to follow the proceedings. And as I
15 heard those questions, it reminded me of what is done in the
16 United States with respect to -- in some states, where somebody
17 has been convicted and is facing execution but is incompetent.
18 And regrettably, in the United States, the Supreme Court has said
19 that you can medicate an incompetent person just long enough for
20 that person to be competent enough to be executed.

21 [13.54.30]

22 And that's what's going on through my mind as I'm listening to
23 this testimony. Can we medicate someone and then monitor that
24 situation on a minute-by-minute basis to ensure that it's not
25 disruptive to the proceedings and that that individual is assured

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1 that their fair trial rights are fully protected?

2 We're not here to discuss what your decision ultimately should
3 be, but I think it's fair to say that severance is perhaps the
4 only reasonable and just thing to do. And I think the subjective
5 intention that you will be expressing in doing so would be that,
6 even when we have very difficult issues before us, we don't take
7 the easy way, because there are no easy ways in this sort of a
8 case, they're only very difficult choices that we must make. And
9 the difficult choice and regrettable to some is that, in this
10 case, Ms. Ieng Thirith must be severed from this case and allow
11 the proceedings to go forward in an expeditious manner. And I
12 leave it to others to decide what should happen ultimately with
13 this Accused.

14 Thank you.

15 MR. PRESIDENT:

16 Thank you, Counsel.

17 We now proceed to Counsel for Nuon Chea, if they would wish to
18 make any observation on this.

19 [13.56.32]

20 MR. PESTMAN:

21 Thank you, Your Honours. I will be brief as well.

22 We admire the creativity of the Trial Chamber and we welcome your
23 suggestion to sever the case to split it into two parts. I
24 envisage two speed trial; the first trial is for those accused
25 who are able to digest normal hearing days, who can sit entire

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1 days and are therefore fully fit to stand trial, and the other
2 part, the other trial would be for those accused to whom justice
3 has to be fed piecemeal, those that are not entirely fit to stand
4 trial.

5 And, Your Honours, the reasons you have given for the possible
6 severance of Ieng Thirith's trial also apply to our client. Like
7 Ieng Thirith, his health is deteriorating, he will need ongoing
8 medical assistance and testing, and there will be, like in Ieng
9 Thirith's case, fluctuations in his day-to-day condition.

10 And therefore I would like to request, in the interest of Ieng
11 Sary's and Khieu Samphan's right to an expeditious trial, to also
12 sever Nuon Chea's trial from the main trial.

13 [13.58.20]

14 Thank you very much.

15 MR. PRESIDENT:

16 Thank you, Counsel.

17 We now proceed to the defence team for Ieng Thirith to make their
18 closing statement or argument. And as we already made it clear,
19 the counsel is allotted 30 minutes for this purpose.

20 MR. PHAT POUV SEANG:

21 Good afternoon, Mr. President, Your Honours of the Trial Chamber,
22 and good afternoon to the prosecutors and my learned friends.

23 [13.59.37]

24 I am here with my colleague representing Ieng Thirith. I am here
25 to make our final observation with regard to our client's

1 situation. And of course we understand that it is the Trial
2 Chamber who will ultimately make the final decision on the
3 evidence and that the burden of proof is now shifted to us,
4 because the evidence before us here is that, in the case - in The
5 Prosecutor v. Nahak, it is the evidence that is important to be
6 based upon to determine whether the person is not fit or is not
7 competent enough to stand trial. So the burden of proof is
8 indeed, with regard to the fitness to stand trial, not to be
9 shifted to the counsel for the Accused Person, it is the
10 prosecution who bear this burden of proof.

11 And in the same case, the Special Committee for the Severe Crimes
12 believes that the Trial Chamber method is genuine to follow.

13 And there are two methods found in the Strugar case at the Trial
14 Court.

15 First, the Trial Court noted the burden of proof that the Accused
16 Person is found to be unfit to stand trial, which should be
17 produced by the defence counsel.

18 However, at the Appeal Court, such burden shall not -- has been
19 found to be not shouldered by any particular party.

20 The Supreme Court Chamber noted its agreement with the Trial
21 Chamber that the Accused Person who has been considered to be
22 unfit to stand trial shall present the evidence. And this case is
23 very consistent with the common law tradition.

24 In Josep Nahak's case, as I indicated, the party -- in particular
25 the defence counsel has been found to be not the party that

1 shouldered the burden of proof to find that the Accused Person is
2 not fit to stand trial or not, and the Trial Chamber itself is
3 obliged to analyze all the evidence to see whether it is ample
4 enough to rule on the competency of the Accused Person to stand
5 trial.

6 [14.03.42]

7 The counsel for Ieng Thirith would like to pinpoint the
8 following; that, on the 26th of May 2004, we refer to this
9 particular context that, first, if the Trial Chamber finds that
10 the burden of proof -- with regard to the burden of proof, and
11 that the Chamber finds that the Accused is unfit to stand trial,
12 it is not really actually the burden of the defence counsel to
13 find out that his or her client is not fit to stand trial, it is
14 -- therefore bear no burdens. And this finding is also based on
15 the evidence that the Trial Chamber need to rely on.

16 And at the ICTY, they followed the adversarial hearing --

17 MR. PRESIDENT:

18 Counsel Phat Pouv Seang, could you please slow down a little bit
19 for our record and look at the President's gesture with regard to
20 the speed for clarity.

21 Thank you.

22 MR. PHAT POUV SEANG:

23 (Microphone not activated)

24 The Chamber has found that the Accused Person is fit to stand
25 trial. And with regard to this point, it is really the -- it has

1 already been the case that has been referred to all along. This
2 finding is not really relying on the burden of proof.

3 And as already noted, the ICTY followed the adversarial hearing
4 in which each party has the burden of proof with regard to the
5 matter at issue. But it is not the case here at the ECCC, in
6 which the inquisitorial tradition is introduced -- or the Chamber
7 is guided by the inquisitorial tradition.

8 In a judgment on the 17th of July 2008, in which The Prosecutor
9 v. Strugar, the prosecution also bear the burden of proof, and
10 that the Chamber has noted that it has agreed with the decision
11 made by the Trial Chamber that, when the Accused Person is found
12 to be -- or is considered to be unfit to stand trial, has to
13 prove.

14 [14.07.35]

15 Finally, the Chamber has ruled that the burden of proof shall not
16 be the task by the defence counsel. It is in the case when the
17 Court was considering the competence of Mr. Strugar in his
18 participation in the trial. And in the Judgment itself it is
19 summarized in only one paragraph, in the Judgment of the Supreme
20 Court Chamber, that it is not really the objective for such a
21 debate.

22 And according to the decision made by the Special Commission for
23 the Severe Crimes in the case of The Prosecutor v. Nahak in the
24 year 2005, with regard to the Judgment on the competence of the
25 Accused to stand trial, the Court regardlessly looked at the

1 decision made by the Chamber and rule as follows.

2 First, since this is the general customary law, the burden of
3 proof shall be shouldered by the prosecution. And pursuant to the
4 presumption of innocence principle stipulated in the statute of
5 the ICTY, although in the latter case that the court ruled that
6 the burden of proof should be on the side of the defence counsel,
7 the court ruled that, according to the international criminal
8 laws, the court has found no particular relevance to the
9 jurisprudence and such laws that really shift the responsibility
10 of burden of proof to the defence counsel.

11 With regard to this conclusion, the Court in Nahak's case finally
12 emphasized that the Chamber has already considered all the
13 evidence put before it and finally ruled that this evidence is
14 true that the Accused Person is unfit to stand trial, and the
15 decision is based on the fact that the proceeding can proceed and
16 that -- in Strugar case, it is concluded that the prosecution had
17 already fulfilled the burden of proof, although the Court has not
18 really asked the prosecutors to do that.

19 [14.12.06]

20 I think I'll conclude my observation and would like to hand over
21 to my colleague.

22 MS. ELLIS:

23 May it please you, Mr. President, Your Honours, firstly, can I
24 just say I will refer to the name of a case, not the citation. We
25 will provide that later, for speed.

1 Our primary submission is that Madam Ieng Thirith is unfit to
2 stand trial, and the proceedings against her should be
3 discontinued.

4 The expert evidence provided to the Trial Chamber is unequivocal.
5 Professor Campbell is a geriatrician of considerable experience,
6 and expertise, and eminence. He has concluded that Ieng Thirith
7 has a global cognitive impairment, particularly evident in the
8 domains of memory, speech, (inaudible) frontal lobe function, the
9 latter being responsible for reasoning, planning, judgment and
10 interpersonal relationships in particular.

11 The finding is consistent with her having a dementing process.

12 It's a moderately severe illness which is probably thought to be
13 Alzheimer's and which has no way in which it can be improved to a
14 significant degree.

15 In the opinion of Professor Campbell, her cognitive impairment
16 impairs her ability to comprehend questions, to follow
17 instructions, to recall events, to concentrate, and to maintain a
18 consistent line of thought. She is disorientated in time and
19 place and indeed, to some extent, in person.

20 These impairments, we submit, are such as to clearly
21 significantly compromise her ability to participate meaningfully
22 in her trial and to exercise her fair trial rights as they have
23 been identified in Strugar.

24 [14.14.30]

25 The Trial Chamber has sought the assistance of four additional

1 experts, who have provided a supplementary assessment. There is
2 clearly no significant difference in their conclusions. Emphasis
3 may be slightly different, and, as we've just heard, the
4 terminology used is also in some cases different, but the basic
5 facts are the same: it is agreed this is a cognitive impairment
6 of moderately severe nature.

7 The diagnosis is further supported even by doctors such as
8 Professor Ka, who, in November 2009, thought the impairment was
9 mild. He subsequently, this year, assisted Professor Campbell and
10 was entirely supportive of Professor Campbell's view.

11 Likewise, Dr. Chak Thida, who we heard in February of this year,
12 appeared to be out on a limb with a rather more optimistic
13 assessment, having reviewed the position in August at the request
14 of Professor Campbell, is also of an identical view.

15 It has to be remembered that the diagnosis which has been reached
16 has been based on a number of different factors: the examination
17 of Ieng Thirith, her history, formal tests, observations by both
18 her doctors and carers, and CT scans. And we submit it's of
19 considerable significance that the CT scans which have been
20 reviewed with the assistance of a radiologist show that there
21 has, over time, been some deterioration in the generalized brain
22 atrophy, because this, of course, accords with the views of those
23 whose observations have been sought, those who have had a chance,
24 such as Dr. Chamroeun, to observe her in the detention centre,
25 the Chief of the Detention Centre and indeed Professor Ka

1 himself. All have noted that, as time has gone on, she has
2 deteriorated in her ability to look after herself and to
3 generally behave appropriately.

4 [14.17.20]

5 We submit that the evidence which has been put before the Trial
6 Chamber from these experts, which is of course to assist the
7 Chamber in coming to its conclusion on fitness to stand trial, is
8 very persuasive in one direction alone, and it is this, that she
9 cannot meaningfully exercise her fair trial rights.

10 Of particular significance, perhaps, is the finding of a study
11 done on those who have dementia, when the question of competence
12 has been raised, and it is clear that deficits in orientation and
13 memory are strong indicators of incompetence to in fact deal with
14 the trial process.

15 Particularly significantly, we say, is the fact that there is no
16 doubt at all that Ieng Thirith has no ability, through no fault
17 of her own, to recall events in her life. To stand trial before
18 this Trial Chamber, she must be in a position to recall the
19 important significant events that occurred, firstly, between 1975
20 and 1979, but also, if the Closing Order is considered, to be
21 able to go further back in time in order to explain her role, if
22 she had one, in the development of the Communist Party of
23 Kampuchea.

24 She has no memory of that. Neither does she have a memory of more
25 recent events. And it is perhaps unnecessary for me to point to

1 the details of what she lacks. She lacks ability, as we've heard,
2 to recall names of people she sees on a regular basis who are the
3 closest to her. She doesn't recall the roles of those who are
4 important in her life or who have come to see her. She doesn't
5 recall, by virtue of her belief in the continued living of
6 members of her family who are long dead, significant events such
7 as funerals. She has no memory, long or short-term, on the basis
8 of anything that has been provided by way of information to this
9 Chamber. And therefore we submit that it would be wrong to cause
10 her to stand trial in these circumstances.

11 [14.20.22]

12 I'd now like to move, if I can, to address each of the questions
13 that we were asked to consider.

14 The first is: May an accused be considered mentally unfit to
15 stand trial if any one of the criteria for this determination
16 identified in Strugar is found to be lacking, or must all
17 criteria be viewed together when making this assessment?

18 We submit that if any one of the criteria as set out in Strugar
19 is lacking, the Accused should be found unfit to stand trial.

20 The reality, if the capacities are considered individually, is
21 that they are set out discretely for convenience. In fact, all
22 that has happened is the trial process has been divided up into
23 its various parts: the charges, the Accused pleading to those
24 charges, the Accused following the trial proceedings, the Accused
25 providing details of what she says did or did not happen and

1 instructing counsel in that manner, and finally understanding the
2 consequences of the proceedings.

3 If the Accused cannot understand the nature of the charges, we
4 submit she can't be fit to plead guilty or not guilty. And if
5 looked at in this way in respect of each of these matters, we
6 submit it is clear they all overlap and they stand together.

7 And to appreciate the significance of each of these rights, one
8 only has to pose the question slightly differently: Can the trial
9 be fair if the Accused cannot plead to the indictment? Can the
10 trial be fair if the Accused cannot understand the nature of the
11 charges, if she cannot follow the proceedings, cannot instruct
12 counsel, and cannot understand the consequences of the
13 proceedings? We say the answer is: Obviously, the trial can't be
14 fair.

15 [14.23.02]

16 The accused who appear before these Trial Chambers clearly have
17 different levels of intellect; it's not that that is being
18 considered, it is the level of competence to deal with the trial
19 process.

20 The matter was considered in the case of Nahak, which was a case
21 in East Timor, and it was said there that "a failure to have
22 adequate capacity as to any one of these elements of competency
23 would be fatal to a defendant's fitness to stand trial".

24 This is the point that we seek to underline. And in that case, it
25 was emphasized that understanding shouldn't only be factual

1 understanding, it must be a rational understanding of the issues.

2 [14.24.00]

3 It is instructive to look at other cases where the issue of
4 fitness has arisen and to pay special attention to the words that
5 are used, because it will be seen that what is always referred to
6 is rights or capacities in its pure plural form, underlying that
7 these rights are the minimum guaranteed rights for a fair trial,
8 and the capacities are the basic fundamental capacities or
9 competencies which an accused should have in order to stand
10 trial.

11 The case of Strugar, both on appeal to the Appeals Chamber and at
12 first instance, repeatedly referred to the minimum guarantees and
13 to the fair trial rights of the Accused, which of course, in that
14 case, they were applying by virtue of the articles in the ICTY
15 Statute which gives effect to the ICCPR Articles 15 and 16.

16 [14.25.21]

17 Throughout the decision in the lower court in Strugar and in the
18 Appeals Chamber, there is a reference to the plurality of the
19 rights and the capacities. And that -- it should be also noted,
20 when the Trial Chamber referred to a "minimum standard of overall
21 capacity" which could, in one way, be viewed as referring to a
22 more global view, that was a phrase that was criticized by the
23 Appeals Chamber, who preferred the formulation "meaningful
24 participation", which allows the Accused to exercise his fair
25 trial rights.

1 [14.26.12]

2 And Nahak said that, to be competent, the "defendant must be
3 substantially able to understand and to exercise at trial the
4 rights to which he is entitled under the law. Without such a
5 capacity on the part of a defendant, the rights themselves become
6 meaningless".

7 And the Trial Chamber in Strugar said that "the enjoyment of the
8 rights would appear to presuppose that the Accused has a level of
9 mental and physical capacity and that the Accused possesses the
10 capacities in order to be able to exercise the rights". So time
11 and again, that is the way in which the matter's dealt with.

12 [14.27.01]

13 We hope it assists if we also make reference to what was a very
14 important case in the United Kingdom, that of the Pinochet
15 decision, the Secretary of State *ex parte* Amnesty International,
16 where the Home Secretary there proceeded on the basis that the
17 decisive criteria are the quality of the memory, the ability of
18 an accused to process information, following proceedings, and
19 then went on to identify the very capacities that we see
20 identified in Strugar as all being core capacities which must be
21 present.

22 And this underlines that these rights, of course, are minimum
23 requirements accorded to an accused in the case.

24 [14.27.53]

25 And so on that point, first question, we submit that it can't be

1 right, that some of these rights are not able to be utilized by
2 an accused; they stand together. Absent the capacity in any one
3 of them, the trial would not be fair and justice would not be
4 done.

5 If I can then, please, move on to question 2: "Does the Accused's
6 impaired memory as identified by both Professor Campbell and the
7 experts render her unable to exercise her fair trial rights to
8 the standard required in the Strugar test?"

9 [14.28.38]

10 We submit that memory does impact on each of these capacities for
11 the reasons already mentioned. There is a deterioration to the
12 point where there is no significant short-term memory, and she
13 has no long-term memory of the events. And therefore, in those
14 circumstances, she is not in a position to meaningfully engage
15 with any of those five capacities that are set out in the case of
16 Strugar.

17 In Strugar, it was said that the availability of counsel may
18 compensate for any deficiency of a relevant capacity, but the use
19 of counsel requires the Accused to have the capacity to instruct
20 counsel sufficiently for this purpose. And of course that
21 requires the Accused providing an account of what she says she
22 did, where she was, when she said certain things, if she said
23 them, who she knows. All of that is absent.

24 [14.29.52]

25 Strugar referred to the case that was before the European Court

1 of Human Rights, of S.C. against the United Kingdom, where again
2 what was stressed was the effective participation. And that
3 presupposes that the Accused is able to explain to his lawyers
4 the version of events that is being put forward, and point to
5 statements that the Accused agrees or disagrees with, and put
6 forward facts that might assist the Defence.

7 [14.30.25]

8 Absent memory, none of this can be undertaken, and this matter
9 was endorsed in the case of Nahak, again.

10 Pinochet, too, as I've pointed out, said that the decisive
11 criteria when determining the Accused's fitness to stand trial
12 was the quality of, in that case, his memory. And that, we
13 submit, is for obvious reasons, as if you can't remember any of
14 the events -- and we point out this is not her fault, it is a
15 genuine deficit of memory -- then it is impossible to in fact
16 plead and do any of the other capacities that is required.

17 There is no doubt from the experts that her memory is truly, at
18 all levels, impaired, and that must compromise her ability to
19 have a fair trial.

20 [14.31.28]

21 And the Court will recall that she didn't remember she was a
22 Minister, 'til it was repeatedly put to her. At the centre of
23 this, when she spoke to Professor Campbell, she had no
24 recollection of what she'd done at the relevant time, and I'm
25 sure you'll recall that he said in order to try and assist

1 herself, she started looking through papers which were completely
2 irrelevant to anything at all. It's a coping mechanism, as he
3 described it, but it underlines how difficult her position would
4 be: no memory of family, no memory of where she is, and any of
5 these other features we've heard about.

6 [14.32.11]

7 Coming on, then -- and I'm conscious of the time, I hope I can
8 just have the few additional minutes if I need them -- the third
9 question -- I should say the last two questions are considerably
10 shorter. The third question: "Does the degree of impairment
11 identified by Professor Campbell and the psychiatric experts in
12 relation to Ieng Thirith's capacity to enter a plea, to instruct
13 counsel, to testify, to understand the nature of the charges, and
14 follow the proceedings, details of the evidence, and consequences
15 of the proceedings indicate she's unfit to stand trial, taking
16 account that she is represented, and so thus to some extent can
17 exercise those rights?"

18 Our submission on this is that it is quite clearly the case that
19 there are situations where, as envisioned in Strugar, the
20 problems are such that, with the assistance of counsel, it is
21 possible for an individual to participate in the proceedings and
22 exercise her rights and for the proceedings to be fair because
23 compensation is envisaged.

24 [14.33.33]

25 But, as Strugar said, "the availability of Trial counsel may

1 certainly enable an accused to more adequately deal with the
2 above matters - that's the rights -- and in a particular case may
3 well adequately compensate for any deficiency of a relevant
4 capacity. The use of counsel requires however that the accused
5 has the capacity to instruct counsel sufficiently for this
6 purpose".

7 In the case of Nahak, which dealt with this point it was said
8 that "the major function of counsel is to assist the defendant
9 but not to replace him. The mere fact that a defendant is
10 represented by counsel does not mean, ipso facto, that the
11 accused is competent simply because his lawyer is. Moreover, the
12 mere fact that a defendant has the theoretical ability to say yes
13 or no to his attorney does not mean he has the capacity to make
14 intelligent decisions concerning his defense. Accordingly, a
15 lawyer's presence in a case, even where he or she serves the best
16 interests of the client, is not a substitute for a defendant
17 being able to instruct his counsel and actively assist in his own
18 defense. A defendant, who is unable to do more than agree with
19 his attorney because he doesn't have the capacity to do
20 otherwise, cannot be described as competent, even though
21 represented".

22 And the Court there emphasized that there had to be a present
23 ability to consult counsel and to assist in one's defence, and,
24 they said, probably the most significant element of the
25 competences. And that was again reflected in the European Court

1 of Human Rights jurisdiction.

2 [14.35.41]

3 What we say about this is that no memory means counsel has no
4 ability to assist in those minimum guaranteed rights because,
5 contrary to some popular belief, counsel does not make up
6 defences, counsel does not fill in the gaps when an accused
7 doesn't mention something. Counsel is instructed by an accused
8 who gives an account of the facts that she, in this case, seeks
9 to rely upon. Counsel is provided with a comment on the content
10 of witness statements, on the relationship between the maker of
11 the statement and the Accused, on what is accepted and what is
12 rejected in the witness statements. And, where it's suggested
13 that words are spoken if they've been misunderstood, it is for
14 the Accused to put the correct version of events, it is for the
15 Accused to say if she wasn't in a particular place or where she
16 was, if she wasn't performing a particular role, what she was
17 doing instead. This is just some of the examples.

18 [14.37.09]

19 Well, Ieng Thirith is not in a position to do any of that. So,
20 faced with more than 100 statements and expert evidence on what
21 it said about this period in Democratic Kampuchea history, she
22 has nothing at all to contribute to counsel. We were not there.
23 We aren't there to provide her account for her, and therefore,
24 with the best will in the world and doing as much as we can to
25 try and help, we bring this matter to the Court because we aren't

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1 able to do more than highlight, in the statements, what is
2 contrary to her interest in terms of what is said by witnesses,
3 but she has no ability to comment on that, she can't assist in
4 the preparation or presentation of her case. And this is
5 something which has been accepted again by both Professor
6 Campbell and the four experts who have provided the supplementary
7 report.

8 It's not her fault, she's lost the brain cells, we're told, and
9 sadly they aren't regained. And therefore, where there is a
10 complete void in her head as to what went on, she can't retrieve
11 that information, so she can't provide it to us.

12 If I may then move on to the fourth question: "As found by the
13 experts, the nature of Ieng Thirith's condition is degenerative,
14 it may entail ongoing delays to the proceedings." And then listed
15 are the problems that may arise, and therefore we are asked to
16 consider if it's in the interest of justice that she be severed
17 from the indictment.

18 Well, the Trial Chamber has the power under Internal Rule 89 ter
19 to sever an indictment if it's in the interest of justice to do
20 so.

21 [14.39.22]

22 Of course, as I've already indicated, our submission is that she
23 shouldn't just be severed from this indictment; as it stands, the
24 case should be discontinued because she is unfit and not likely
25 to, in any meaningful way, recover.

1 But we certainly understand that, if the Trial Chamber were to
2 take the view either that she is unfit, but that in the light of
3 some of the proposals put forward, there might be sufficient
4 improvement, then we would submit the obvious course to adopt is
5 severance in this case because it is clearly, we submit, not a
6 case that she is now in a position to go ahead, and the other
7 three Accused -- or two, depending on the view you take of one of
8 them -- certainly are entitled to a fair and expeditious trial.
9 And any of the proposals would certainly require there to be a
10 further delay before a trial of four could go ahead as we
11 understand it.

12 If she is fit, then of course different considerations arise, but
13 we would submit her difficulties as identified and as
14 insurmountable as such that we would say that she should be
15 separate from others so they are not unreasonably, unduly, and
16 improperly, and unfairly inconvenienced by the necessity to
17 accommodate the very particular problems suffered by Ieng
18 Thirith.

19 And the final question that was posed to us: "What consequences
20 are there for the Accused, should she be severed from the
21 indictment?"

22 Well, in our submission, the consequences, should severance take
23 place, really stem from the reason for which the Trial Chamber
24 decides, if it does in its wisdom, that severance is the
25 appropriate and fair course to take.

1 If the Accused is separated from the others because she is unfit,
2 then the Trial Chamber has to determine, firstly, whether there
3 is a, we submit, reasonable prospect that there is going to be
4 any change in that condition. We submit the evidence does not
5 support that view, in which case discontinuance would take place.
6 There is a presumption of innocence in these Courts, until proven
7 otherwise.

8 [14.42.40]

9 If the Trial Chamber takes the view that -- unfit at the moment
10 but there may be matters which will improve that position, then
11 the review should take place after any provisions that might help
12 have been put in place or any medication has been prescribed and
13 been monitored, and that would then require either Ieng Thirith
14 to be detained while this assessment is made, or otherwise
15 provisional release. And there is certainly an argument that her
16 condition may be bettered in a different environment which is
17 more stimulating, as we've heard.

18 Likewise, if she's deemed fit but needs to wait, then again both
19 those considerations apply. If she's going to need help, which
20 will cause her to be tried separately from the others, the Court
21 may feel it's more likely that she'll need less help and will be
22 less inconvenienced were she in fact to be released into a
23 different environment rather than detained. But these are
24 matters, depending on the decision of the Trial Chamber, we
25 submit, to be canvassed perhaps at a later stage.

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1 [14.44.12]

2 So, with those submissions, we conclude, and I'm grateful for the
3 additional few minutes we've been allowed.

4 MR. PRESIDENT:

5 It is now an appropriate time to have a short afternoon break for
6 20 minutes. We will come back by 3.10 -- or 10 past three -- this
7 afternoon. And then we will hand over to the prosecutors. The
8 prosecutor is allotted 45 minutes to make their submission,
9 followed by 15 minutes of the Lead Co-Lawyer's submission.

10 Thank you.

11 (Court recesses from 1445H to 1511)

12 MR. PRESIDENT:

13 Please be seated. The Court is back in session.

14 [15.11.40]

15 We now hand over the floor to the prosecution to make their final
16 submission in this hearing. Please be reminded that the
17 prosecution is allotted 45 minutes for your submission.

18 You may now proceed.

19 MR. ABDULHAK:

20 Thank you, Mr. President, and good afternoon, Your Honours.

21 [15.12.11]

22 I will deal with each of the five questions that Your Honours
23 have asked in the scheduling order, but, perhaps as a way of
24 providing a general roadmap and summarizing the prosecution's
25 position, that might be useful if I do so at the outset.

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1 And let me say first, Your Honours, that over the past days we've
2 reflected and considered this matter very carefully. The
3 prosecution supports every Accused's right to a fair trial. The
4 prosecution will always uphold those rights. We see ourselves, as
5 Officers of the Court, in a role that is there to assist you and,
6 ultimately, the Accused in having a fair trial.

7 As I said, we've considered the evidence carefully, including the
8 testimonies of yesterday and today, and our respectful submission
9 is that you cannot at this stage come to a firm determination
10 that Ieng Thirith is unfit to stand trial. And I will explain why
11 we do so.

12 And before I go into more detail, I'll just reflect also on the
13 gravity of the decision that is before Your Honours.

14 This of course is one of the largest and most important criminal
15 cases prosecuted since Nuremberg. The Accused stands charged with
16 crimes that affected, literally, millions of people.

17 She's entitled to a fair trial. Her application to be found unfit
18 to stand trial must be considered carefully and in light of the
19 impact that a decision that she is unfit would have on not only
20 her, but also the victims of the crimes that are alleged against
21 her, and the wider community.

22 [15.14.37]

23 Now, we've heard earlier a summary of the evidence as it stands
24 in relation to Ieng Thirith's memory impairment, and of course
25 the Co-Prosecutors accept that evidence before you indicates that

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1 there are considerable gaps in Ieng Thirith's memory, that she
2 does have considerable difficulty with recall; that is simply the
3 evidence before you. However, the evidence before you is also
4 that the Accused has met five out of seven capacities which Your
5 Honours instructed the experts to consider, and those are to
6 plead, to understand the nature of the charges, to understand the
7 detail of the evidence, to understand the consequences of the
8 proceedings, and to testify. These were the capacities which the
9 experts on balance found to be satisfied. And I think -- our
10 respectful submission is, in their evidence before the Court, the
11 experts showed that their conclusions in these five criteria are
12 well considered and that they are simply correct.

13 We will come back to the other -- the remaining two criteria.

14 Having acknowledged the memory difficulties which are certainly
15 considerable, I think it is appropriate to also consider that the
16 picture is not black and white, as it were; there are numerous
17 indicia that Ieng Thirith's cognitive functioning is preserved to
18 a significant degree.

19 You will recall that the experts testified that she was able to
20 participate in interviews for two hours at a time or longer. This
21 is a consistent finding with the report provided in November 2009
22 by Dr. Brinded and Professor Ka.

23 [15.17.02]

24 She -- her general demeanour is pleasant, she is happy to be
25 interviewed, she's happy to participate in meetings. She is able

1 to express herself, she has no obvious difficulty in finding
2 words. Significantly, in our submission, she speaks two foreign
3 languages, and apparently with a degree of fluency.

4 It was also the evidence given by the experts today that her
5 overall cognitive performance and her memory may improve, and
6 this is in part because there are likely a number of contributing
7 factors to that cognitive impairment, and those factors include
8 four years of life in a restricted environment where one doesn't
9 receive a great degree of intellectual stimulation and where
10 one's general ability to manage their business is supervised and
11 restricted. Such circumstances can, and in this case probably
12 have added to her difficulties.

13 Additionally, I think it is clear now that the medications that
14 have been prescribed over -- and administered over the past four
15 years have had some effect. To be fair, I think that effect, the
16 extent of that impact is not clear, but it is there. One of those
17 medications has still not been discontinued. It is a strong
18 sedative; it is a medication which has an adverse effect on one's
19 concentration and on their cognitive abilities.

20 There was discussion about Ieng Thirith's ability to appreciate
21 what is happening in Court, what is happening in these
22 proceedings, and I think her reaction, which we heard described
23 today, is an important one for Your Honours to bear in mind. This
24 is an Accused who understands that we're here considering matters
25 of her fitness to stand trial. In our respectful submission, she

1 understands that, if you find her unfit, that she may not go to
2 trial. She used, it's fair to say, a lay person's description of
3 that, but it is our submission that this is the correct
4 interpretation of those words.

5 [15.19.56]

6 It is simply our submission that, both in the interests of Ieng
7 Thirith's own wellbeing and in the interests of justice, this
8 Court must exhaust all options before it declares her unfit to
9 stand trial. It is fair to say that there are indicia that she
10 would have difficulties, and clearly there would be considerable
11 difficulty if an Accused is unable to recall any of the matters
12 with which she is charged, but it is also the case that her
13 memory may improve.

14 And you heard the experts testify today that their testing of her
15 memory was quite limited, and so I would disagree with my learned
16 friend that it is clear that she has no recollection whatsoever
17 of the events in 1975 to 1979. What is clear, Your Honours, in
18 our respectful submission is that you can't come to a firm
19 determination on that matter. What is clear in our submission is
20 that Ieng Thirith is able to receive, process, and appropriately
21 react to information, as she does, for example, when she reads
22 newspapers and discusses them with the Chief of the Detention
23 Facility.

24 And it appears, as I believe Dr. Fazel testified today, that her
25 memory -- that her performance in the sphere of memory may

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1 improve if she's prompted with documents and with photographs,
2 videos, and other means in which she may be able to recall events
3 that are important for these proceedings.

4 [15.21.59]

5 And I will now deal briefly with Your Honours' questions. I don't
6 propose to go in great detail on some of these legal issues; I
7 believe they've been adequately covered by other counsel, and of
8 course the law is before Your Honours, so I will be very brief in
9 relation to the first question: "May an accused be considered
10 mentally unfit to stand trial if any one of the criteria are
11 found to be lacking?" And I think there -- in this respect, there
12 might be some agreement in fact between us and my learned friend,
13 counsel for the Defence.

14 If a single -- if one of these conditions was completely lacking,
15 so that, for example, an accused is unable to testify or they are
16 completely unable to understand the evidence or the charges
17 against them, then I think it would be reasonable to say that it
18 would -- that they would not be able to effectively exercise
19 their fair trial rights.

20 Of course, in this case, that is not what the evidence shows. The
21 experts have testified that Ieng Thirith would have considerable
22 difficulty but not that those two capacities which they
23 considered were completely absent.

24 Of course, the five -- or rather, seven matters are indicia based
25 on a consideration of fair trial rights as found in the ICCPR. So

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1 they're not conditions, but they are indicative of matters that
2 go to the very heart of a criminal trial.

3 [15.23.52]

4 Looking at how those seven matters might apply in the present
5 context, it is our submission that Your Honours should take into
6 account the specific procedure applicable before this Court, and
7 we think this is a relevant matter to take into account.

8 There are significant differences between the way in which an
9 accused is presented with evidence in this Court and the way that
10 occurs at most of the other -- most of the international
11 tribunals.

12 For example, at the ICTY, where much of the case law that we've
13 considered comes from, an accused sees no evidence until they're
14 presented with an indictment. In fact, even when they are
15 presented with an indictment, they're not given all the evidence
16 against them; evidence is progressively provided to them over a
17 period of time, in pre-trial proceedings, and in fact additional
18 documentary evidence may be provided during the trial. An accused
19 at the ICTY is faced with a considerable workload, a workload
20 that far exceeds that which an accused in Ieng Thirith's
21 position, here, faces.

22 [15.25.08]

23 Ieng Thirith has participated in a judicial investigation in
24 which evidence was gathered to ascertain the truth of the matters
25 alleged by the prosecutors. That investigation was required to

1 uncover both inculpatory and exculpatory evidence. Equally, here
2 at trial, Your Honours play an active role in the process of
3 discovering and adducing the evidence, and of course these
4 proceedings are an illustration of that. Evidence is not brought
5 forward by the prosecutors afresh; evidence has been on the case
6 file and has been considered, one would assume, by counsel over a
7 period of almost four years now.

8 Given that time is limited, I will point very, very briefly to
9 what we think might have been a misunderstanding on the part of
10 the experts in considering one of the two criteria and
11 specifically the Accused's understanding of the procedures.

12 [15.26.29]

13 Your Honours asked the experts, at paragraph 2 of your order of
14 the 23rd of August 2011, to consider whether the Accused has an
15 adequate level of understanding of court procedures, and that, of
16 course, is consistent with international jurisprudence. The
17 experts interpreted this to mean "understanding the course of the
18 proceedings", and this is at paragraph 43 of their report. Our
19 submission is that there is a significant difference between
20 these two matters.

21 And by way of illustration, if Your Honours consider the
22 Kovacevic decision of the 12th of April 2006, at paragraph 5,
23 subparagraph 2, there is a description of what an expert should
24 consider in looking at this particular criterion. It is not an
25 understanding of proceedings as they unfold in a very detailed

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1 and extensive manner and an ability to comment on everything that
2 is happening at all times, it is an ability to understand the
3 charges, the roles of the parties, and how the proceedings will
4 unfold.

5 I will just also address, while I'm discussing this matter, very
6 briefly the issue of burden of proof, and I will submit that my
7 learned friend was incorrect when he suggested that the
8 prosecution bears the onus of proof. The Nahak decision, in our
9 submission, indicates and establishes very clearly that this is a
10 finding that the Chamber makes independent of any burden. And I
11 believe the Chamber in Strugar came to a very similar conclusion,
12 although initially it started from the premise that the
13 prosecution had an onus.

14 Looking at the issue of memory impairment, I have -- and this is
15 a question, the second question that you've asked us to consider,
16 and our response is simply, as I indicated at the outset, that it
17 is impossible for you now to come to a firm conclusion as to
18 whether her impaired memory would render her unable to exercise
19 her fair trial rights. And we must bear in mind that experts,
20 both Professor Campbell and the four experts who have submitted
21 the most recent report, do not exclude the possibility that
22 treatment may improve prospects for Ieng Thirith.

23 [15.29.38]

24 Considering -- moving on to point three and looking at whether or
25 not the degree of impairment indicates that Ieng Thirith is unfit

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1 to stand trial, taking into account the fact that she's
2 unrepresented -- that she is represented, I think it might be
3 relevant here to just briefly consider what type of impairment
4 the courts have found to be sufficient to render an accused unfit
5 to stand trial.

6 I believe there are only two cases in which such a decision has
7 been reached by international tribunals, and they are the case of
8 Kovacevic by the ICTY, to which I've referred, and of course the
9 Nahak case by the Special Panels for Serious Crimes in East
10 Timor, and there's been extensive references to the Nahak
11 decision.

12 Nahak was found unfit to stand trial. And the reason I refer to
13 this decision is because it is quite detailed, but also because
14 Kovacevic is heavily redacted, and so factual matters are not
15 available for our consideration. And these are some of the things
16 that the Court found in relation to Nahak.

17 In 1999, some six years before the Court's determination, he was
18 described by people around him as crazy, or insane. Some three
19 years before the matter came before the Court, a prosecutor had
20 already requested that he be released -- and this was during
21 proceedings before an investigating judge -- on the basis that he
22 was behaving in a very peculiar manner and to a lay person
23 appeared abnormal.

24 [15.31.29]

25 When interviewed by psychiatrists some 15 months before the Court

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1 decision, he informed the psychiatrist that, while in his garden,
2 he heard voices of people who were not physically present. He
3 also spoke about an invisible person who grabbed him by the neck.
4 When asked about the proceedings, he said he understood what a
5 judge and a lawyer did, saying that they sit in a tribunal whilst
6 people bring them food. This was the level of impairment in that
7 case.

8 [15.32.07]

9 And whilst the principles of that case are applicable here, we
10 think it is also important to consider the degree of impairment
11 that the courts have been confronted with when finding accused
12 unfit to stand trial. We say that the position in relation to
13 Ieng Thirith is very different.

14 Also, dealing very briefly with the issue of counsel, we think --
15 we submit, Your Honours, that you should again consider this
16 matter in light of the particular procedure applicable before
17 this Court and the protections inherent in the fact that Your
18 Honours have an active role -- play an active role in the
19 proceedings.

20 We will also note that the issue of counsel's inability to assist
21 Ieng Thirith is a recent one. From our review of the case file,
22 it appears that it was raised only in February of this year, at
23 which point counsel indicated that they had some difficulty in
24 obtaining instructions. Of course, evidence shows that, in late
25 2009, she was -- her cognitive impairment was not significant at

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1 all. And so our submission is that you should also consider this
2 matter in looking at how her rights have been protected thus far
3 and what the future may hold.

4 [15.34.10]

5 Moving on to the issue of severance -- and I think the
6 submissions by the Defence were that you had a choice here of
7 either severing or discontinuing proceedings -- it is our
8 submission that, in any event, discontinuance or termination is
9 entirely inappropriate in any circumstance.

10 It is instructive that there is no international case on the
11 record in which an accused has had their proceedings -
12 proceedings against them terminated, no matter how ill. In fact,
13 two accused that were found to be terminally ill at the ICTY,
14 Talic and Djukic, had -- were provisionally released but did not
15 have proceedings against them terminated, and the Court
16 indicated, I believe in Djukic, that the ICTY statute does not
17 provide for a withdrawal of an indictment or a termination of
18 proceedings in these sorts of circumstances.

19 [15.35.32]

20 And I mention this because equally the law applicable before this
21 Court doesn't provide for a termination of proceedings in
22 circumstances where an accused is found unfit to stand trial. And
23 of course Your Honours are familiar with Articles 7 and 8 of the
24 Code of Criminal Procedure, and I won't read them here, but
25 certainly those articles do not include, as a ground for

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1 extinguishment of criminal proceedings, unfitness to stand trial.
2 In terms of the impact, if any, on the other Accused, we would
3 simply submit that, at this stage, any such delays or
4 consideration of any such delays would be speculative.
5 Your Honours, all four Accused are elderly, all four Accused
6 suffer from various health problems. Any of the Accused can at
7 any point ask to have proceedings adjourned or to receive medical
8 treatment, and we simply say that there is no difference between
9 Ieng Thirith and the remaining Accused. The difference is perhaps
10 that this -- if any, at this point in time, is that Ieng Thirith,
11 in our submission, requires immediate treatment and that the
12 treatment should be provided because it is in her interests and
13 in the interest of the proceedings.

14 [15.37.11]

15 But, Your Honours, you will be confronted from time to time with
16 delays in these proceedings, and it is not appropriate, in our
17 view, to sever now, or to come to the determination of unfitness
18 and sever simply because Ieng Thirith requires additional
19 treatment.

20 [15.37.41]

21 I think I've dealt with the issue of what consequences flow for
22 Ieng Thirith from a severance order, and I won't go beyond,
23 unless Your Honours want me to expand on that, but we would
24 simply say that the position is that it has not been established
25 on balance of probabilities that Ieng Thirith is not fit to stand

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1 trial whilst she suffers from an impairment of her memory caused
2 apparently by the Alzheimer's disease.

3 We do not know how quickly that disease has progressed. We do not
4 know that it renders her completely unable to recall matters from
5 the period covered in the indictment. And it appears that these
6 problems may be overcome both right now by the provision of
7 stimulation and memory aides, and then in the longer term by the
8 medical treatment which Professor Campbell recommended. And I
9 would recall for the record that, in his testimony, Professor
10 Campbell said that all measures must be tried before one can come
11 to a firm determination on this matter.

12 There was a reference, or a comparison was made to situations in
13 the United States where people are provided medical treatment to
14 remain sane pending execution. And of course, Your Honours, it's
15 an inappropriate comparison; it is not the situation you're
16 facing here.

17 Professor Campbell's evidence was that, if donepezil is
18 administered, it would likely show its impact within a period of
19 three months. It could then be effective, the Professor
20 testified, for one or two years or even longer. It is entirely
21 appropriate and it is in Ieng Thirith's interest to exhaust all
22 options to ensure that she receives the treatment that she
23 requires and to alleviate the symptoms that she is exhibiting. It
24 is also in the interest of justice and in the interest of these
25 proceedings that all efforts be made to ensure that she can

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1 continue to participate in the long run. And of course we have
2 submitted that the evidence before you now is not such that you
3 can come to a determination that she is not fit to stand trial.
4 Those are my submissions, and I will hand the floor to my
5 colleague. Thank you.

6 [15.41.05]

7 MR. CHAN DARARASMEY:

8 Good afternoon, Mr. President, Your Honours, and the Court.

9 I would like to proceed with our observation concerning the
10 fitness to stand trial of Ieng Thirith and the severance with
11 regard to the accused person Ieng Thirith on top of what already
12 is asserted by my colleague.

13 The psychiatric experts already put in their reports that Ieng
14 Thirith is fit to stand trial. Her condition is better than
15 previously assessed. We hope this will be the concrete basis for
16 the Chamber to consider that Ieng Thirith shall be present during
17 the upcoming hearings.

18 Ieng Thirith is fit to participate in person because she can
19 listen, she can speak, she can remain seated or remain standing
20 physically, although she cannot remain seated or standing for a
21 long period of time as opposed to other ordinary persons, and she
22 indeed can continue to participate in the following proceedings.

23 [15.42.54]

24 Her cognitive function is normal, as she is able to analyze right
25 from wrong. That cognitive function has not been completely

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1 impaired. The reason that she has poor memory or does not -- or
2 is unable to recall her past story is a normal health status for
3 a person of her age, and that -- her health condition is not very
4 stable, that's why it was in her memory at some point, but that
5 does not really hinder her from participating in the judicial
6 proceedings.

7 According to the medical check and assessment made by the experts
8 who already testified before the Chamber, that -- the result of
9 their report or assessment is positive. The responses the experts
10 obtained from Ieng Thirith were different from what they viewed
11 from other previous report, but they concluded that Ieng Thirith
12 could respond to several of the questions put to her.

13 [15.44.33]

14 If in the future, after her fitness has already been assessed, if
15 it is found that Ieng Thirith's fitness changes, then parties may
16 request for her fitness to be reassessed. So the prosecutor
17 submits that the Chamber may reconsider with regard to her
18 fitness to stand trial in the future if she -- the conditions
19 were to be changed.

20 With respect to the expeditious trial and in the interest of
21 justice, presence of the accused person Ieng Thirith in the
22 proceeding is essential, and we anticipate or expect that, in the
23 upcoming hearings, there will times when questions are put and
24 that it is -- Ieng Thirith is needed to respond to those
25 questions to ascertain the truth, so her presence is vital to the

1 proceedings, Your Honours.

2 As an accused person and according to the international practice
3 and jurisprudence, several accused persons claim that they have
4 suffered from dementia or cognitive impairment, but that did not
5 stop them from participating in the Court proceedings, as long as
6 they are able to understand the details of the evidence and the
7 procedures of the court of law.

8 The accused person Ieng Thirith co-operated, as indicated in the
9 report by the experts, she could co-operate with her counsel, and
10 that -- she emphasized in her response to the expert that her
11 lawyers were helping her.

12 Her memory decline with regard to the events that happened to her
13 in the past does not really suggest that she has lost the
14 capacity to understand the situation around her.

15 [15.47.40]

16 With regard to testify, we submit that Ieng Thirith is able to
17 understand all the questions to be put to her in the future
18 hearings, because the Accused Person can use her remain
19 cognitive, or a memory, or ability to address those questions.

20 And, according to the experts' report, she has the competence --
21 enough competence to testify, and there is no difficulty for her
22 to respond to questions. And she is -- actually can also, by
23 that, respond to questions in the future hearings.

24 Your Honours, the prosecution submits that, having examined or
25 heard from the expert, Ieng Thirith recognizes people she met,

1 although she cannot name those people. This suggests that she can
2 help explain to the Court about the testimonies of witnesses and
3 those whom she has known.

4 With regard to the report, again, by the experts, Ieng Thirith
5 understood the questions put to her. That's why she could respond
6 to those questions. Her responses at times were not consistent,
7 but it is suggested that they were meant to evade responding to
8 the questions directly. So we submit that Ieng Thirith is able to
9 answer questions put by parties during the proceedings, because
10 her ability -- her memory ability can allow her to do that.

11 [15.50.28]

12 Accused person Ieng Thirith can participate in the proceedings
13 through a remote means of participation, according to the report,
14 and the prosecutor submits that these facilities can assist the
15 Accused Person to participate in the proceedings. And we would
16 like to refer to Document E111/2 with regard to the audio-visual
17 means to facilitate or to assist the Accused Person to take part
18 in the proceeding remotely. Although her memory may decline
19 moderately or mildly, by way of joining the proceedings through
20 the remote participation she can assist the Court, and we believe
21 that the Court can allow some time for her to break.

22 Your Honours, the decision to be made by the Chamber today is
23 very vital to the accused Ieng Thirith's fitness to stand trial,
24 and we are convinced that the determination is significant to
25 ensure that Ieng Thirith will be able to participate in the

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1 upcoming hearing. It is better to see her in the proceedings
2 rather than having her out of the proceeding, because it will
3 serve the interests of justice and also the interests of public
4 information.

5 [15.52.56]

6 Currently, the Accused Person may have deficit memory -- memory
7 deficit, but she has not developed any other illness, for example
8 depression, because the experts already emphasized that they
9 could not find any sign of depression. And according to their
10 evaluation which is based on the ICT-10, they already stated
11 clearly that Ieng Thirith had no other symptom, other than what
12 they described.

13 She, Ieng Thirith, may have difficulty or handicap in independent
14 living, but that only happens to her daily life, daily living
15 conditions. And the prosecutors submit that this does not affect
16 significantly to her participation in the trial proceedings,
17 because the experts already made it clear that she is able to
18 take part in the trial proceedings.

19 [15.54.20]

20 Ieng Thirith's attention and concentration may decline and her
21 social behaviour also decline, but those do not really affect her
22 participation in the proceedings because she is represented by
23 her counsel. Ieng Thirith can converse and also is able to hide
24 -- or evade her response, and it is not really the case to a
25 person who experiences the loss of memory to do that. We believe

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1 that a normal, ordinary -- or ordinary person also may experience
2 such loss of -- such a situation.

3 The experts indicated that Ieng Thirith has no problem speaking
4 and she has no problem in communication or in choosing words to
5 speak. And according to the test, the -- rather, according to the
6 test, her rhythm of speech is normal. She was able to respond to
7 questions, and we believe that she can also participate in the
8 proceedings without any problem.

9 [15.56.00]

10 The prosecutors submit that it is significant, according to our
11 submission, that the Chamber finds that Ieng Thirith's presence
12 is very vital to the future proceedings, because her presence is
13 essential except in the situation where her health does not allow
14 her to participate in the proceeding, that the Chamber may decide
15 on that basis and that the Chamber may reconsider her actual
16 fitness at that moment.

17 The prosecutors are of the view that Ieng Thirith should not be
18 released, because being here she is well taken care of, and it is
19 better off for her being here, indeed.

20 [15.57.19]

21 With regard to the severance issue, the prosecutors are of the
22 opinion that Ieng Thirith should not be severed from other
23 Accused Persons in the proceedings, because she is fit to attend
24 or to stand trial and participate in the proceedings. In the
25 future trials, there will be questions raised by parties that

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1 need response from Ieng Thirith. Her responses may link to the
2 other Accused Persons or other Accused Persons may raise
3 questions that may be relevant to Ieng Thirith to respond. The
4 severance may cause some obstacle to this connection.
5 The prosecutors are also of the opinion that the importance of
6 Case 002 is that the procedures should not be severed -- in
7 particular, the Accused Person should not be severed. If the
8 Chamber were to decide to sever the Accused Person from others,
9 then the other Accused Persons may take the opportunity to submit
10 such application for them to be severed from others, and this
11 will not be good in terms of economy of the Court -- or judicial
12 economy, rather.

13 [15.59.15]

14 The prosecutors do not find that the procedure with regard to the
15 severance of Ieng Thirith should be in place.

16 Those are my submissions. And I would like to thank Mr. President
17 and the Judges of the bench. I'm very grateful, Your Honours.

18 MR. PRESIDENT:

19 Thank you, both National and International Co-Prosecutors.

20 [16.00.00]

21 Now we give the floor to the Civil Party Lawyers to make their
22 final submission for this hearing. And please be kindly reminded
23 that you have 15 minutes for your submission, so you may now
24 proceed.

25 MR. PICH ANG:

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1 Mr. President, Your Honours, members of the public and everyone
2 in and around the courtroom, on behalf of the civil parties, I
3 have a few observations to make, but I am trying not to repeat
4 what the prosecution has already made it clear already.

5 [16.00.52]

6 In my capacity as the Civil Party Lead Co-Lawyer, I completely
7 agree with the prosecution that Ms. Ieng Thirith is fit to stand
8 trial and she is capable to participate in the proceedings. And I
9 would also like to bring up some observation in addition to what
10 the prosecution has already made. In the interests of time, I'm
11 not going to be long. I will try to be brief on this issue.

12 As mentioned by the experts in their testimony this morning, Ms.
13 Ieng Thirith has been able to respond to the questions. In
14 addition to her mother tongue, Khmer language, she can express
15 herself in English and French. And the Chief of the Detention
16 Facility of the ECCC also confirmed this assertion that Ms. Ieng
17 Thirith has some sense of humour as well in her conversation with
18 the security guards on certain occasions.

19 So I think that she is really able to participate in the
20 proceeding, and in addition to that, she can actually understand
21 the consequence of her charges as well. For example, she
22 understands the word "dementing", which is obvious that she
23 understands that.

24 [16.02.23]

25 As for a set of questions introduced in the test of the expert to

1 assess the mental capacity of Ms. Ieng Thirith using the
2 so-called MMSE, she scored on average on that standard test. And
3 I would also like to comment briefly on that.

4 In terms of her capacity to recall, or recollect the time of the
5 year, the experts pointed out that she did not look at the
6 calendar or the watch, or clock in the detention cell or the
7 meeting room of the detention facility, but this is quite common
8 in Cambodia. Sometimes, Cambodian people do not pay attention to
9 the day of the month or the year, or so. It is not really
10 necessary for someone to know that. That's why it is not uncommon
11 for a person not to know the day of the month or the year.

12 [16.03.50]

13 In addition, if Ieng Thirith, at her age, does not know her exact
14 age, that is not something uncommon either, because sometimes the
15 person can understand or can answer the date of birth when asked,
16 but when he or she is asked the exact age, we sometimes have to
17 do some calculation. So it is not uncommon for a person not to
18 know the exact age.

19 And as for - as for the questions to be asked to the Accused who
20 has a sense of Cambodian tradition, those questions must be
21 appropriate in the context of Cambodian culture.

22 [16.04.43]

23 As for her capacity to participate in the proceedings, we are of
24 the opinion that, if we recall or try to induce her to recall her
25 past story, I think that would be helpful for her. It may prompt

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1 her to answer the questions or to plead in court. So I think that
2 is one of the practical ways to allow or to enable her to
3 participate meaningfully in the proceedings.

4 Since many points that we would like to raise now are identical
5 to those raised by the prosecution already, I don't think it is
6 worth repeating those points again, but what I would like to
7 emphasize here is that, in principle, the Lead Co-Lawyers support
8 what the prosecution has raised, but we will have to take into
9 account whether we should allow the severance of Ieng Thirith's
10 case with other accused or not. We are of the opinion that we
11 should sever the case to allow the proceeding to move forward as
12 expeditiously as possible.

13 [16.06.07]

14 As for the comment raised by the Defence for Nuon Chea with
15 regard to the severance, I think that the condition of Nuon Chea
16 is completely different from that of Ieng Thirith. So we, the
17 Civil Party Lawyers, do not support the severance of Nuon Chea
18 from the other defence, because I think that Nuon Chea has a
19 capable mind and he is in a stable state of health, even though
20 he cannot remain sitting for long hours.

21 And that's all for my points. And I would like to now hand over
22 to my colleague.

23 MS. SIMONNEAU-FORT:

24 Yes, Mr. President, Your Honours.

25 [16.07.23]

1 The Chamber should assess Ieng Thirith's aptitude on the basis of
2 criteria that were discussed at length, and interpreted, and
3 challenged as well. And I would simply like to say as my final
4 words -- to draw a parallel to forms of behaviour on the part of
5 Ieng Thirith that were noted by the experts in their reports.
6 In paragraph 41 of the report, the experts noted that Ms. Ieng
7 Thirith denies her eventual guilt: "I never killed anybody", "I
8 never did it", "I never did that", "how could I have mistreated
9 people", etc. Denying does not seem to me be the expression of
10 incapacity. Denial, on the contrary, is the expression of a will.
11 It's also, on the other hand, a relatively common practice among
12 people who are prosecuted.

13 [16.08.28]

14 And in the same way, in paragraph 42 of their report, the experts
15 underline that Ms. Ieng Thirith refuses to bring up the charges
16 as well as her signification. Here, once again, refusing is not
17 the same thing as being unable to understand. On the contrary,
18 it's the expression of a desire, of a will, it is taking a
19 stance, it is deciding, and it is also, once again, a practice
20 that is quite common among people who are prosecuted.

21 And in paragraph 46 of the report, the experts underline once
22 again that Ms. Ieng Thirith refuses to speak about the
23 consequences of a possible sentence. Here again, she is
24 expressing not the inability to understand, but again a very
25 strong desire to not speak about what disturbs her, and this,

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1 once again, is something that is quite common among people who
2 are prosecuted.

3 [16.09.24]

4 However, in parallel to this way of behaving, Ms. Ieng Thirith
5 speaks very openly, and without any reticence, and without any
6 doubt about many different things, and in particular about the
7 consequences of a possible -- on fitness to stand trial. And you
8 can see -- as she said: "They accuse me of being mad, and nobody
9 can do anything to someone who is mad." I don't think you can be
10 any clearer than that. She has -- she understands perfectly well
11 what has been discussed here over the past few days and what we
12 discussed for three days in August, and she knows very well that
13 she might not be tried, and that she is willing to speak about.

14 [16.10.07]

15 And I just wanted to underline, on the one hand, her desire not
16 to speak about what might involve her possible conviction because
17 that disturbs her and, on the other hand, how much she accepts to
18 speak about her eventual unfitness and, of course, of the
19 consequences that might be to her benefit of this unfitness.

20 Isn't this the expression of a very selective form of
21 understanding? Isn't this a proof that she can clearly see what
22 is happening and that she is -- has a very opportunistic approach
23 about the stakes in this trial? I won't say much more.

24 [16.10.54]

25 Now I'd like to say a few words about severance.

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1 It seems to me that you have ruled on this fitness and that you
2 will rule on severance as well. I simply want to tell you we are
3 all mindful of an expeditious trial and to accelerate the
4 proceedings, and for various reasons. And I would say that our
5 reason is specifically the health of the civil parties. But I
6 would also say that, sometimes, decisions that are taken in view
7 of accelerating the trial have the opposite effect; they may give
8 rise to multiple legal issues that sometimes lead to a
9 prolongation of the trials when we were expecting something
10 quicker. I would even say that what our -- what Nuon Chea's
11 defence said, gave us an overview of the possible issues that we
12 may face in the future.

13 I know that you are aware of these complications, and I will
14 simply finish by telling you that we will rely on your wisdom for
15 a final decision on this.

16 [16.12.07]

17 MR. PRESIDENT:

18 Thank you.

19 Ms. Diana Ellis, you have something to say?

20 MS. ELLIS:

21 Mr. President, do we have the right to make a brief response to
22 the points that have been made, please?

23 MR. PRESIDENT:

24 Your request is granted, but please be reminded to be extremely
25 brief on your remarks.

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1 MS. ELLIS:

2 Thank you very much.

3 The interests of justice are certainly not met by holding a trial
4 for an accused who is unfit and who is there in presence but no
5 more. And this is well understood in international jurisprudence,
6 and an example should be given in this Court, in this country.
7 The gravity of the charges is not in doubt, and it is right,
8 where charges as grave as this are being concerned, that the
9 Trial Chamber gives very particular consideration to the issues,
10 but ultimately, however grave the charges, if the Accused cannot
11 exercise her fair trial rights, then the trial should not
12 proceed.

13 [16.14.06]

14 We would remind the Court that in the IMT, in 1945, Krupp von
15 Bohlen was also charged with very grave offenses arising out of
16 the Nazi era, and he appeared at Nuremberg, and he was found
17 mentally unfit to stand trial because he had lost all memory and
18 reasoning. So that there is an example of very grave matters
19 nevertheless not being proceeded with. And indeed that was the
20 case for Pinochet, it was dementia. Kovacevic and Nahak were both
21 psychotic; ultimately, that stopped their trial.

22 It doesn't matter what the disease is; what we submit the Trial
23 Chamber has to look at, is the impact of the condition on the
24 capacities which are necessary to ensure the fairness of the
25 trial. It is for that reason that an accused who is incapacitated

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1 and cannot exercise her trial rights should not go on trial to
2 satisfy the interests of victims or the general public. Those
3 categories of people have valid interests that they may wish to
4 see pursued, but in this Trial Chamber, that is not the decision
5 making feature of the case.

6 [16.16.06]

7 We did not hear, in the course of the evidence of the experts, a
8 challenge to Professor Campbell's view that the significant
9 cognitive impairment rendered Ieng Thirith, at the time -- and
10 effectively still because she didn't improve with the reduction
11 in medication -- fit to stand trial. The experts giving evidence
12 before you today have concurred with Professor Campbell's
13 opinion, with slight differences that we referred to earlier, but
14 the overriding opinion was that she is not able to exercise her
15 fair trial rights, and that was not challenged. It is therefore
16 something of a surprise to hear the manner in which you've been
17 addressed on these matters today. There has not been any evidence
18 put before the Trial Chamber to suggest that Ieng Thirith is
19 feigning in her incapacities.

20 [16.17.14]

21 No one suggests that she's reached the final stages of dementia
22 which render her totally incapable of exercising any brain
23 function and will leave her lying on a bed, unable to do
24 anything. What you have been told is that she has significant
25 cognitive impairment and her dementia is moderately to severe in

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1 its progress, which will ultimately get worse, and you're
2 familiar with all those tests which support that.
3 And therefore, again, to suggest that, because she can respond or
4 laugh or remembers one or two details, that is sufficient to be
5 fit to stand trial is, we submit, a complete misunderstanding of
6 her fair trial rights encompass and require.

7 We should respond to the comment made by the prosecutor that this
8 is a recent matter that the Defence has brought to the attention
9 of the Trial Chamber. I indicated on an earlier occasion, in
10 August, that we, acting on behalf of Ieng Thirith, had brought
11 this matter to the attention of the Co-Investigating Judges back
12 in 2009. And you may well imagine that it was not brought to the
13 attention of the Co-Investigating Judges at the first moment. It
14 became a concern for the Defence. And indeed, as I've also
15 already mentioned to the Trial Chamber, we had, prior to that,
16 felt it necessary to instruct a neuropsychiatrist to advise us. I
17 say that so it's in the material before the Trial Chamber, in the
18 context of these more recent applications on the fitness hearing,
19 but nevertheless, as a matter of record, there should be no
20 misunderstanding or suggestion that we're suddenly jumping on any
21 kind of bandwagon or, late in the day, are bringing this to the
22 Court's attention.

23 [16.20.00]

24 Far from being involved in the investigation stage, Ieng Thirith
25 did not participate in any of the interviews which she was

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1 invited to attend. And at those hearings, at an earlier stage,
2 when detention matters were under discussion, you will recall
3 that Professor Campbell had the benefit of looking at the DVDs,
4 and he said that, in his opinion, she was then showing signs of
5 cognitive impairment and malfunction of her memory, again going
6 back to 2009.

7 The matters that have been put before you, which suggested might
8 improve her condition - you may consider you want to see whether
9 there is any support for that by providing additional medication
10 - but at the moment we submit the evidence is all one way, that
11 now she is unfit.

12 Another reason therefore why severance would save there being any
13 further delay is that, because she's been unfit up to now to give
14 any instructions to her lawyers, it certainly renders our
15 position complicated to meet current trial deadlines.

16 If it's thought that anything is going to prompt her memory,
17 which at the moment is gone, then we would need after that
18 improvement, if it were noted, to then be able to address many of
19 those matters that clearly we haven't been able to deal with
20 because of her lack of memory, short and long term.

21 It is entirely contrary to the evidence to suggest that it is
22 typical of her age that she has these memory problems. Short term
23 memory problems, as you've heard, are associated with the aging
24 process. But as we were told this morning by Dr. Fazel, long term
25 loss of memory in fact is something that the elderly retain, far

1 from losing it. And so what you have is clear evidence, there, of
2 an atypical loss of memory as a result of a dementing process.

3 [16.22.44]

4 So we would like to bring those additional matters before the
5 Trial Chamber, which we submit support our contention. She is at
6 the moment quite unfit to stand trial and exercise her rights in
7 any meaningful way.

8 Thank you very much.

9 MR. PRESIDENT:

10 Thank you, Counsel.

11 The proceeding on the fitness to stand trial of Ieng Thirith is
12 coming to the conclusion. We have listened to the parties'
13 arguments and observations.

14 The Chamber is in receipt of observation from the Ieng Sary
15 defence regarding the Accused's right to be absent himself from
16 the proceeding before the Chamber following the waiver of his
17 right to be present. The Chamber notes that filings in the form
18 of observation are not admissible before the Chamber. It
19 accordingly directs the parties not to file responses or replies
20 to this filing.

21 The Chamber clarifies for the benefit of the parties and the
22 public that all accused, including Ieng Sary, are routinely
23 summoned and brought to the Court before the beginning of each
24 hearing.

25 Once before the Chamber, the accused Ieng Sary is entitled to

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1 waive his right to be present at his trial and he cannot be
2 compelled to remain in Court. However, it is for his counsel to
3 fully advise him of the consequences of this decision, in
4 particular that he may in consequence not be aware or able to
5 effectively challenge all details of the evidence against him.
6 The Chamber follows that if voluntary absenting himself from
7 proceedings, the accused Ieng Sary cannot complain at a later
8 date that he did not receive a fair trial.

9 [16.25.31]

10 This is the additional clarification by the Chamber.

11 And now the proceedings on the specification of reparation by the
12 Civil Party Lead Co-Lawyers as well as the hearing of the
13 testimony provided by experts on the fitness to stand trial of
14 Ieng Thirith is coming to a conclusion.

15 Ladies and gentlemen, in my capacity as the President of the
16 Trial Chamber and on behalf of my fellow Judges, I would like to
17 thank you for your input during this hearing.

18 I would like to thank the Co-Prosecutors, the co-lawyers for the
19 Accused, the Lead Co-Lawyers for the civil parties, and officers
20 of the units, sections of the Office of Administration, security
21 personnel, detention facility security guards, staff of the Trial
22 Chamber and interpreters for your participation and efforts to
23 make this hearing fruitful.

24 Having now heard testimony and oral argument regarding the
25 additional supplementary expert assessment provided to the

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1 Chamber, the Chamber will issue its decision concerning the
2 accused Ieng Thirith's fitness to stand trial in due course.
3 The detention facility security guards are now instructed to
4 bring Ieng Sary, who is following this proceeding by audiovisual
5 means, back to the ECCC's detention facility.

6 I now declare this hearing closed.

7 (Judges exit courtroom)

8 (Court adjourns at 1627H)

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